Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations

Volume 3 of 3

January 2019

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FPDS: The Federal Procurement Data System—Next Generation is the primary source for DoD prime contract award data. FPDS is the source for much of the data cited in this report.

> FPDS is a living database, updated in real time. For this reason, the same query will produce different results when run at different points in time. In accordance with FAR Subpart 4.604(c), DoD submits an annual certification within 120 days of the end of the fiscal year, which serves as an official statement of FPDS-recorded contract procurement for that year. The underlying data, however, continues to change.
>
> Charts, tables, and calculations in this report are cited with date of data extraction. Because these data extractions occurred at various times over the course of 809 Panel research, officially certified DoD data may differ slightly from the data in this report.

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Section 6
Streamlining and Improving Compliance

In some cases, DoD's procurement processes and procedures have become outdated, creating barriers to entry for prospective industry partners. In other cases, compliance has become overzealous and needs to be recalibrated to honor the intent of the law in a more efficient way.

RECOMMENDATIONS

Rec. 62: Update the FAR and DFARS to reduce burdens on DoD's commercial supply chain to decrease cost, prevent delays, remove barriers, and encourage innovation available to the Military Services.

Rec. 63: Create a policy of mitigating supply chain and performance risk through requirements documents.

Recommendations continued on following page.

RECOMMENDATIONS

Rec. 64: Update socioeconomic laws to encourage purchasing from nontraditional 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.

Rec. 65: Increase the acquisition thresholds of the Davis–Bacon Act, the Walsh–Healey Public Contracts Act, and the Services Contract Act to $2 million.

Rec. 66: Establish a purpose statement for bid protests in the procurement system to help guide adjudicative bodies in resolving protests consistent with said purpose and establish a standard by which the effectiveness of protests may be measured.

Rec. 67: Reduce potential bid protest processing time by eliminating the opportunity to file a protest with the COFC after filing at the GAO and require the COFC to issue a decision within 100 days of ordering a procurement be delayed.

Rec. 68: Limit the jurisdiction of GAO and COFC to only those protests of procurements with a value that exceeds, or are expected to exceed, $75,000.

Rec. 69: Provide as part of a debriefing, in all procurements where a debriefing is required, a redacted source selection decision document and the technical evaluation of the vendor receiving the debriefing.

Rec. 70: Authorize DoD to develop a replacement approach to the inventory of contracted services requirement under 10 U.S.C. § 2330a.

Rec. 71: Adopt a professional practice guide to support the contract audit practice of DoD and the independent public accountants DoD may use to meet its contract audit needs, and direct DoD to establish a working group to maintain and update the guide.

Rec. 72: Replace 18 system criteria from DFARS 252.242-7006, Accounting System Administration, with an internal control audit to assess the adequacy of contractors' accounting systems based on seven system criteria.

Rec. 73: Revise the definition of business system deficiencies to more closely align with generally accepted auditing standards.

INTRODUCTION

The U.S. government is not a typical commercial client; complying with its many layers of requirements is burdensome for both the government and contractors. Federal procurement law, federal acquisition regulations, and DoD's internal regulations combine to create a labyrinth of challenges to the acquisition workforce and to the contracting community. Laws such as the Truth in Negotiations Act of 1964, the Contract Disputes Act of 1978, the Competition in Contracting Act of 1984 (CICA), and the Federal Acquisition Streamlining Act of 1994 were enacted to establish fairness and to mitigate risks between the government and industry. In some cases, federal laws promote or protect a segment of the industrial base that may be disadvantaged or technologically critical to national security. At their heart, federal procurement laws help to establish functional relationships between government and industry.

Unlike the decluttering efforts in other sections of this report, the recommendations in Section 6 do not seek to repeal any federal procurement laws. The recommendations in this section acknowledge that for DoD to be a better interagency colleague and a better partner with industry, DoD must comply with these laws and regulations. In some cases, DoD's processes and procedures have become outdated, creating barriers to entry for prospective industry partners. In other cases, compliance has become overzealous and needs to be recalibrated to honor the intent of the law in a more efficient way. The recommendations in Section 6 aim to streamline and improve DoD's execution of compliance.

This section addresses a variety of topics under the compliance umbrella. Recommendations 62 and 63 address subcontracting clauses that are flowed down from prime contractors to their suppliers. These recommendations seek to streamline the list of mandatory flow down clauses while continuing to address supply-chain risk mitigation. Recommendations 64 through 65 focus on socioeconomic policies such as domestic purchasing preferences (e.g., the Buy American Act and the Berry Amendment) and labor-related laws. In both cases, the Section 809 Panel recommends that the application of these laws to DoD be updated to reflect current market realities and cost thresholds. Recommendations 66 through 69 focus on bid protests in the procurement system. These recommendations clarify the purpose of bid protests and establish more streamlined practices for the two main adjudicative bodies, the Government Accountability Office (GAO) and the Court of Federal Claims (COFC). Recommendation 70 addresses authorizing DoD to develop a replacement approach to the Inventory of Contracted Service (ICS). DoD has created "complicated, customized information management systems in response to 10 U.S.C. § 2330a," the statue mandating contractor service data be collected and reported. Reducing this zealous practice would reduce burdens on both DoD and contractors. Finally, Recommendations 71 through 73 relate to adoption of an Audit Professional Practice Guide, an attachment to this section (see Attachment 6-1).

RECOMMENDATIONS 62 AND 63 SHARE THE COMMON THEME: STREAMLINING THE LIST OF MANDATORY SUBCONTRACTING FLOW DOWN CLAUSES WHILE CONTINUING TO ADDRESS SUPPLY-CHAIN RISK MITIGATION

The FAR, DFARS, and other agency FAR supplements contain hundreds of contract clauses with a wide range of applicability based on characteristics of the contract. These clauses are incorporated in government contracts to implement laws, regulations, Executive Orders (EOs), and other administrative contract requirements to mitigate risks that may or may not be unique to the contract or order. In addition to the basic requirements, many contract clauses contain specific provisions requiring the contractor to *flow down* the terms of the clause to its subcontracts.

DoD attempts to mitigate risks across its supply chain by requiring FAR and DFARS clauses to be flowed down to agreements between prime contractors and their subcontractors. In the current environment, certain risks are especially sensitive, such as the areas of counterfeit parts, information security, and cybersecurity. Vulnerabilities along the supply chain are often difficult to detect and can compromise government networks and operations. In 2015, Chinese attackers used a contractor's credentials to install malware on the Office of Personnel Management's network that remained unnoticed in the system 14 months.[1] DoD imposes stringent regulations on contractors and subcontractors to detect security risks and take mitigating action when necessary.

FAR and DFARS clauses are generally included in contracts based on the prescriptive language in the FAR and DFARS and implemented through the clause logic in the contract writing systems. The contract writing system assigns applicability of clauses to each contract based on attributes of the procurement (e.g., contract type, award value). The clauses selected by the contract writing system are typically listed in the contract, often only by reference with no distinct markings in the prime contract to indicate whether the clauses flow down to subcontracts. To determine which contract clauses are required to flow down to subcontractors, the prime or upper-tier subcontractor must read the text of each clause and determine whether each one is appropriate to flow down to subcontracts on a clause-by-clause basis. Industry representatives told the Section 809 Panel this practice rarely happens because the purchasing functions at the higher tiers had such a large volume of transactions that clause-by-clause analysis was impractical or that other business reasons made it prudent for them to value having consistent terms over tailoring terms for each transaction.[2]

Furthermore, DFARS 252.244-7001, Contractor Purchasing System Administration, requires that contractor purchasing systems "ensure that all applicable purchase orders and subcontracts contain all flow down clauses." Contractors' proficiency in flowing down the correct contract clauses under the correct circumstances is considered by the government to be a critical capability of a contractor's purchasing system and may be evaluated as part of a Contractor Purchasing System Review (CPSR). The Defense Contract Management Agency (DCMA) is responsible for conducting CPSRs. Failing a

[1] GAO, *Weapon Systems Cybersecurity: DoD Just Beginning to Grapple with Scale of Vulnerabilities, GAO-19-128,* accessed October 24, 2018, https://www.gao.gov/assets/700/694913.pdf.

[2] Industry representatives said this is particularly relevant when either (a) they have many transactions with the government, and they use the same subcontractors to support each, so it's convenient to have the terms and conditions with "vendor X" always the same or (b) when they have many subcontracts/subcontractors on the same effort, and it is more convenient to have the same terms and conditions for every subcontractor on the effort.

DCMA CPSR could negatively affect contractors' cash flow by requiring contract payments to be withheld, or even preventing contractors from securing future government business.

The FAR and DFARS flow-down clauses introduce numerous terms and conditions with specific compliance requirements that are additive to, and inconsistent with, traditional terms and conditions used to buy products and services in the commercial market place.[3] Most commercial transactions in the United States are governed by Uniform Commercial Code. The additional burden of FAR and DFARS clauses on commercial products and services purchases is often unnecessary, ineffective, and may limit competition to only those contractors that have traditionally sold goods and services to the government. Work currently being performed by regulatory task forces within DoD to reduce the regulatory burdens placed on contractors should continue in an effort to reduce the burden on the entire DoD supply chain.[4] In addition, DoD must shift its focus away from creating contract clauses that should only apply when DoD is procuring specific products or services, because they end up getting overly applied to all fixed price contracts or all contracts over a certain dollar amount, unless those clauses relate to managing the risks associated with the transactions. Requirements owners and program managers have the requisite expertise to know when, for example FAR 52.246-11, Higher-Level Contract Quality Requirement, would be required in a contract. These clauses could be standardized for all information technology procurements or all janitorial services contracts within a department or agency. This approach would provide greater discretion than basing inclusion off of whether a contracting officer is buying a supply or a service, the contract type being used, or the contract dollar value.

Although the number of FAR and DFARS clauses applicable to DoD contracts is excessive and should be reduced, these recommendations do not call for comprehensive elimination of clauses or the flow down requirements. There are, however, several areas that should be addressed relative to flow-down clauses that will help reduce the burden on prime contractor supply chains and increase the proficiency with which clauses are selected for flow down.

Both government agencies and contractors have struggled to be precise in the inclusion of contract clauses in DoD contracts and resultant subcontracts. The complex and ever-changing nature of FAR and DFARS flow-down clauses stymy contractor purchasing systems and supply chains, which increases costs, creates delays, and may erect barriers that limit innovation available in the supply chain.

[3] See GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies, GAO-17-644*, accessed November 9, 2018, https://www.gao.gov/assets/690/686012.pdf.

[4] Enforcing the Regulatory Reform Agenda, Executive Order 13777 (2017), requires Executive Branch departments and agencies to appoint a regulatory reform officer to oversee implementation of regulatory reform initiatives and policies and establish a Regulatory Reform Task Force to review and evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law.

RECOMMENDATIONS

Recommendation 62: Update the FAR and DFARS to reduce burdens on DoD's commercial supply chain to decrease cost, prevent delays, remove barriers, and encourage innovation available to the Military Services.

Problem

FAR and DFARS contract clauses that are required to be flowed down from prime contractors to subcontractors, especially commercial subcontractors, are excessive and create additional burdens on DoD's supply chain, the effects of which increase cost, create delays, create barriers and limit innovation available to the Military Services

Background

FAR and DFARS clauses applicable to DoD contracts incorporate terms and conditions into agreements between DoD and prime contractors that are intended to protect a broad set of government interests. Similarly, transactions in the commercial marketplace are governed by terms and conditions established between buyers and sellers to protect the parties' interests. Depending on the industry, the goods or services exchanged, and the prime contractor's leverage over potential subcontractors, terms and conditions may be driven by either the buyer or the seller and are often subject to negotiation between the parties. The terms and conditions of sale are established to mitigate risk between the interested parties and to govern disputes.

The FAR and DFARS flow down clauses create contract requirements, many of which are unique to doing business with the government, that often erect barriers for businesses unfamiliar with the government's unique terms and requirements. In a 2017 report, GAO found that 11 out of 12 selected nontraditional companies in its review cited "Government-specific contract terms and conditions" as a challenge to doing business with DoD.[5] The report also cited certain nontraditional company officials who indicated the number of unique clauses and the cost of compliance with the associated requirements is a substantial part of the challenge to doing business with the government.[6]

Discussion

Because most of the innovative, nontraditional firms DoD says it needs to attract are operating in the commercial marketplace, it is appropriate to look at government-unique flow-down clauses that might differ from commercial practice. A substantial number of FAR and DFARS clauses either explicitly *flow down* to subcontracts for commercial items or *are not explicitly exempt* from being flowed down to subcontracts for commercial items.

Currently, there are two primary contract clauses intended to limit the number of additional terms and conditions that flow down from prime contract to subcontract. DFARS 252.244-7000, Subcontracts for Commercial Items, advises the contractor that it is not required to flow down any DFARS contract clause to its subcontracts for commercial items unless so specified in the particular clause.

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[5] GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies, GAO-17-644*, 9, accessed November 9, 2018, https://www.gao.gov/assets/690/686012.pdf.
[6] Ibid, 15–16.

FAR 52.244-6, Subcontracts for Commercial Items, instructs prime contractors to limit flowdown to 19 specified clauses, as applicable, in subcontracts for commercial items. FAR 52.244-6 is prescribed for inclusion in solicitations and prime contracts other than those for commercial items.

Recommendation 2, found in the *Volume 1 Report*, effectively removes all government commercial buying clauses from FAR 52.212-4(r), 52.212-5, and DFARS 212.301 because the statues from which those clauses derived did not explicitly state that the statute applied to commercial buying. Based on this same analysis, the clauses removed from 52.212-4(r), 52.212-5, and DFARS 212.301 should also be removed from FAR 52.244-6 as appropriate and necessary to achieve the intended outcome of unencumbering DoD's access to commercial innovation. In addition to the clauses identified in 52.244-6 as flowing down to commercial subcontracts, a number of other FAR clauses have been identified as flowing down to commercial subcontractors.[7]

DFARS 252.244-7000 does not specifically identify the DoD clauses that are required to be flowed down to subcontracts for commercial items. The clause instead relies on the prime contractors or higher-tier subcontractor to determine flow down applicability on a clause-by-clause basis. As mentioned above, the government contracting environment (e.g., fear of negative CPSR findings, high transaction volumes, primes' desire for consistency) leads to prime contractors either taking a very conservative approach to tailoring flow downs, or not tailoring at all. These approaches may result in improper compliance requirement burdens on the supply chain. Updating DFARS 252.244-7000 to include all of the required commercial item flow down provisions, similar to FAR 52.244-6, would provide a single point of reference for contractors to determine which clauses flow down. These changes only make a positive effect where the prime contractor is entering into subcontracts for commercial products or services.

The Section 809 Panel also addresses these concerns in Recommendation 92 found in this report, and the recent actions Congress has taken in Section 849 of the FY 2018 NDAA and Section 839 of the FY 2019 NDAA. Those sections of law require a review and report by the FAR and DAR Councils of the efficacy of the defense-unique clauses applied to commercial contracts and subcontracts regardless of the limitations in 41 U.S.C. § 1906 and 10 U.S.C. § 2375. Relying on the FAR and DAR councils to provide that review, without providing additional direction, will not resolve the problems associated with the proliferation of government and defense-unique clauses applicable to commercial buying and flowed down to commercial subcontracts.

Conclusions

For DoD and DoD prime contractors to be able to access innovative commercial solutions, the Section 809 Panel's Recommendations 2 and 92 must be implemented in addition to this recommendation. Congress must establish stricter standards that the FAR and DAR Councils must follow in determining what government and defense-unique clauses flow down to commercial subcontracts associated with noncommercial prime contracts. In addition, the FAR and DAR Councils should revise FAR Clause 52.244-6, Subcontracts for Commercial Items, to include only those clauses that have been determined necessary for flow down to subcontracts for commercial items based on

[7] See Robert V. Lieg, *A Study on the Applicability for Federal Acquisition Regulation (FAR) Clauses to Subcontracts Under Prime Defense and NASA Contracts,* (Arlington, VA: National Defense Industrial Association, 2017).

Congress's direction. Based on the analysis in the *Volume 1 Report*, no FAR clauses should flow down to subcontracts for commercial items, and 52.244-6 should be updated to reflect the removal of all applicable flow downs unless Congress explicitly directs that they flow down. Similarly, for DFARS 252.244-7000, Subcontracts for Commercial Items, language and flow down requirements should be updated and aligned with the structure and content of FAR 52.244-6 to provide a single point of reference for defense-unique clauses intended to flow down to subcontracts for commercial items. Any clauses added to 52.244-6 or 252.244-7000 should be the only additional terms and conditions necessary to protect the government's interest relative to the relationship between prime contractors and subcontractors for the majority of commercial item subcontracts. This recommendation does not change prime contractors' responsibility to evaluate contract risks and include or flow down terms that the prime determines are appropriate to allocate or mitigate those risks.

Implementation

Legislative Branch

- Amend 41 U.S.C. § 1906(c) to require the limited number of FAR clauses that flow down to commercial subcontracts to be consolidated into one clause and prohibit federal agencies from requiring any other FAR clauses be flowed down to commercial subcontracts.
- Amend 10 U.S.C. § 2375(c) to require the limited number of DFARS clauses that flow down to commercial subcontracts to be consolidated into one clause and prohibit DoD from requiring any other DFARS clauses be flowed down to commercial subcontracts.

Executive Branch

- Strike all mandatory flow-down clauses from FAR 52.244-6 and DFARS 252.244-7000 consistent with the Section 809 Panel's Recommendations 2 and 92, and consolidate all clauses required to be flowed down to commercial subcontractors into these two clauses.

Note: Explanatory report language and draft legislative and regulatory text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- Changes to FAR clauses will improve commercial buying across all federal government agencies.

Recommendation 63: Create a policy of mitigating supply chain and performance risk through requirements documents.

Problem

Supply chain risk issues have grown in importance as the U.S. supply base has grown increasingly global. The DFARS system was not designed to develop policy; it was designed to deploy and implement policy that has already been developed.

Background

Supply chain risk issues have grown in importance as the U.S. supply base has grown ever more global. Even a cursory review of open-source media makes clear that rivals and enemies exploit those risks. Vulnerabilities to espionage, attack, and political embarrassment will grow in the future, unless the United States develops and rapidly implements effective policy countermeasures. The DFARS system was designed to implement policy from statute and originated from DoD or other agencies if those policies apply to DoD. The DFARS is an ineffective tool when DoD tries to use it to develop solutions. It is slow, and it lies in the jurisdiction of the Defense Pricing and Contracting office under USD(A&S), which does not have the expertise or authority to drive change in the technical, requirements, and program execution communities.

Seeking to understand the effects of FAR and DFARS clauses on DoD's supply chain, the Section 809 Panel identified more than 160 FAR and DFARS clauses that include subcontract flow down clauses. Not all flow down contract clauses are included in every government procurement or apply to every subcontract. Yet clauses are more likely to be over applied to prime contracts and subcontracts due to the complexity of determining applicability, especially when applicability is based primarily on the risks associated with what is being procured and not risks associated with the business arrangement. The volume of contract clauses alone creates a real or perceived barrier to entry for new government contractors and subcontractors. Many flow down 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.

Discussion

Numerous contract clauses address subject matter that should be addressed individually in a contract's statement of work or requirements document as opposed to being included in broadly applied contract clauses. The substantial volume of contract clauses flowed to prime contractors and subsequently throughout the supply chain, is driven, in part, by over application of clauses for which requirements were intended to protect the government's interest.

One traditional defense contractor explained that nontraditional companies they seek to subcontract with will often be handed a subcontract containing all or most of the 160-plus clauses included in the prime contract. This situation occurs because the prime contractor is leery to determine a clause does not need to be flowed down. On the receiving end, the nontraditional companies do one of three things: (a) accept the business opportunity without fully understanding all of the compliance requirements, (b) hire lawyers or consultants who can decipher and explain what they must do to meet all the compliance requirements, or (c) they refuse the subcontract. When companies accept the subcontracting opportunity without understanding what all of the clauses require, the risks DoD is most interested in managing are lost in the sheer volume of clauses. In the other two situations, opportunities are lost because only certain small or innovative nontraditional companies will have the capital to expend on lawyers or consultants that can interpret what the contract requires.

Instead of addressing requirements on a contract-by-contract basis, the government has taken a blanket approach to requirements, imposing compliance requirements that may not meet the intended purpose under the circumstances of the procurement, or may be altogether unnecessary for a particular procurement. DoD does not have a system for directing risk mitigation requirements across the

enterprise, except through the DFARS. Certain organizations within DoD, like the Air Force Installation and Mission Support Center, have developed standardized performance work statements for services acquired across the agency. In addition, procurement of certain products has been centralized through organizations like the Defense Logistics Agency and Defense Information Systems Agency. These organizations have the capacity and experience in developing and implementing policies applicable to requirements for the entire enterprise.

Conclusions

The panel acknowledges Congress' ongoing work in this area as a step in the right direction, specifically the passage of S. 3085, the Federal Acquisition Supply Chain Security Act of 2018, which mandates the creation of a Federal Acquisition Supply Chain Security Council. DoD should develop a system for directing risk mitigation requirements across the enterprise outside the DFARS. DoD needs a Supply Chain Assurance Council that can bring appropriate technical expertise to bear quickly to develop policy solutions. It also needs an execution arm that can deploy policy and oversee its implementation. Congress should amend Sec. 807 of the FY 2018 NDAA to incorporate this recommendation in its effort to enhance supply chain scrutiny.

Implementation

Legislative Branch

- Amend Section 807 of the FY 2018 NDAA to require DoD implement tools for supply chain risk mitigation policies through the requirements generation process rather than through the DAR Council process.

Executive Branch

- Require the Secretary of Defense develop tools and processes for implementing supply chain risk mitigation policies through the requirements generation process rather than through the DAR Council process.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

RECOMMENDATIONS 64 AND 65 SHARE THE COMMON THEME: UPDATE APPLICATION OF SOCIOECONOMIC POLICIES AND LABOR-RELATED LAWS TO REFLECT CURRENT MARKET REALITIES AND COST THRESHOLDS

Unlike the private sector, the federal procurement system must integrate a range of socioeconomic objectives and policies with the economic trade-offs of cost, schedule, and performance. Socioeconomic policies are intended to advance a variety of social and political goals, from standardizing labor and

environmental practices to encouraging market participation by small or disadvantaged business categories. Socioeconomic policies are created through a series of statutes, EOs, and regulations, many of which are decades old. Within DoD acquisition, these policies are implemented through the FAR and the DFARS.

In incorporating socioeconomic provisions into its purchases, the federal procurement system becomes less efficient than the private sector. The process is regularly called burdensome and confusing, with conflicting regulations, numerous acquisition cost thresholds that trigger the applicability of different provisions, and often entirely separate rules for DoD procurements. Overall, the consequences of an inefficient federal procurement system are increased costs, delays, and potential exclusions of new, innovative entrants. These consequences are typically amplified in DoD acquisition due to sheer volume and additional national security implications. Socioeconomic policies have been identified as impeding DoD's ability to field the most innovative technologies to the warfighter in a rapid, costly, and efficient manner.

Despite this argument, there are many social and economic benefits to advancing socioeconomic objectives in the federal procurement system. Domestic purchasing preferences may support a degree of national industrial capacity that might not survive in the global marketplace. These preferences may also contribute to supply chain security for critical technologies. Other policies may advance political goals in support of small or otherwise disadvantaged businesses, thereby increasing market participation and competition. Finally, labor-related laws and regulations help to ensure that wage and safety standards are maintained across the United States. These goals are sustained through the purchasing power of the federal government.

In attempting to balance socioeconomic objectives and efficient purchasing, the Section 809 Panel seeks to further refine the way DoD applies socioeconomic policies to its procurements. In all circumstances, national security implications drive the recommendations. When socioeconomic policies hamper DoD's ability to procure the most effective warfighting capability, the procuring capability must be prioritized. When socioeconomic policies serve national security interests, DoD should update and retain them.

The remaining sections of this paper propose a series of Recommendations more closely aligned to this type of socioeconomic policy. The first section addresses domestic purchasing preferences: the Buy American Act and the Berry Amendment. Domestic purchasing preferences create a series of costly and confusing domestic sourcing requirements which are frequently out of sync with global supply chains and market dynamics. For these socioeconomic policies, the panel recommends excepting these requirements when DoD is procuring commercial products. Additionally, the panel recommends adopting a public interest exception for the Berry Amendment identical to the one that exists for the Buy American Act. The second section addresses three labor-related laws. In this category, the panel recommends increasing the acquisition thresholds of the Davis–Bacon Act, the Walsh–Healey Public Contracts Act (Walsh–Healey Act), and the Services Contracting Act to $2 million to mitigate a large portion of the duplicated administrative burden imposed by these obsolete provisions while still covering most of the DoD expenditure in this area.

RECOMMENDATIONS

Recommendation 64: Update socioeconomic laws to encourage purchasing from nontraditional 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.

Problem

Domestic purchasing preferences—notably the Buy American Act and the Berry Amendment—can undermine DoD's ability to field the most innovative technologies to the warfighter in a rapid, costly, and efficient manner.[8] Although they are intended to prioritize U.S. manufacturing, domestic purchasing preferences often result in premium pricing for products that may not be the most state-of-the-art items available in the commercial market. Given the diminished capacity of U.S. manufacturing in some industrial sectors, supply chain constraints may also affect delivery volumes and schedules. Through universal applications of the Buy American Act and the Berry Amendment, DoD is currently unable to balance its requirements to both access commercial innovation and to protect critical technology.

Background

The Buy American Act

The 1933 Buy American Act (BAA) provides preferential treatment for domestic sources of supplies, manufactured goods, and construction material in federal government contracts above the micropurchase threshold. BAA imposes a two-part test for a product to be considered a *domestic end product*:

- The end product must be manufactured in the United States.
- More than 50 percent of the cost of all the components must be manufactured in the United States.

Exceptions and waivers to BAA exist, which are implemented by FAR 25.103 and FAR 25.401(a)(2). Exceptions include public interest considerations, domestic nonavailability, unreasonable cost, and products used outside the United States. Waivers to BAA are traditionally granted under authority of the Trade Agreements Act and are related to acquisitions under the World Trade Agreement Government Procurement Act or any Free Trade Agreement.[9] BAA does not apply to services.

DoD regulations covering BAA are found in DFARS 225 and differ from civilian agencies in several ways. DoD may waive BAA for national security purposes through the public interest exception procedures established by 10 U.S.C. § 2533 and DFARS Subpart 225.103(a)(ii). DoD also uses a separate,

[8] American Materials Required for Public Use, 41 U.S.C. § 8302. Requirement to Buy Certain Articles from American Sources; Exceptions, 10 U.S.C. § 2533a.
[9] National Security Objectives for National Technology and Industrial Base, 19 U.S.C. § 2501.

more stringent pricing evaluation method known as the Balance of Payments Program, implemented through DFARS Subpart 225.75, whereas civilian agencies apply between a 6 percent and 12 percent price preference to domestic sources. Using the Balance of Payment calculation regulations, DoD's price preference for U.S. products is 50 percent and does not discriminate between large and small businesses. Additionally, the FAR Council issued a partial waiver to the two-part test for all commercial off-the-shelf (COTS) products. This waiver requires that a COTS item be manufactured in the U.S. but does not track the origin of components. An additional exception to BAA exists for all commercial information technology (IT) purchases by the federal government.[10]

The Berry Amendment

The Berry Amendment requires DoD to purchase domestically grown or sourced food, clothing, fabrics (including ballistic fibers), and hand or measuring tools. The Berry Amendment was enacted in 1941 to protect the U.S. industrial base during times of war. The Berry Amendment differs from BAA in two ways: It applies only to DoD, and it requires items to be 100 percent domestic in origin.

There are a number of exceptions to the Berry Amendment, which are listed in DFARS 225.7002-2. Most notably, exceptions to the Berry Amendment include purchases under the Simplified Acquisition Threshold (SAT), items waived through the Domestic Non-Availability Determination (DNAD) process, and acquisitions made outside the United States in support of combat operations.[11] There is no public interest exception to the Berry Amendment. Regulations covering the Berry Amendment are found in DFARS 225.7002. Administrative procedures are described in PGI 225.7002-1.

Discussion

The negative consequences of domestic purchasing preferences include increased costs, barriers to entry for some U.S. business, and disincentives to innovate. Products purchased under both BAA and the Berry Amendment can result in premium pricing for DoD. The domestic origin requirements of both laws are out of sync with modern, global supply chains. If U.S. commercial companies operate in these globalized markets, their products may not be compliant or eligible to compete for federal government contracts. Maintaining solely domestic supply sources is not possible or profitable for many U.S. companies; thus, the regulations act as a barrier to entry for supplying to DoD. Finally, U.S. companies able to meet domestic sourcing requirements can face minimal competition, which can directly affect innovation. Although incentives to innovate under domestic purchasing preference are mixed, DoD must be able to access the most innovative products in a timely and cost effective manner.

DoD's 50-percent price preference for domestic goods under BAA means that U.S. products may be 49 percent more expensive than the market price and still be considered *reasonable*. For example, the Secretary of Defense released a 1989 report, *The Effect of the Buy American Restrictions Affecting Defense*

[10] Per recurring general provision in the annual General Government Appropriations Act, originally enacted by section 535(a) of the Transportation, Treasury, and Independent Agencies Appropriations Act, 2004 (division F of Pub. L. No. 108-199; 118 Stat. 345) and most recently enacted by section 615 of the Financial Services and General Government Appropriations Act, 2018 (division E of Pub. L. No. 115-141). Because the Commercial IT exception does not currently exist in U.S. Code, the Panel recommends codifying this recurring appropriations provision in Title 41 (*See,* Implementation section).

[11] "Berry Amendment FAQ," Defense Pricing and Contracting, accessed October 25, 2018, https://www.acq.osd.mil/dpap/cpic/ic/berry_amendment_faq.html.

Procurement, acknowledging that BAA imposed higher costs on the federal government. In this report the Navy noted that as a result of domestic sourcing restrictions, it was spending 30 percent above market price in the mooring chain industry and 40 percent above market price in the anchor chain industry.[12] Furthermore, the 100 percent domestic sourcing requirements of the Berry Amendment place a substantial burden on DoD acquisitions of textiles, apparel, and footwear in particular. The U.S. textile, apparel, and footwear industry has declined sharply in the last 25 years, leaving a limited number of domestic manufacturers and an eroded U.S.-based supply chain.[13] DoD must pay premium prices for 100 percent U.S. origin products, which often lack genuine competition at some point in the supply chain; many components in this industry are single or sole sources. The reduced industrial capacity for Berry Amendment-compliant goods may cause delivery delays or other issues.

BAA and Berry Amendment provisions are increasingly out of step with commercial practices and global supply chains across most product categories. The direct result is a reduction in viable suppliers and less competition. For example, in a 2002 memorandum to the Defense Acquisition Regulations Council, Leslie G. Sarasin of the American Frozen Food Institute stated that,

> *"[t]he Berry Amendment required DOD to procure foods, entirely of U.S. origin ingredients. Often, DOD was forced to reject multi-ingredient, commercially available food items processed in the United States because the domestic origin of all ingredients and components of the product could not be demonstrated. This policy put DOD at odds with common commercial practice in the food industry, which typically follows U.S. tariff law in determining questions of foreign origin, and limited its access to the widest possible selection of products."*[14]

The overall effect of BAA's domestic sourcing requirements on innovation is negative, and the effect of 100 percent domestic sourcing requirements on innovation remains mixed. Critics of domestic preferential systems and other protectionist legislation argue that they do not incentivize U.S. firms to innovate. The federal government loses out on innovation both from domestic companies lacking the incentive to innovate and from foreign businesses not allowed to compete.[15] Proponents of the Berry Amendment believe that a stable customer base allows U.S. manufacturers to invest in research and development—especially for defense-unique goods—knowing that their relationships with DoD are long-term.

Conclusions

Domestic sourcing preferences add a layer of complication and inefficiency to defense acquisition, but also serve broader political and security goals. The national security reasons to retain domestic sourcing preferences include protecting the U.S. supply base and its innovations and ensuring the

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[12] Keith A. Hirschman, *The Costs and Benefits of Maintaining the Buy American Act,* Naval Postgraduate School Thesis, June 1998, 58, accessed October 25, 2018, http://www.dtic.mil/dtic/tr/fulltext/u2/a350159.pdf.
[13] *See, for example,* Stamen Borisson and Elizabeth Oakes, "Defense Industrial Base Assessment of the U.S. Textiles and Apparel Industry," U.S. Dept. of Commerce, Bureau of Industry and Security, 2017.
[14] Valerie Bailey Grasso, *The Berry Amendment: Requiring Defense Procurement to Come from Domestic Sources,* Congressional Research Service, April 21, 2005, 8, accessed October 25, 2018, http://www.dtic.mil/dtic/tr/fulltext/u2/a462469.pdf.
[15] "Why Restrictions on Domestic Sourcing Hurts the American Government, Jobs and the Economy," A.R. "Trey" Hodgkins, IT Alliance for Public Sector, September 19, 2017, accessed on October 25, 2018, https://itaps.itic.org/news-events/techwonk-blog/why-restrictions-on-domestic-sourcing-hurts-the-american-government-jobs-and-the-economy.

security of critical goods and their components. The national security reasons to reject domestic sourcing preferences include enabling DoD to access the most advanced technologies in the quickest manner at the most reasonable prices and reduced administrative burden. From this national security perspective, DoD must strike a balance in achieving these goals. By granting exceptions to domestic purchasing preferences for commercial goods, DoD is able to open its market research to certain new, innovative products regardless of their origin while still working to protect its defense-unique acquisitions.

Allowing DoD to grant public interest exceptions to the Berry Amendment will ensure that it can access advanced, state-of-the-art technology. The public interest exception and procedures to the Buy American Act—found in 10 U.S.C. § 2533 and DFARS Subpart 225.103(a)(ii)—should be replicated for the Berry Amendment. The program manager or requiring agency should directly contribute to the contracting officer's determination for a public interest exception.

Implementation

Legislative Branch

- Amend 41 U.S.C. § 8302 to include an exception to the Buy American Act for DoD purchases of commercial products.
- Amend 10 U.S.C. § 2335a to include an exception to the Berry Amendment for DoD purchases of commercial products.
- Amend 10 U.S.C. § 2335a to include a public interest exception, identical to the exception established under BAA in 41 U.S.C. § 8302 and 10 U.S.C. § 2533.
- Amend 41 U.S.C. § 8302(b)(2) to codify the commercial IT exception.

Executive Branch

- Add an exception for commercial goods to DFARS 225.103 (regarding BAA) and an exception for commercial goods for DFARS 225.7002-2 (regarding the Berry Amendment).
- Add a public interest exception to DFARS 225.7002-2 (regarding the Berry Amendment) to mirror the public interest exception found in DFARS 225.103(a)(ii).
- Modify DFARS references to align with the changes to U.S. Code described under Legislative Branch above.

Note: Explanatory report language and draft legislative and regulatory text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

Recommendation 65: Increase the acquisition thresholds of the Davis-Bacon Act, the Walsh-Healey Public Contracts Act, and the Services Contract Act to $2 million.

Problem

The Davis–Bacon Act, the Walsh–Healey Act, and the Service Contract Act negatively affect defense acquisitions in several ways. They impose often-artificially high costs of labor on federal contracts. Their duplicative and outdated provisions – namely, their acquisition thresholds – impose heavy administrative burdens on DoD and on industry. Because public funding does not dominate total U.S. expenditures for the labor categories covered by these laws, a smaller percentage of U.S. workers are covered by them than in the 1930s. Because of this, these labor laws also serve as a barrier to entry to working for the federal government. Private companies with both commercial and federal clients often wish to avoid maintaining two sets of standards for their workforces. Competition for defense contracts is thus reduced.

Background

The Davis–Bacon Act

The Davis–Bacon Act[16] was originally passed in 1931. As amended, the Davis–Bacon Act requires contractors to pay no less than the prevailing wages to various classes of labor employed under construction contracts in excess of $2,000. All contracts covering the construction, alteration, and/or repair – including painting and decorating – of public buildings or public works in the United States are included.[17] The Department of Labor (DOL) determines prevailing wages by surveying interested third parties. The federal minimum wage is not the same as the prevailing wage. The DOL prevailing wage determinations related to the Davis–Bacon Act have been written into 58 other federal program statutes.[18] Although DOL's administration of the act has changed over the years, the statute itself has remained largely unchanged since 1935.

The Davis–Bacon Act is implemented through FAR Subpart 22.4 and DFARS Subpart 222.4. In addition to the wage rate requirements, FAR Subpart 22.406 requires contractors to maintain detailed payroll records for all laborers on federally funded construction projects for 3 years. Contractors and subcontractors must submit certified payroll data on a weekly basis, and make payroll records and employees available for DOL inspections.[19]

[16] Wage Rate Requirements, 41 U.S.C. 31-IV.
[17] Rate of Wages for Laborers and Mechanics, 40 U.S.C. § 3142.
[18] *See,* Statutes Related to the Davis–Bacon Act Requiring Payment of Wages at Rates Predetermined by the Secretary of Labor, 29 CFR Part 1, Appendix A.
[19] Davis–Bacon and Related Acts Provisions and Procedures, 29 CFR 5.5(a)(3).

The Walsh–Healey Act

The Walsh–Healey Act was enacted in 1936 to extend the protection of the federal government to employees of contractors that furnish materials, supplies, articles, and equipment in any amount exceeding $15,000 (the original threshold was $3,000).[20] The Walsh–Healey Act requires the following:

- The contractor must pay its employees not less than the prevailing minimum wages as determined by the Secretary of Labor.
- No employee of the contractor will be permitted to work more than 40 hours per week, unless the contractor has otherwise agreed with its employees in accordance with the Fair Labor Standards Act.
- The contractor will not employ males younger than 16, females younger than 18, or convict labor.
- The work will not be performed under conditions that are unsanitary, hazardous, or dangerous to the health and safety of the employees.[21]

In January 2011, the Walsh–Healey Act was recodified as the Public Contracts Act, and its provisions were restated as chapter 65 of U.S. Code Title 41.[22] For DoD acquisition, the Walsh–Healey Act is implemented through FAR Subpart 22.6 and DFARS Subpart 222.6.

The Walsh–Healey Act delineates several exemptions established by DOL. Most notably, the exemptions apply to contracts for items usually purchased on the *open market*, (i.e., generally available commercial items and for contracts for the purchase of perishables, including dairy, livestock, and nursery products).[23] In addition, DOL's regulations grant full exemptions from the Walsh–Healey Act to the following contract categories: public utility services; materials or supplies manufactured outside the United States; purchases against the account of a defaulting contractor where the stipulations of the statute were not included in the defaulted contract; and contracts to sales agents or publisher representatives for the delivery of newspapers, magazines, or periodicals.[24]

The Walsh–Healey Act does not apply to personal services or subcontractors. It does apply to the work of a *substitute manufacturer*. If the regular practice in the industry for manufacturers of the final product to manufacture subcomponents rather than to purchase them from other firms or to perform certain services rather than to have other firms perform these services, the other firms are substitute manufacturers and subject to the Walsh–Healey Act.

[20] The Walsh–Healey Public Contracts Act, 41 U.S.C. 35.
[21] Ibid.
[22] An Act to Enact Certain Laws Relating to Public Contracts as Title 41, United States Code, "Public Contracts," Pub. L. No. 111-350, 124 Stat. 3677.
[23] Walsh–Healey Public Contracts Act, Statutory Exemptions, FAR 22.604-1.
[24] Walsh–Healey Public Contracts Act, Regulatory Exemptions, FAR 22.604-2.

The Service Contract Act

The McNamara–O'Hara Service Contract Act[25] (SCA) was enacted in 1966 and amended in 1976. SCA generally applies to all federal government contracts for service employees with a contract value over $2,500 performed in the United States. Examples of covered service contracts include contracts for cafeteria or food services, security guard services, washing laundry, custodial and janitorial services, dry cleaning services, and computer services. DOL provides locality-based wage determinations on a contract-by-contract basis. SCA also has requirements such as recordkeeping and notification requirements, as implemented in FAR Subpart 22.10.[26] The provisions of SCA apply to contractors and subcontractors at all tiers.

Exemptions from SCA include contracts that are covered by the Davis–Bacon Act or the Public Contracts Act; communications services; public utilities; and postal services.[27] Additionally, DOL is authorized to establish administrative exemptions to SCA for any of the following services: automobile maintenance, financial services, conference hosting, transportation, and real estate or relocation.[28]

Discussion

The Davis–Bacon Act, the Walsh–Healey Act, and the Service Contract Act affect defense acquisition in two significant ways, both of which have been documented for decades. The three labor laws levy high wage rates and costs across many labor sectors. They also create an additional layer of administrative burden through their recordkeeping requirements, which is often compounded by duplicative provisions found in FLSA and the Occupational Safety and Health Act[29] (OSHA). Because the acquisition thresholds are so low for the application of all three laws to federal contracts, nearly all related DoD contracts are subject to these cost and administrative burdens. These thresholds are relics that do not reflect current labor market dynamics and the additional labor protections that have been enacted.

Cost Inflation

Increased labor costs associated with the Davis–Bacon Act have been documented in a series of noted studies in the past ten years. A 2008 Beacon Hill Institute paper argues that on average, Davis–Bacon Act prevailing wages were found to be 22 percent higher than construction wages reported through the Bureau of Labor Statistics for the same general area.[30] The increase in labor costs translated to a 9.9 percent average increase in overall project costs, but in some areas project costs were increased by almost 20 percent.[31] In 2010, the U.S. Chamber of Commerce recommended repealing the Davis–Bacon Act because it inflates federally funded construction costs by as much at 15 percent, costing the tax payers more than $1 billion annually, in addition to a $100 million a year in government administrative costs. The Chamber argued that repealing the Davis–Bacon Act would create an estimated 31,000 new

[25] Required Contract Provisions, Minimum Wages, 41 U.S.C. 351.
[26] Labor Standards Clauses for Federal Service Contracts, 29 CFR 4.6(e), (g).
[27] Service Contract Labor Standards, 41 U.S.C. § 6702.
[28] Administrative Limitations, Variances, Tolerances, and Exemptions, 29 CFR 4.123.
[29] Fair Labor Standards Act, 29 U.S.C. § 203. Occupational Safety and Health Act of 1970, 29 U.S.C. 15.
[30] Sarah Glassman, Michael Head, David Tuerck, and Paul Bachman, *The Federal Davis–Bacon Act: The Prevailing Mismeasure of Wages,* The Beacon Hill Institute, February 2008, 32, accessed October 25, 2018, http://www.beaconhill.org/BHIStudies/PrevWage08/DavisBaconPrevWage080207Final.pdf.
[31] Ibid, 33.

construction jobs and remove a barrier that keeps many small and minority-owned firms from competing for federal or federally funded contracts.[32] Finally, a 1983 Congressional Budget Office (CBO) report concluded that compliance with the Davis–Bacon Act increases federal construction costs by 3.7 percent.[33] Adding to its older estimates in 2013, CBO determined that repeal of the Davis–Bacon Act would save $13 billion in discretionary federal government outlays.[34]

SCA also increases the direct costs of services provided to the federal government. In a 1990 testimony before Congress, the General Services Administration (GSA) provided examples of 10 cases where the prevailing rates established by DOL were higher than the rates GSA found to be prevailing in the area. GSA found that DOL's prevailing rate exceeded the rates in the area by 28 percent to 82 percent.[35]

The Walsh–Healey Act does not impose the same potentially inflationary wage rates that are observed in the Davis–Bacon Act or the Service Contract Act. Instead, it uses the federal minimum wage established by the FLSA.

Outdated and Burdensome Management

DoD acquisition is also affected by the three labor laws through the additional burden caused by duplicative labor standards requirements and the confusion around their applicability. For example, GAO argued that the provisions of the Davis–Bacon Act were rendered moot with the passing of the Fair Labor Standards Act of 1961 (FLSA).[36] GAO also suggested that Congress should consider repealing SCA for a number of similar administrative and financial reasons:

- Inherent problems exist in its administration.
- Wage rates and fringe benefits set under it are generally inflationary to the government.
- Accurate determinations of prevailing wage rates and fringe benefits cannot be made using existing data sources.
- The data needed to accurately determine prevailing wage rates and fringe benefits would be very costly to develop.
- The FLSA and administrative procedures implemented through the federal procurement process could provide a measure of wage and benefit protection for employees the act now covers.[37]

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[32] "Davis–Bacon Act," U.S. Chamber of Commerce, August 4, 2010, accessed October 25, 2018, https://www.uschamber.com/Davis–Bacon-act.
[33] Congressional Budget Office, *Modifying the Davis–Bacon Act: Implications for the Labor Market and the Federal Budget,* July 1983, accessed October 25, 2018, https://www.cbo.gov/sites/default/files/98th-congress-1983-1984/reports/doc12-entire_0.pdf.
[34] "Options for Reducing the Deficit: Repeal the David-Bacon Act," Congressional Budget Office, November 13, 2013, accessed October 25, 2018, https://www.cbo.gov/budget-options/2013/44791.
[35] *See*, Paul R. Shlemon, "The Service Contract Act-A Critical Review," *Federal Bar Journal*, Vol. 34, No. 3 (Summer 1975), 240–48.
[36] GAO, *The Davis–Bacon Act Should Be Repealed, HDR-79-18,* April 27, 1979, 24, accessed October 25, 2018, https://www.gao.gov/assets/130/126529.pdf.
[37] GAO, *The Congress Should Consider Repeal of the Service Contract Act*, *GAO/HRD-83-4,* January 31, 1983, i, accessed October 25, 2018, https://www.gao.gov/assets/140/139434.pdf.

FLSA and OSHA provisions have subsumed the provisions of the Walsh–Healey Act.[38] In addition to these duplications, there is a great deal of confusion around the applicability of the act in certain cases. An important example of this administrative confusion involves Section 8(a) contractors under the Small Business Administration (SBA). Because SBA negotiates these contracts, the Section 8(a) companies generally believe themselves to be subcontractors that do not fall under the eligibility of the Walsh–Healey Act. A 1981 decision by the U.S. Comptroller General, however, established that Section 8(a) companies were, in fact, prime contractors in terms of labor type and that the Public Contracts Act did apply to this SBA program.[39] In establishing this precedent, the Walsh–Healey Act burdens companies of all sizes, disproportionately so for very small businesses.

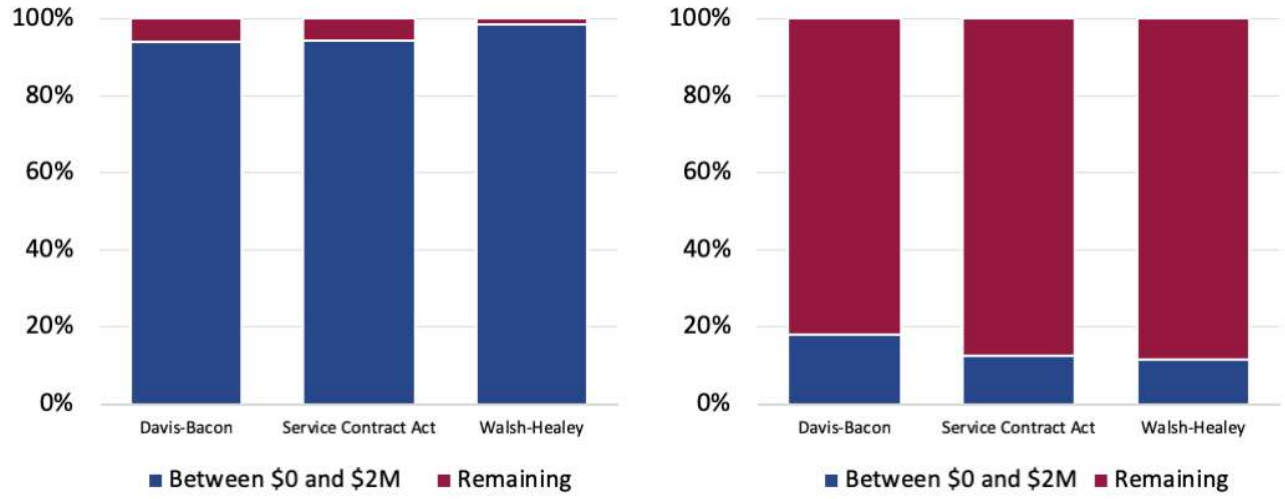
Outdated Acquisition Thresholds

Previous efforts have been made to increase the acquisition thresholds for the three labor laws, which are decades old—two are original to their 1930s founding. In 1993, the Section 800 Panel recommended raising the threshold for the Davis–Bacon Act to the SAT. This recommendation was primarily motivated by a desire to eliminate contracting agency oversight required to ensure contractor compliance with the act on small dollar contracts.[40] Because the acquisition thresholds for the Walsh-Healey Act and SCA are similarly low, the Section 809 Panel recommends substantially raising all three thresholds. The motivation remains the same: to reduce the administrative burden for small contracts, calculated at modern threshold amounts.

In conducting analysis for updating the acquisition thresholds for the three labor laws, the Section 809 Panel sought to balance the total dollar amount obligated by DoD related to these laws with the number of low dollar contract actions required to comply. Calculations made using data from the Federal Procurement Data System (FPDS) indicate the vast majority of contract actions related to these labor provisions fell below the $2 million threshold in FY 2017 (see Figure 6-1).[41] In terms of total funding, the majority of dollars spent during this time were on contract actions exceeding of $2 million (see Figure 6-1). For example, in FY 2017, 94 percent of contract actions related to the Davis–Bacon Act were for contracts below the $2 million threshold; yet, only 18 percent of the total dollars spent were for contracts less than $2 million. The same is true for the Walsh–Healey Act and SCA. Ninety-nine percent of contract actions related to the Walsh–Healey Act fell below the $2 million threshold, but only 12 percent of the total dollars spent were on contracts below $2 million. Ninety-four percent of contract actions related to SCA fell below the $2 million threshold, but only 12 percent of the total dollars spent were on contracts below $2 million. Thus, raising the acquisition thresholds would reduce the administrative burden on smaller contracts while still covering most of the DoD expenditure in this area.

[38] *For discussion, see,* "Walsh–Healey Public Contracts Act," The Wifcon Forums and Blogs, August 22, 2017, accessed October 25, 2018, http://www.wifcon.com/discussion/index.php?/topic/4080-Walsh–Healey-public-contracts-act/.
[39] Comptroller General of the United States, *Small Business Administration – Request for Advance Decision, File: B-195118,* May 22, 1981, 5, accessed October 25, 2018, https://www.gao.gov/assets/440/432959.pdf.
[40] The Acquisition Law Advisory Panel to the United States Congress, *Streamlining Defense Acquisition Laws,* Jan. 1993, pp. 4-25 and 4-26.
[41] FDPS data extracted on September 17, 2018.

Figure 6-1. DoD Contract Actions for FY 2017 (left) and Dollar Total of DoD Contract Actions for FY 2017 (right)



Conclusions

Despite the well-documented cost inflation and administrative burden imposed on defense acquisitions by the Davis–Bacon Act, the Walsh–Healey Public Contracts Act, and the Service Contract Act, it is not necessary to repeal these laws or to waive their applications to all DoD acquisitions. However, raising their acquisition thresholds to $2 million will strike balance between achieving less burdensome contract actions and continuing to uphold the intent of these laws for most of DoD's related expenditures.

Implementation

Legislative Branch

- Establish a socioeconomic labor threshold of $2 million for DoD at 10 U.S.C. § 2338a.
- Apply the socioeconomic labor threshold to the Davis–Bacon Act at 10 U.S.C. § 2338a.
- Apply the socioeconomic labor threshold to the Walsh–Healey Public Contracts Act at 10 U.S.C. § 2338a.
- Apply the socioeconomic labor threshold to the Service Contract Act at 10 U.S.C. § 2338a.

Executive Branch

- There are no Executive Branch changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

RECOMMENDATIONS 66 THROUGH 69 SHARE THE COMMON THEME: CLARIFY THE PURPOSE OF BID PROTESTS AND ESTABLISH MORE STREAMLINED PRACTICES FOR THE TWO MAIN ADJUDICATIVE BODIES

Bid protests have evolved in a piecemeal fashion since the early 20th century into the primary and, at times controversial, means of providing transparency and accountability in the federal procurement process. The current bid protest system has become an almost inherent element of public procurement and has shaped the way international procurement regimes address transparency and accountability—as evidenced by the *challenge* procedures in many international treaties, including the North American Free Trade Agreement (NAFTA) and the World Trade Organization's (WTO's) Agreement on Government Procurement (GPA). This development has occurred despite there being no parallel in the private sector and the lack of an officially stated purpose for bid protests.

Although many nations continue to base their challenge system on the U.S. bid protest system, it is difficult to determine how effective the U.S. model is at providing transparency and accountability relative to the procurement delays and added costs that result from nearly all protests. One certainty is that a bid protest, or the threat of a protest, does delay and add costs to DoD procurement, disrupting the delivery of needed products and services to warfighters.

Critics have attacked aspects of the U.S. model, citing issues like inconsistent agency debriefing practices and inadequate record production on review. The Senate has weighed in on the matter in its FY 2016, FY 2017, and FY 2018 versions of the annual NDAA, attempting to minimize the disruption protests have on the procurement system, penalize protestors that file *meritless* protests, bolster debriefing requirements, and gather more information on the perceived *two-bite* problem. In many cases, anecdotal evidence of bid protest process abuse appears to drive many of these legislative proposals.

This paper briefly reviews the evolution of the U.S. bid protest process to provide context for the recommendation to establish a purpose statement. The remainder of the recommendations are intended to reform the existing bid protest system into something that better achieves the said purpose and provides value to the procurement system. These recommendations are informed by the RAND study on bid protests directed by Congress in Section 885 of the FY 2017 NDAA, and Section 809 Panel stakeholder meetings with members of the private bar and the American Bar Association Public Contract Law Section, corporate counsel, agency counsel from across DoD and the interagency community, GAO, and the COFC. These recommendations include an expansion Congress's efforts to increase communication with disappointed offerors in the debriefing process.

RECOMMENDATIONS

Recommendation 66: Establish a purpose statement for bid protests in the procurement system to help guide adjudicative bodies in resolving protests consistent with said purpose and establish a standard by which the effectiveness of protests may be measured.

Problem

Currently none of the statutes governing the protest process, nor those waiving sovereign immunity and allowing protests, discuss a purpose for protests as part of the procurement process. The current lack of an established purpose, makes it difficult to evaluate the effectiveness of the current protest process and produces reform efforts intent on resolving discreet perceived problems rather than ensuring the process achieves the desired outcome.[42] Protest reform efforts are difficult enough in that they must balance two competing policy goals: "(1) ensuring accountability in the procurement process while at the same time (2) expeditiously resolving protests."[43]

Professors Ralph Nash and John Cibinic raised the issue of a lack of a congressionally stated purpose for protests shortly after the adoption of CICA and codification of the GAO's bid protest jurisdiction:[44]

> *before legislation is adopted it must be determined what purpose is to be served by an award protest system: Should its purpose be to grant monetary and injunctive relief to disappointed parties as a matter of right, or should it be primarily a technique for review of agency compliance with statutes and regulations?"*[45]

Nash and Cibinic's concern focuses on a desire for CICA to provide adequate guidance to GAO and potential protest litigants as to the purpose of protests, rather than providing a standard to gauge reform efforts. The adjudicative bodies responsible for deciding protests and those who participate in filing and defending protests could also benefit from congressional direction as to the purpose of bid protests in the federal procurement system.

Background

A bid protest is defined as a written objection to the following:

> *1) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.*
>
> *2) The cancellation of such a solicitation or other request.*
>
> *3) An award or proposed award of such a contract.*

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[42] See, for example, the "loser pays" provision Sec. 827 of the FY 2018 NDAA, Pub. L. No. 115-91 (2017).
[43] Raymond M. Saunders and Patrick Butler, "A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims," *Public Contract Law Journal,* Vol.39, No. 3 (2010), 539.
[44] Competition in Contracting Act of 1984, Pub. L. No. 98-369 §§ 2701-2753 (1984).
[45] Ralph C. Nash and John Cibinic, Award Protests: The Tunnel at the End of the Light, Nash & Cibinic Report, 1 No. 3 Nash & Cibinic Rep. ¶ 25 (March 1987).

> *4) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.*
>
> *5) Conversion of a function that is being performed by Federal employees to private sector performance.* [46]

An interested party, with respect to a contract or a solicitation is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by the failure to award the contract."[47]

Prior to Congress granting interested parties authority to challenge agency decisions related to procurement actions in court, Justice Hugo Black opined the following in *Perkins v. Lukens Steel*:

> *Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions on which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone.*[48] *[emphasis added]*

Clearly the Court believed that the longstanding purpose of government procurement law was to protect the procurement process and was not intended to provide benefit to individual litigants. The right to challenge government procurement actions has been granted to private litigants by Congress since the Court's decision in *Perkins v. Lukens Steel*, which is discussed as part of the narrative for Recommendation 67. Congress, in the legislation passed subsequent to the Court's decision in *Perkins*, did not indicate whether that right to challenge government procurement was for protecting the procurement system or making aggrieved litigants whole.[49]

Discussion

Although Congress has not legislated the purpose for bid protests at GAO or COFC, the conference report for CICA states:

> *The conferees believe that a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief. To accomplish this, the conference…codifies and strengthens the bid protest function currently in operation at the General Accounting Office (GAO).*[50]

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[46] Definitions, 31 U.S.C. § 3551(1). FAR 33.101 contains the same definition except that it does not include the fifth basis for protests.
[47] Definitions, 31 U.S.C. § 3551(2).
[48] *Perkins* v. *Lukens Steel, Inc.*, 310 U.S. 113, 128 (April 29, 1940), accessed November 9, 2018, https://supreme.justia.com/cases/federal/us/310/113/.
[49] See the Contract Disputes Act of 1978, Pub. L. No. 95-563 (1978), the Competition in Contracting Act of 1984, Pub. L. No. 98-369 §§ 2701-2753 (1984), and the Administrative Disputes Resolution Act of 1996, Pub. L. No. 104-320 (1996). The conference report to the Competition in Contracting Act indicates that Congress intended to override Justice Black's opinion.
[50] H.Report 98-861, Deficit Reduction Act of 1984, Conference Report to accompany H.R. 4170, Section 2751–Procurement Protest System, 1435, accessed November 9, 2018, https://www.finance.senate.gov/imo/media/doc/Conf-98-861.pdf.

Congress has emphasized the desire to resolve protests in an expeditious manner. For example, 31 U.S.C. § 3554(a)(1) states, "the Comptroller General shall provide for the inexpensive and expeditious resolution of protests" and 28 U.S.C. § 1491(b)(3) requires COFC to "give due regard to the interests of national defense and national security and the need for expeditious resolution of the action."

The Executive Order (EO) that establishes agency protests also provides insight into the purpose for agency protests. The EO establishes agency level protests to "ensure effective and efficient expenditure of public funds." [51] In the absence of a clearly articulated purpose for protests, stakeholders across the acquisition community express differing opinions. Those opinions center primarily on ensuring transparency and accountability, but also include ensuring fairness and providing offerors who feel they have been harmed by an agency's action a means to seek redress. In addition, various international free-trade agreements the United States has acceded to and existing model public procurement codes published by the United Nations and the American Bar Association (ABA) provide insight into what the purpose of protests should be.

The United States has entered into multiple international free-trade agreements that obligate it to maintain a *challenge* or *review* process. *Challenge* and *review* are the terms of art the rest of the world uses to describe protests. For instance, NAFTA[52] states: "In order to promote fair, open and impartial procurement procedures, each Party shall adopt and maintain bid challenge procedures for procurement."[53] This statement articulates a fairly clear purpose for the challenge/protest process: to promote fair, open, and impartial procurement procedures. The recently negotiated United States–Mexico–Canada Agreement similarly requires an independent domestic review authority to "review, in a non-discriminatory, timely, transparent and effective manner, a challenge or complaint…by a supplier."[54]

Similar to the trade agreements, but not binding on the government, are the model procurement codes developed by groups of international and domestic experts. These model procurement codes may be useful in defining a purpose for the protest process and the goals it should be tailored to achieve.

Two model procurement codes—the United Nations Commission on International Trade Law (UNCITRAL) and the ABA Model Procurement Code for State and Local Governments—recommend adopting a challenge/protest process and provide insight into the purpose of a protest or challenge system. Of note is that these procurement codes were modelled in whole or in part on the U.S. public procurement process.

[51] Executive Order 12979 of October 25, 1995, Agency Procurement Protests, Fed. Reg. Vol. 60, No. 208 (Oct. 27, 1995).
[52] North American Free Trade Agreement, as approved by Congress in the North American Free Trade Agreement Implementation Act of 1993 (Pub. L. No. 103-182) (19 U.S.C. § 3301 note).
[53] North American Free Trade Agreement, Section C, Article 1017: Bid Challenge, accessed November 26, 2018, https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=2#A1016.
[54] United-States-Mexico-Canada Agreement, Chapter 13: Government Procurement, Article 13.18(1), 13-21, accessed November 26, 2018, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/13%20Government%20Procurement.pdf.

UNCITRAL provides for protests/challenges. The enactment guide provides the following purpose for challenges/protests:

> *A key feature of an effective procurement system is the existence of mechanisms to monitor that the system's rules are followed and to enforce them if necessary. Such mechanisms include not only audits and investigations, and prosecutions for criminal offences, but also challenge procedures, in which suppliers and contractors are given the right to challenge decisions and actions of the procuring entity that they allege are not in compliance with the rules contained in the applicable procurement legislation."*[55]

ABA Model Procurement Code for State and Local Governments provides a similar rationale for the purpose of protests, arguing for adoption of the *private Attorneys General* concept. The commentary to the authorizing language for protests states,

> *(1) It is essential that bidders, offerors, and contractors have confidence in the procedures for soliciting and awarding contracts. This can best be assured by allowing an aggrieved person to protest the solicitation, award, or related decision.*[56]

Under this theory, aggrieved private entities with an interest in a given procurement are recognized as being well situated to identify and raise alleged violations of procurement laws and regulations.

Conclusions

The Section 809 Panel gathered data from representatives of academia, industry, the private bar, COFC, and GAO. The panel interviewed the procurement executives and members of the offices of general counsel for the Military Services on the issue of protests. Additionally, practitioners in the acquisition community at all levels, from both industry and government, participated in stakeholder meetings, providing input to the panel.

A consistent theme of the arguments in favor of a robust protest process is the need for the government to have a means of checking its own performance to ensure compliance with law and regulation and to protect public funds. A vocal minority were also concerned about protecting the rights of disappointed offerors. What Congress, the Executive Branch, UNCITRAL, and ABA have said regarding the purpose of protests indicates that the purpose for granting aggrieved persons the ability to protest is to ensure the procurement process remains effective and efficient while maintaining the confidence of participants in the system.

Because there is no corollary for protests in the private sector, there is no guidance to draw on in determining a purpose for protests. While there is no general consensus as to the purpose of protests, the vast majority agree that there is a need for a protest process to protect the integrity of DoD's procurement system. Congress should adopt the following purpose statement in Title 10, and it may be

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[55] United Nations Commission on International Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement,* UNCITRAL (2014), accessed November 26, 2018, http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf.
[56] Model Procurement Code for State and Local Governments, §9-101, ABA (2000).

worthwhile to incorporate a tailored version of this purpose statement in Titles 28 and 31, for bid protests:

> *The purpose of Congress in providing for review of procurement action of the Department of Defense through the procurement protest system under subchapter V of chapter 35 of title 31 and through causes of action under section 1491(b) of title 28 was to enhance confidence in the Department of Defense contracting process by providing a means, based on protests or actions filed by interested parties, for violations of procurement statutes and regulations in a timely, transparent, and effective manner; and a means for timely, transparent, and effective resolution of any such violation.*

Implementation

Legislative Branch

- Amend Title 10 to include the following purpose statement for bid protests:
  - The purpose of Congress in providing for review of procurement actions of DoD through the procurement protest system under subchapter V of chapter 35 of title 31 and through causes of action under section 1491(b) of title 28 is to enhance confidence in the Department of Defense contracting process by providing
    - a means, based on protests or actions filed by interested parties, for violations of procurement statutes and regulations in a timely, transparent, and effective manner; and
    - a means for timely, transparent, and effective resolution of any such violation.

Executive Branch

- Incorporate a modified version of the above statutory purpose statement for protests into DFARS 233.102.

Note: Explanatory report language and draft legislative and regulatory text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- This purpose statement would govern protests filed in response to procurement decisions made by all federal government agencies.

Recommendation 67: Reduce potential bid protest processing time by eliminating the opportunity to file a protest with the COFC after filing at the GAO and require the COFC to issue a decision within 100 days of ordering a procurement be delayed.

Problem

Currently, the U.S. bid protest system allows for challenges in the procuring agency, GAO, and COFC. The system is further bifurcated into preaward and postaward challenges of procurement decisions.

Complicating matters, challengers that lose at the agency level may bring the same, or a more refined protest to GAO or COFC. Challengers that lose at GAO may bring the same protest to COFC. This possibility creates potential for the agency to have to relitigate the same protest at three different levels—agency, GAO, and then COFC. Relitigating a protest at COFC after an unsuccessful protest outcome at GAO is what is often referred to as *two bites*. Only once COFC rules is a record created that may be subject to appellate review by the United States Court of Appeals for the Federal Circuit at the request of either party.

Allowing protestors to litigate a protest at GAO and, if not satisfied with the GAO decision, file the same or a refined version of the protest at COFC undermines one of the critical aspects of GAO's jurisdictional mandate: "providing for the inexpensive and expeditious resolution of protests."[57] In the current system, GAO cannot conclusively resolve a protest. The option remains to relitigate that very same protest at COFC. For GAO to achieve its statutory purpose, the opportunity for a second protest opportunity at COFC must be eliminated.

Background

What appears to be the first protest was filed by an attorney on behalf of the English Construction Company at GAO, which at that time was the General Accounting Office.[58] The attorney seeking relief at GAO from irregularities in the bidding process wrote:

> *It is respectfully protested that not only is the acceptance of the Sloan Dickinson Corporation's bid without authority of law but results in such unfair and unequal treatment of all the other bidders as to present a situation where without a doubt all bids should be rejected and the work re-advertised in the interest of the Government and for the protection of the rights of contractors in general.*[59]

Prior to the English Construction Company case, the term *protest* was often used by litigants filing actions in the United States Court of Claims. As early as 1889 the Court recognized that a claimant had "protested against the contract being awarded" and "at the time the bids were opened plaintiff protested to the Architect against the award to any one (sic) but his associate."[60] In this particular case, the claimant was not arguing that the government violated certain procurement rules, but that the award violated the claimant's patent rights. The court dismissed the claim because there was no actual or implied contract between the claimant and the government.

In the English Construction Company protest, the disappointed bidder also did not have a contract with the government. The GAO solicitor, or general counsel, ultimately concluded that the GAO had the authority to decide protests filed by disappointed bidders but dismissed the protest finding no violation of law.[61] This case marks the first time that an adjudicative body of the federal government exercised jurisdiction over an alleged violation of procurement rules filed by a party that did not have a

[57] Decisions on Protests, 31 U.S.C. § 3554(a)(1).
[58] Daniel I Gordon, *In the Beginning: The Earliest Bid Protests Filed with the US General Accounting Office,* 13 Public Procurement Law Review 147, 154 (2004).
[59] Ibid, 155.
[60] Schillinger v. United States, 24 Ct. Cl. 278 at 287 (Ct. Cl. Mar. 18, 1889).
[61] Daniel I Gordon, *In the Beginning: The Earliest Bid Protests Filed with the US General Accounting Office,* 13 Public Procurement Law Review 147, 156 (2004).

contractual relationship with the government. Less than 2 years later GAO published its first written bid protest decision.[62]

To decide the first bid protest, the Comptroller General, determined GAO had jurisdiction by virtue of GAO's authority to give advance decisions to certifying and disbursing officers on the legality of payments. Bid protest authority was not codified until, as part of the Debt Reduction Act of 1984, Congress passed the CICA. [63] Subsection D of CICA specifically provided for the Procurement Protest System now codified at 31 USC § 3551, et. seq.

The Comptroller General is charged with "providing for the inexpensive and expeditious resolution of protests" filed at GAO and to issue final decisions within 100 days after the protest is submitted.[64] To be eligible for a stay of award or stay of performance, a postaward bid protests must be filed with GAO no later than 10 days after the date of contract award, or 5 days after the date of a required debriefing, whichever is later.[65] GAO will consider a protest timely if it is filed within 10 days after the protestor knew or should have known of the basis for the protest.[66] In reviewing protests of agency procurement decisions, GAO is limited to whether the "agency's judgement was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations" and whether the agency's action was prejudicial to the protestor.[67] Although bid protests originated at GAO, bidders may now file a bid protest at any or potentially all of three options: the agency, GAO, and COFC.

The agency forum, detailed in FAR 33.103, implementing EO 12979, provides that an interested party may file a protest with the contracting officer and request an independent review of its protest at one level above the contracting officer. [68] The FAR states that the "agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests."[69] Preaward protests must be filed before bid opening and in all other cases the protest must be filed within 10 days after the basis of a protest is known or should have been known.[70] Most often this would be 10 days after the contract award.

COFC was first established as the Court of Claims in 1855 and was responsible for resolving claims during the Civil War. COFC jurisdiction was subsequently expanded by the Tucker Act of 1887, as later amended in 1996 by the Administrative Disputes Resolution Act (ADRA). [71] The Tucker Act provides

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[62] Ibid, 162.
[63] Pub. L. No. 98-369, Title VII, 98 Stat. 1175 (1984).
[64] Decisions on Protests, 31 U.S.C. § 3554(a)(1). Congress also directed the Comptroller General utilize an express option when appropriate, that would resolve protests within 65 days after filing. Agencies are required to file an agency report with the relevant portions of the administrative record for the procurement in response to a protest within 30 days.
[65] Review of Protests; Effect on Contracts Pending Decision, 31 U.S.C. § 3553(d)(4).
[66] 4 CFR § 21.2(a)(1).
[67] Ostrom Painting & Sandblasting, Inc., B-285244 (Comp. Gen. Jul. 18, 2000).
[68] "Interested party for the purpose of filing a protest" as defined at FAR 33.101 means "an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." The same definition is used in 31 U.S.C. § 3551(2)(A). FAR 33.103(d)(4).
[69] FAR 33.103(c).
[70] FAR 33.103(d)(4).
[71] 28 U.S.C. § 1491. See also what is described as the "Little Tucker Act" at 28 U.S.C. § 1346, which appears to give concurrent jurisdiction to contract related claims under $10,000 to both the COFC and the District Courts. However, pursuant to § 1356(A)(2) the "Little Tucker Act" does not apply to contracts subject to the Contracts Dispute Act found in 41 U.S.C. §§ 7104 and 7107.

COFC jurisdiction over claims against the United States founded on, among other things, "any express or implied contract with the United States." This authority was initially viewed as limited to contract disputes. Later the Court recognized jurisdiction over implied in-fact contracts for which the United States is obligated to fully and fairly consider the proposals of offerors, effectively adopting jurisdiction over protests. The ADRA amended the Tucker Act to provide COFC exclusive jurisdiction, resting jurisdiction away from the district courts, over preaward and postaward bid protests. District Court jurisdiction is often referred to as *Scanwell* jurisdiction, as it arose out of the decision of the Court of Appeals for the D.C. Circuit in *Scanwell Laboratories v. Shaffer*. *Scanwell* jurisdiction was based on the Court's finding that the Administrative Procedures Act gave disappointed offerors standing to challenge contract awards.[72] The exclusive jurisdiction of COFC became effective on January 1, 2001.[73]

COFC requires a more formal legal process than GAO, although GAO has developed its own set of formal practices over the years. Protests before COFC more closely resemble litigation in the district courts with many of the associated rules of procedure. COFC requires protestors, for example, to be represented by counsel.[74] Some argue that the additional procedures at COFC and the requirement for representation account for the fact that more than 95 percent of DoD protests are filed at GAO.[75] Additional key differences between GAO and COFC include agency representation by the Department of Justice at COFC and the remedies that can be granted. Perhaps most significant is that COFC is authorized to review "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[76] COFC and the United States Court of Appeals for the Federal Circuit have interpreted the "in connection with" phrase to be "very sweeping in scope."[77] Its review is therefore potentially more expansive and less predictable than GAO's.

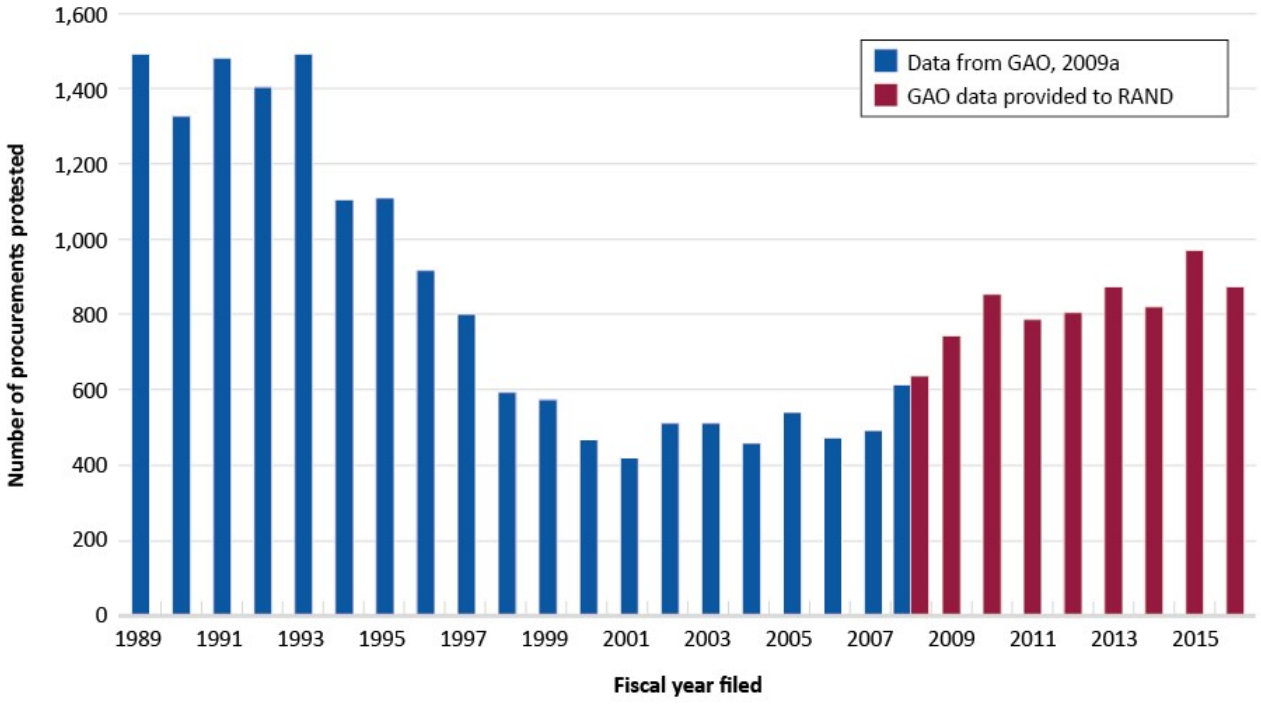
Some might argue that a positive result of COFC's broader jurisdictional scope is that the court may, and recently has, reviewed agency decisions related to requirements development. The injunction COFC issued as a result of a 2014 SpaceX protest ultimately led to mediation between the U.S .Air Force and SpaceX, resulting in a delay in competing space launch requirements while SpaceX was becoming certified for national security launches.[78] The injunction was not issued because of a violation of procurement laws, but because COFC found that the contract awardee's source of supply may have been restricted by EO.[79] In the Palantir case, the Court ruled the U.S. Army violated a procurement

[72] Scanwell Laboratories v. Shaffer, 424 F.2d 859, 861-873 (D.C. Cir. 1970).
[73] Pub. L. No. 104-320 §§ 12(a) and (d), 110 Stat. 3874 (1996). The ADRA provided a sunset provision which terminated the district courts on January 1, 2001 unless Congress acted to extend that date. Congress did not take such action.
[74] See RCFC 83.1. COFC allows pro se representation of individuals or families, but corporations and partnerships must be represented by counsel. The Department of Justice (DoJ) represents DoD at COFC.
[75] RAND reported that from 2008-2016 11,459 protests actions were filed at GAO while only 475 were filed at COFC. Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 35, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.
[76] There can be significant differences in the interests of DoJ and the interests of DoD in given protest. These differences manifest themselves in more adversarial proceeding before COFC than before GAO.Space Exploration Technologies Corps. v. US, No. 14-354C, Order to Grant Temporary Injunction (April 30, 2014), accessed November 26, 2018, https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2014cv0354-0-0.
[77] Ibid.
[78] SpaceX Gets Air Force Certification to Compete for Military Launches, nbcnews.com (26 May 2015). https://www.nbcnews.com/science/space/spacex-gets-air-force-certification-compete-military-launches-n364986.
[79] Space Exploration Technologies Corps. v. US, No. 14-354C, Order to Grant Temporary Injunction (April 30, 2014), accessed November 26, 2018, https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2014cv0354-0-0.

statute by refusing to consider commercially available solutions, such as Palantir's, in procuring a software solution.[80] The Palantir ruling came after Palantir had unsuccessfully protested the procurement before GAO.[81] On its review, COFC set the conditions for agencies to seek broader competition, which should result in substantial benefits to the government, including access to better technology and lower prices.[82] It should be noted that not all share the view that COFC's review in these two cases was ideal, even though, at least in the case of SpaceX, COFC's decision appears to have resulted in savings for the taxpayer and increased capability for DoD.[83]

According to presentations made by GAO and COFC to the Section 809 Panel, in FY 2017 there were 2,596 bid protests filed at GAO governmentwide, with 55 percent being defense-related, and 132 bid protests cases were filed at COFC.

Figure 6-2. DoD Procurement Protests at GAO, FYs 1989-2016[84]



SOURCE: RAND analysis of GAO, 2009a, and GAO-provided data.
RAND ***RR2356-4.2***

[80] Palantir USG, Inc. v. US, No. 16-748C (Nov 3, 2016), accessed November 26, 2018, https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0784-113-0.
[81] Ibid.
[82] In March of 2017, Palantir filed a GAO protest of a similar Navy software procurement and the Navy chose to withdraw the solicitation and "re-examine the procurement record and its acquisition approach." Lizette Chapman, *Palantir Wins Bid Protest Against Navy Over Contract Bid Request*, Bloomberg.com (March 28, 2017), accessed November 26, 2018, https://www.bloomberg.com/news/articles/2017-03-29/palantir-wins-protest-against-navy-over-contract-bid-request.
[83] Those who do not share the view, believe that it is not COFC's role to second-guess DoD's requirements determinations but only to determine if DoD followed applicable procurement law and did not act arbitrarily or capriciously in acquiring the products and services that meet those requirements.
[84] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 30, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.

Regarding GAO protests, Section 885 of the FY 2017 NDAA directed RAND to create a report, *Assessing Bid Protests of the U.S. Department of Defense Procurements Identifying Issues, Trends and Drivers*, which shows that between FY 2008 and FY 2016, protesters initiated 21,186 actions at GAO.[85] "Protest actions associated with DoD agencies accounted for roughly 60 percent of the total protest actions over this period."[86] The number of protests filed at GAO has risen slightly since 2007, but according to Figure 6-2, protest numbers are still lower today than they were in the early 1990s.

Among the 11,459 protest actions related to the 7,368 DoD procurements RAND analyzed, 26.9 percent were preaward protests. Among the approximately 8,376 postaward protests, DoD issued a stay override in only 1.2 percent of the cases.[87] Of all GAO protests, 21.2 percent result in a decision by GAO, with only 2.6 percent of the protests being sustained.[88] Approximately 38 percent of Do- related protests result in corrective action.[89] GAO combines these two numbers into an effectiveness rate of 41 percent and argues that because this rate has held rather steady since 2009, it is reasonable to conclude that claims of frivolous protests accounting for the recent increase in protests is overblown.[90]

With regard to the timeliness at both GAO and COFC, the RAND report included a compilation of data on the time it took both GAO and COFC to render decisions.

RAND found that 50 percent of all GAO protests are resolved within 30 days and 70 percent within 60 days. If a protest goes to a decision, however, GAO takes almost the full 100 days to either sustain or deny the protest.[91] If DoD takes corrective action, it typically does so prior to submitting the agency report.[92] See Figure 6-3.

GAO, as part of the Legislative Branch, is only authorized to make recommendations to the Executive Branch agency to remedy a violation of procurement laws or regulations.[93] The executive agency has discretion whether it follows those recommendations, but from FY 2014 through FY 2017, only twice did an agency choose not to follow a GAO recommendation resulting from a sustained protest.[94] Any of the parties to a protest may seek reconsideration of an adverse GAO decision; however, GAO's decisions are not binding on the agency, so there is no path to an appellate review at a court.[95]

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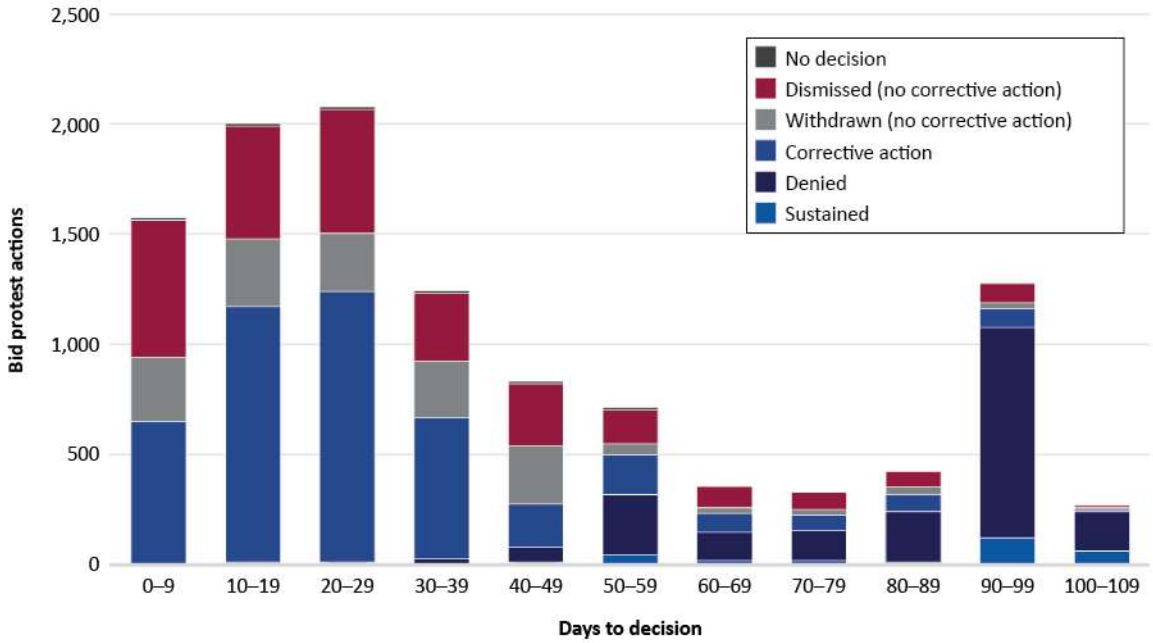
[85] The RAND study analyzed protest "actions." Multiple protest actions may be filed related to one procurement. Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 27-28, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.
[86] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 29-30, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.
[87] Ibid, 35.
[88] Ibid, 37.
[89] Ibid.
[90] Ibid.
[91] Ibid, 44.
[92] Ibid.
[93] 31 U.S.C. § 3554(b)-(c).
[94] See GAO Bid Protest Annual Report to Congress for Fiscal Years 2014-2017 available at https://www.gao.gov/legal/bid-protests/reference-materials#annual_reports.
[95] 4 CFR § 21.14.

Figure 6-3. Days to Close a Protest Action at GAO, FYs 2008-2016[96]



SOURCE: RAND analysis of GAO data.
NOTES: Excludes reconsiderations. All protest cases were resolved within the 100-day window.
The interval of 100–109 days includes only decisions that took 100 days.
RAND *RR2356-4.11*

Once a preaward protest is filed with GAO, the contracting officer may not make a contract award for that procurement while the protest is pending.[97] If a postaward protest is filed within a certain timeframe, the contracting officer must suspend contract performance while the protest is pending.[98] This delay in awarding or performance of a procurement under protest is known as a *CICA stay*. It is important to note that the stay may be overridden by the head of the procuring activity based on certain written findings. To award a contract when a procurement is subject to a preaward protest, the head of the procuring activity must make a written finding that "urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for the decision of the Comptroller General."[99] The head of the procuring activity may authorize performance of a contract subject to a postaward protest under the same rationale, or by finding that "performance of the contract is in the best interests of the United States."[100]

The CICA stay does not apply to agency-level protests, but FAR 33.103 prohibits the award of a contract while a preaward protest is pending and requires the contracting officer to suspend performance of a contract while a postaward protest is pending.[101] As an exception, the agency may determine that there are urgent and compelling reasons for making award or that it is otherwise in the

[96] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 44, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.
[97] 31 U.S.C. § 3553(c)(1).
[98] 31 U.S.C. § 3553(d)(3).
[99] 31 U.S.C. § 3353(c)(2).
[100] 31 U.S.C. §§ 3553(d)(3)(C).
[101] See FAR 33.103(f)(1) and (3).

best interests of the government to proceed.[102] Agency processes may vary in how the *at least one level above the contracting officer* standard of review is applied, but almost all agencies require that legal counsel assess any final decision in response to the agency protest to ensure the legal sufficiency of the decision, even though not required by the EO or the FAR.

The CICA stay does not apply to protests filed at COFC; instead plaintiffs (protestors) must seek a preliminary injunction to prevent the contract from being awarded or the contract performance from beginning or continuing.[103] In practice, the need for a stay is often agreed to by the parties at the outset of the litigation and does not require a formal motion.

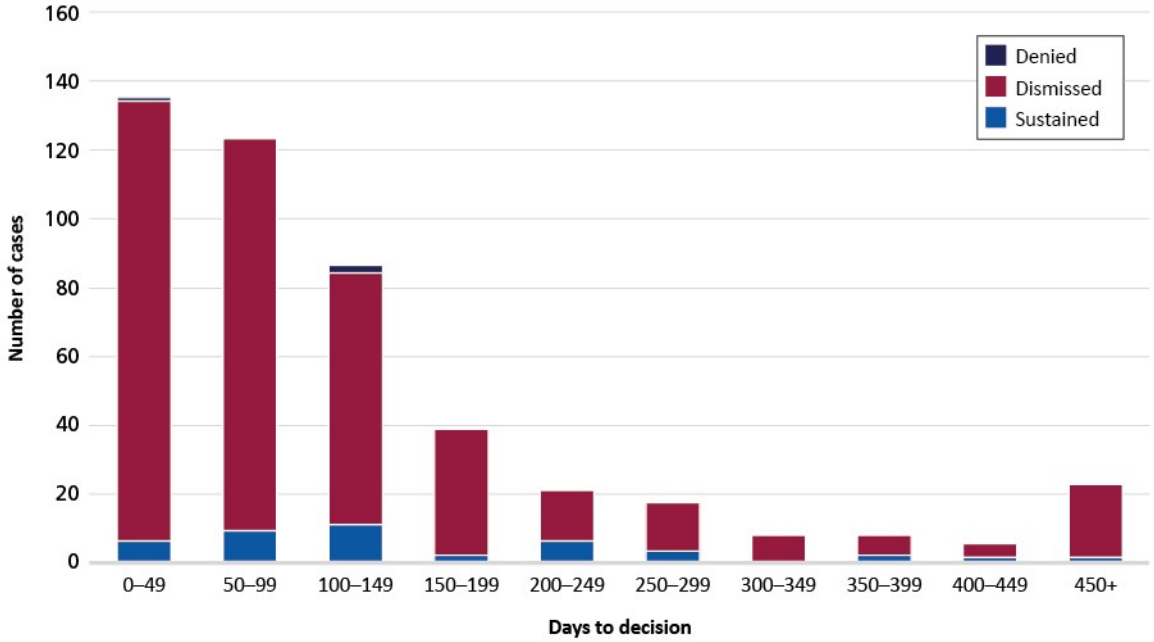
Regarding COFC protests, the RAND study shows that between January 2008 and May 2017protestors filed 475 cases related to DoD procurements.[104] These bid protests make up approximately 20 percent of the court's docket.[105] Of the 475 case filed, only 9 percent were sustained, and RAND found that the sustain rate at COFC has been falling since 2008.[106] As RAND points out, this situation could suggest that "protestors are being less selective in the cases they bring to COFC."[107] The parties appealed to the Federal Circuit in 12 percent of the cases.[108]

Timelines at COFC have been improving over the last few years, with the court issuing a decision within 133 days, on average, of the protester filing the complaint.[109] Yet in the 10-year period, COFC took more than 450 days to close approximately 20 cases.[110] See Figure 6-4.

The time it takes the government to file the complete administrative record with the Court can drive the timeline at COFC. The government took an average of 37 days to file the administrative record with COFC, but in at least one case, it took more than 350 days to file the complete administrative record.[111] Some of COFC's extended timelines can be linked directly to the agency's inability to provide the administrative record in a timely fashion.

[102] FAR 33.103(F)(1)
[103] Michael J. Shcaengold, T. Michael Guiffre Elizabeth M. Gill, *Choice of Forum for Federal Government Contract Bid Protests*, 18 Fed. Circuit B.J. 243, 310-311 (2009).
[104] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 47, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.
[105] Ibid, 48.
[106] Ibid, 55. In FY 2008 almost 20 percent of the cases heard by COFC were sustained, but in FYs 2012 and 2014-2016, 6 percent or less of protests were sustained. In 2013 there as a spike up to almost 15 percent, but the overall trend is clearly down.
[107] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 54, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.
[108] Ibid.
[109] Ibid, 57.
[110] Ibid, 58.
[111] Ibid, 58.

Figure 6-4. Number of Days to Close Cases with the COFC, CYs 2008-2017[112]



SOURCE: RAND analysis of COFC data.
NOTE: Data cover the period through May 2017.
RAND *RR2356-5.10*

Discussion

Agency attorneys expressed concern to the Section 809 Panel over the opportunity for a protestor to litigate a protest at GAO and then relitigate that protest at COFC. There is nothing to prevent a protestor from filing a protest with GAO, getting an unfavorable result, and filing the same or a refined version of protest at COFC with the expectation of a different result. The circumstances that create this opportunity for two-bites include GAO being a legislative body, not a court, and a lack of timeliness rules for filing postaward protests at COFC other than the 6-year Tucker Act statute of limitations.[113] RAND concluded that an increase in the number of cases filed at COFC that reference GAO "suggests—but does not prove—that a large fraction of cases at COFC were filed previously at GAO, where the protester did not achieve the outcome it wanted."[114] The data RAND relies on shows an increase in the percentage of cases filed at COFC that referenced GAO from less than 20 percent in 2008 to almost 70 percent in 2016.[115] A reference to GAO in a bid protest filed at COFC, however, does not mean the protest was previously adjudicated at GAO. It is just as likely that cases filed at COFC more often references previous GAO opinion(s) in support of the protestor's position as GAO has developed a robust body of published opinions that COFC might find persuasive.

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[112] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 58, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.
[113] *Blue and Gold Fleet L.P. v. United States,* 492 F.3d 1308, 1315 (Fed. Cir. 2007) effectively applied GAO pre-award protest timeliness rules to pre-award protests filed at COFC. COFC also applies the doctrine of latches and dismisses postaward protests that are filed so long after an award that the Government would be prejudiced in mounting a defense.
[114] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 53, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.
[115] Ibid.

Because GAO opinions are nonbinding recommendations, they cannot be appealed directly to a court of law, and COFC is not obligated to follow or provide any deference to GAO opinions.[116] COFC requires the agency to produce a more substantial record, and will review the agency's actions and not the propriety of GAO's previous analysis and recommendation. For years DoD has proposed legislation that would eliminate the opportunity for protestors to relitigate at COFC by applying timeliness rules for filing bid protests at COFC patterned after those established for GAO.[117]

Section 822 of the FY 2019 NDAA directed DoD to spend 18 months studying the number of protests filed at both GAO and COFC and the details associated with those cases to include the extent of the procurement delay resulting from each protest. The DoD legislative proposal that resulted in this legislation lists a number of cases for which a protest was adjudicated by GAO, then the protestor filed suit at COFC delaying each procurement by between 12 months and nearly 24 months.[118] In each case, the eventual outcome after months of litigation was the same as the outcome determined by GAO.[119] This recommendation is patterned after the DoD proposal, which was not intended to result in a study. The two-bite process is not expeditious, is costly to all parties involved, and in each of the cases presented in the DoD proposal provided no added value to the system by way of additional accountability.

Conclusions

An 18-month study is unnecessary to understand that expeditious resolution of a protest cannot happen at GAO if that resolution can be relitigated at a separate forum that is not obligated to give any deference to GAO's findings. Applying timeliness rules to COFC for filing of DoD postaward protests that mirror those that apply to GAO and codifying the preaward timeliness rules currently based on case law, would require protestors to file protests at COFC in a timelier manner and ensure that GAO remains available as an expeditious means of resolving protests. This recommendation would expand on the existing statutory mandate for COFC to "give due regard to the interests of national security and need for expeditious resolution" of actions.[120] In addition, applying GAO's protest resolution timeliness rules to the Court for rendering judgement on a procurement related action, will ensure the Court meets its mandate for expeditious resolution, but only when the Court has ordered a procurement be stayed pending resolution of the action. This approach allows the Court to focus resources on resolving those cases for which performance has been stayed while allowing for longer timelines for cases not subject to an ordered delay.

Protestors would be able to make the choice of protest forum based on the perceived advantages and disadvantages of the different options, and nothing would prevent a protestor from first filing a protest with the agency. The lack of the option to appeal a GAO decision to a court is a consideration that may influence certain protestors to file at COFC rather than GAO, but most of the stakeholders the Section 809 Panel heard from agreed that the vast majority of protestors would choose the more affordable,

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[116] See Raymond M. Saunders and Patrick Butler, *Article, A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims*, 39 Pub. Cont. L.J. 539, 553 (Spring 2010).
[117] DoD Legislative Proposal, *Sec. ___. Timeliness Rules for Filing Bid Protests at the United States Court of Federal Claims,* April 3, 2018, accessed November 27, 2018, http://ogc.osd.mil/olc/docs/3April2018.pdf, filename: Bid Protest.pdf.
[118] Ibid, 4.
[119] Ibid, 4-5.
[120] 28 U.S.C. § 1491(b)(3).

predictable, and efficient GAO forum. This recommendation protects the rights of protestors to choose the forum that will hear their protest, eliminates the potential for extraordinary delays that result from relitigating protests at separate forums, and ensures GAO achieves its statutory purpose.

Implementation

Legislative Branch

- Amend 28 U.S.C. § 1491(b)(3) to place protest filing timeliness rules on COFC that mirror those established for filing protests at GAO and prevent procurements protested at GAO to later be the subject of an action at the COFC.
- Amend 31 U.S.C. § 3556 to ensure protests may be filed at either GAO or COFC, but not both.

Executive Branch

- There are no regulatory changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- These changes only apply to DoD protests, but could be expanded to cover protests of national security related procurements at federal government agencies.

Recommendation 68: Limit the jurisdiction of GAO and COFC to only those protests of procurements with a value that exceeds, or are expected to exceed, $75,000.

Problem

Proponents of the U.S. bid protest model have defended the system as necessary for ensuring fairness, accountability, and transparency in government procurement. They point to the relatively small number of protests that are filed each year and the relative speed with which the vast majority are adjudicated, to argue that the existing process is not overly burdensome. Even the limited number of protests filed each year, however, cost taxpayers, DoD, and contractors who file protests substantial amounts of time and resources and more importantly slow delivery of technology and lethality to the warfighter. When costly protests are filed in conjunction with relatively small-value contract awards, it brings into question whether the value of the transparency and accountability is worth it.

Background

RAND found in its analysis of DoD protests filed at GAO and COFC that a nontrivial number of protests filed are related to contract actions valued at less than $100,000.[121] A little more than 10 percent

[121] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 59, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.

of the procurements that were subject to a protest at GAO were valued at less than $100,000 and approximately 4 percent of the procurements subject to protest at COFC were valued at less than $100,000.[122] RAND questions "whether the costs to the government to adjudicate these protests [at GAO and COFC] exceeds the value of the procurement themselves and thus are not cost-effective."[123]

RAND's report does not make many substantive recommendations, but one recommendation is to "consider implementing an expeditious process for adjudicating bid protests of procurements valued under $0.1 Million."[124] The recommendation suggests potentially having COFC *rule from the bench* or GAO require alternative dispute resolution (ADR) for all smaller-value protests.[125] RAND suggests restricting such smaller-value protests to the agency level as another potential option but describes it as "perhaps less desirable…from a fairness perspective."[126] Ultimately RAND's recommendation is to "come up with a quick way to resolve these cases commensurate with their value while preserving the right to an independent protest."[127]

As discussed above, the United States is signatory to a number of multilateral and bilateral trade agreements that require the signatories to maintain certain public procurement processes, including a protest/challenge process. The WTO's 1994 GPA requires parties to provide a process for suppliers who have, or have had, an interest in a procurement to challenge alleged breaches of the Agreement. [128] The revised GPA has a similar requirement.[129] The United States is among 47 nations that are parties to the revised GPA. In addition, many of the multiple bilateral free-trade agreements to which the United States is a party contain similar provisions. These provisions require a challenge process, but all have applicability thresholds for which the requirements of the agreement do not apply to procurements valued below that threshold.[130] FAR 25.204 contains a table depicting all of the thresholds associated

[122] Ibid, 52.
[123] Ibid, 71.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid, xviii.
[128] Agreement on Government Procurement, World Trade Organization, as approved by Congress in the Uruguay Round Agreements Act (Pub. L. No. 103-465). Agreement on Government Procurement, Article XX: Challenge Procedures, paragraph 2, 26, World Trade Organization (1994), accessed November 27, 2018, https://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf.
[129] See Revised Agreement on Government Procurement, Article XVIII: Domestic Review Procedures, paragraph 1, 23, World Trade Organization, accessed November 27, 2018, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf.
[130] See for example: United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Pub. L. No. 108-286) (19 U.S.C. 3805 note); United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade Agreement Implementation Act (Pub. L. No. 109-169) (19 U.S.C. 3805 note); Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. No. 109-53) (19 U.S.C. 4001 note); United States-Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act of 1993 (Pub. L. No. 108-77); United States–Colombia Trade Promotion Agreement Implementation Act (Pub. L. No. 112-42) (19 U.S.C. 3805 note); U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note); United States–Korea Free Trade Agreement Implementation Act (Pub. L. No. 112-41) (19 U.S.C. 3805); United States-Morocco Free Trade Agreement, as approved by Congress in the United States-Morocco Free Trade Agreement Implementation Act (Pub. L. No. 108-302) (19 U.S.C. 3805 note); United States-Oman Free Trade Agreement, as approved by Congress in the United States-Oman Free Trade Agreement Implementation Act (Pub. L. No. 109-283) (19 U.S.C. 3805 note); United States-Peru Trade Promotion Agreement, as approved by Congress in the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. No. 110-138) (19 U.S.C. 3805 note); United States-Panama Trade Promotion Agreement Implementation Act (Pub. L. No. 112-43) (19 U.S.C. 3805 note); and United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. No. 108-78) (19 U.S.C. 3805 note).

with each of the free trade agreements. A number of agreements that require a protest process apply to all supply and service contracts valued above $80,317.[131] This threshold is the lowest above which the United States must provide a process for challenging decisions of procurement officials.

Discussion

Agencies face protests of procurements at GAO that are at times valued just over the micro-purchase threshold and must litigate at COFC procurements valued well below $100,000. One recent example of a GAO protest was based on an $8,000 contract award. It is difficult to understand how the value, in terms of transparency, outweighs the cost of resolving them. Congress, in Section 822(d) of the FY 2019 NDAA attempted to address this problem by directing the Secretary of Defense to develop a policy for expeditiously resolving protests related to contracts valued less than $100,000, but this policy could only affect agency-level protests. Legislative changes to GAO and COFC's jurisdiction are necessary to ensure this policy is effective.

The first two potential changes proposed by RAND, to mandate ADR at GAO and for COFC to issue bench rulings for protests of small-value contracts would be challenging to implement, would still sacrifice transparency if written opinions were not issued, and could still be very costly for all parties. RAND's final suggestion, to restrict protests below a certain dollar threshold to the agency level, could be implemented immediately, would enable the policy resulting from Section 822(d) to be effective, and would make it less likely that the agencies would spend more taxpayer dollars processing and defending a protest than a procurement is worth.

Conclusions

Congress should limit the jurisdiction of GAO and COFC to protests of DoD procurements valued above $75,000 or expected to be valued above $75,000. This threshold is consistent with the Section 809 Panel's recommendation for raising the public advertising threshold discussed in the *Volume 2 Report*, and ensures that the U.S. protest process remains consistent with existing free trade agreement obligations.[132] This threshold is below the value RAND used for its analysis and will likely effect an even smaller percentage of protests than the percentage identified by RAND; however, it would prevent future protests of $8,000 procurements at GAO or COFC which consume time, resources, and taxpayer dollars that could be reinvested in delivering capability to warfighters.

Implementation

Legislative Branch

- Amend 31 U.S.C. § 3552 and 28 U.S.C. § 1491 to limit the jurisdiction of GAO and COFC to post-award protests of procurements valued above $75,000 and preaward protests of procurements with an expected value above $75,000.

[131] See FAR 25.402.

[132] Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 2 of 3,* Section 3: Simplified Commercial Source Selection, 107-109 (2018).The Panel is not commenting on whether an agency-level protest meets the requirements found in the various free trade agreements, though it appears that an agency-level protest would most likely satisfy those requirements.

Executive Branch

- There are no regulatory changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- This change only applies to DoD but could be expanded to apply to all federal government agencies.

Recommendation 69: Provide as part of a debriefing, in all procurements where a debriefing is required, a redacted source selection decision document and the technical evaluation of the vendor receiving the debriefing.

Problem

Despite the Office of Management and Budget's (OMB's) *Myth-busting 3* memo, which explains how meaningful debriefings can mitigate the risk of protest, many DoD contracting agencies do not consider debriefings as a means of avoiding protests.[133] This perception results in debriefings that many industry and private bar stakeholders described as adversarial, incomplete, and insufficient for informing unsuccessful offerors of the government's rationale for making an award. The presumption across much of DoD appears to be that the more information that is provided at a debriefing, the more likely a disappointed offeror will use the information to file a protest.

Background

The Federal Acquisition Streamlining Act of 1994 created the requirement for debriefings.[134] Debriefings are currently required under FAR Part 15 for competitive negotiated procurements and FAR 16.5 for all task or delivery orders valued in excess of $5.5 million.[135] Section 818 of the FY 2018 NDAA expanded the requirement for a written or oral debriefing to all DoD contract awards and task or delivery orders valued at or above $10 million. [136]

The Section 809 Panel found, similar to what was presented in the RAND report, that the quality and timeliness of debriefings varies across DoD. Even the debriefings that complied with FAR 15.505 often provided insufficient information for bidders to determine if their proposals had been properly evaluated.[137] Some are provided promptly on request and are complete in terms of explaining to offerors why they lost, or why they won a contract award. Many in industry, and the private Bar,

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[133] OMB Memorandum, *"Myth-busting 3": Further Improving Industry Communication with Effective Debriefings,* January 5, 2017, accessed November 7, 2018, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/myth-busting_3_further_improving_industry_communications_with_effectiv....pdf.
[134] Section 1014 of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 (1994). The requirement for DoD is now codified in 10 U.S.C. §§ 2305(b)(5) and (b)(6).
[135] See Postaward Debriefing of Offerors, FAR 15.506. Section 818(a)(2) of FY 2018 NDAA, Pub. L. No. 115-91 (2017).
[136] Section 818 of FY 2018 NDAA, Pub. L. No. 115-91 (2017).
[137] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 22, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.

report that timely and complete debriefings provide them with the information they need to improve future proposals. Debriefings also help companies determine if the government followed its procedures and the governing laws and regulations in making the award determination so they can decide whether to file a protest.

In Section 818 of the FY 2018 NDAA, Congress also created the requirement for DoD to provide a redacted source selection decision document as part of debriefings for all contract awards in excess of $100 million, and, when requested by nontraditional or small businesses, for all contract awards in excess of $10 million.[138]

Discussion

In some cases, industry and the private Bar report that they file protests so they can get the information they need to understand why they lost the contract award. Based on the small number of protests that are actually filed, RAND's finding that "[t]he bottom line is that too little information or debriefings that are evasive or adversarial will lead to a bid protest in most cases," may be a bit of hyperbole.[139] Corporate counsel informed the Section 809 Panel that in many cases bid and proposal teams within companies that find themselves on the losing end of an award decision often lobby corporate leadership to file a protest, especially when the company was the incumbent. The fullness of the debriefing was often a critical element of the decision-making process. An evasive or confrontational debriefing only reinforced the bid and proposal team's assumption that the government made the wrong decision or could not adequately support its decision. Yet in the reportedly rare case in which DoD provided a redacted source selection decision document or other meaningful information, the corporate counsel was able to explain to senior leadership within the company why it lost a potential contract and that a protest would be a waste of time and resources.

It appears that the fear of protests drives the debriefing to be less complete, as opposed to more complete, and agency counsel may end up controlling the actual debriefing. Often times the presence of counsel at a debriefing can send the wrong message to the various parties. Contracting officers reportedly have a tendency to become adversarial if corporate or outside counsel accompany a contractor to a debriefing. At the same time the bidder's decision to have counsel present at the debriefing may be to gain enough information to explain to a bid and proposal team why a protest would not be in the best interest of the contractor. This proposal will not provide the same level of transparency as some of the enhanced debriefing procedures that allow outside counsel are provided access to the evaluation of the successful offeror. Yet, the combination of a redacted source selection decision document and the technical evaluation of the contractor requesting the debriefing, should provide disappointed offerors with adequate information to improve future proposals and understand the rationale behind DoD's award decision.

Conclusions

Congress should expand the Section 818 requirement to provide a redacted source selection decision document as part of a debriefing for all situations in which a debriefing is required and to also provide

[138] Section 818(a)(1) of FY 2018 NDAA, Pub. L. No. 115-91 (2017).
[139] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 23, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.

the technical evaluation documentation of the vendor requesting the debriefing. Providing this additional transparency should minimize the likelihood contractors will file protests because of a lack of information. Providing this additional information may create more work for contracting officers, but in addition to decreasing the number of protests, it should also increase the quality of future proposals, and help recalibrate DoD contracting activities' understanding of the value of a more fulsome debriefing.

Implementation

Legislative Branch

- Amend Section 818(a)(1) of the FY 2018 NDAA to eliminate the thresholds and include the requirement to provide the technical evaluation of the vendor requesting the debriefing.

Executive Branch

- Amend DFARS 215 to include the debriefing requirements included in the amended Section 818(a)(1) of the FY 2018 NDAA.

Note: Explanatory report language and draft legislative and regulatory text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

RECOMMENDATION 70 IS A STAND-ALONE RECOMMENDATION WITH THE THEME: REDUCING THE BURDEN OF MANDATED COLLECTION AND REPORTING OF CONTRACTED SERVICE DATA

Recommendation 70: Authorize DoD to develop a replacement approach to the inventory of contracted services requirement under 10 U.S.C. § 2330a.

Problem

Congressional staffers and senior DoD leaders indicate that spreadsheets produced in compliance with the ICS requirement add little or no value to DoD decision-making processes.[140] One senior DoD acquisition official described the ICS requirements as "a waste of time."[141] Another senior official, when addressing how to improve the requirements, said, "kill them all."[142] Program office and contracting personnel indicate the requirement adds substantial bureaucratic complexities to the acquisition process.[143] According to private-sector contractors who must collect and report data, the requirement creates additional work that adds to administrative overhead. One technical specialist for a defense

[140] DoD officials, interviews with Section 809 Panel, May 2018.
[141] Ibid.
[142] Ibid.
[143] Military department program managers and other acquisition staff, interviews with Section 809 Panel, May 2018.

contractor estimated that his company spent about three workdays per year complying with service contract reporting requirements. He described the requirements as "an unfunded mandate" and "an onerous thing that I don't get anything out of."[144]

DoD has set up complicated, customized information management systems in response to 10 U.S.C. § 2330a. Congress should allow DoD to report on the information it collects on services contracts, without requiring DoD to maintain unique IT systems to collect specific data elements. DoD should center its services contracts reporting on broad, strategic purposes; objectives; and key performance results of the contracts being assessed.

Background

ICS is essentially a count of contractor full-time equivalents (FTEs), as well as several other data points.[145] The term, under 10 U.S.C. § 2330a(c)(2)(E), refers to "number of contractor employees, expressed as full-time equivalents for direct labor, using direct labor hours and associated cost data collected from contractors (except that estimates may be used where such data is not available and cannot reasonably be made available in a timely manner for the purpose of the inventory)." Most ICS data on contractor labor hours and costs are collected directly from vendors via the Contractor Manpower Reporting Applications (CMRAs). The Military Service CMRAs are more modernized versions of the original Army CMRA, which dates back to the initial establishment of the Army's system for tracking contractor manpower. Four separate data systems have been developed in DoD—in addition to the Army's they included one for the Navy, one for the Air Force, and one for other DoD components. There has been discussion of an enterprisewide CMRA to serve as a common IT system for collecting ICS data on contracts throughout DoD.[146] Other ICS data are extrapolated using service contract obligation data from FPDS.

DoD vendors report service contract information to the CMRAs, which in turn feed into ICS. The physical ICS consists of very large compressed files posted to Defense Procurement and Acquisition Policy's website. The compressed files contain Excel spreadsheets with thousands of line items displaying a mixture of vendor-reported and FPDS-derived contractor full-time equivalents (CFTEs). As of March 2018, the most recent uploaded version of ICS was the 66 MB (compressed) FY 2016 version. Ideally, Congress and other stakeholders use ICS for analysis and oversight. Like all other data collection and reporting processes, ICS costs time and money, including up-front investments in developing policy and new or modified IT systems. Costs also include the ongoing data entry and other administrative work by acquisition professionals and vendor employees.

Observers have questioned whether the ICS data collection process is useful.[147] At the congressional level, direct feedback from staffers indicates that ICS does not aid in the legislative or oversight process. The authors of a 2017 study interviewed 11 congressional staffers from both chambers and both major parties, and found that all of them "indicated disappointment with DoD's actions and deliverables with

[144] Technical specialist for medium-sized DoD contractor, phone interview with Section 809 Panel, May 2018.
[145] ICS is required under 10 U.S.C. § 2330a.
[146] See GAO, *DoD Inventory of Contracted Services: Timely Decisions and Further Actions Needed to Address Long-Standing Issues, GAO-17-17,* October 2016, accessed March 23, 2018, https://www.gao.gov/assets/690/680709.pdf.
[147] One senior official said that ICS's "intent is good" but the "execution is incredibly poor, in fact so much that it's a waste of time." Acquisition official, discussion with Section 809 Panel, May 2018.

respect to the inventory."[148] For vendors, the time spent meeting ICS reporting requirements may constitute a substantial impediment to the service contracting process. In the acquisition and contracting community, this additional time spent on vendor compliance may mean longer timeframes and higher costs.

ICS is built largely using data from the CMRAs, the stated purpose of which is to achieve the following:

- Understand workforce composition to allow for "more informed decisions on workforce staffing and funding decisions."
- Improve workforce oversight to "avoid duplication of effort or shifting of in-house reductions to contract."
- "Better account for and explain the total workforce."[149]

CMRA data-entry work is performed by vendors, not DoD acquisition personnel. To ensure the collection of FTE data for the CMRA, DoD contracting officers must require vendors to agree to enter information into the system via the Internet.[150]

Legislative History

In the FY 2002 NDAA, Congress directed DoD to create a "data collection system to provide management information with regard to each purchase of services."[151] This requirement was arguably already being met at the time through the DD-350 contract data reporting system and its successor, FPDS.

Many of the current ICS requirements date back to the early 2000s and the Iraq War. Citing congressional staffers, researchers have noted that "the impetus for the ICS requirement sprung from concern over DoD contractor activities early in Operation Iraqi Freedom," adding that ICS was a "direct outgrowth of security contractor issues and well-publicized events."[152]

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[148] See Nancy Young Moore et al., *A Review of Alternative Methods to Inventory Contracted Services in the Department of Defense,* RAND Corporation (2017): 17, doi: 10.7249/RR1704.

[149] "Enterprise Contractor Manpower Reporting Application: ECMRA Overview," DoD, accessed March 19, 2018, https://www.ecmra.mil/help/help.html.

[150] Enterprise-wide Contractor Manpower Reporting Application (ECMRA) clause inclusion requirements vary by DoD component. Army regulations state that contracting officers "shall ensure that the requirement to report contractor manpower is included in all contracts, task/delivery orders and modifications" (AFARS Subpart 5137.91). Navy and Marine Corps regulations require a standard EMCRA clause to be inserted into all service contracts, but exempt IT service contracts from this requirement (NMCARS 5237.102-90). Neither the Air Force FAR Supplement's chapter on service contracting (AFFARS Part 5337) nor Air Force Instruction 63-138, "Acquisition of Services" (as published May 11, 2017) require contracting officers to include mandatory ECMRA clauses in their contracts. Defense Information Systems Agency (DISA) regulations require contracting officers to require vendors to report data to the ECMRA "for all contracts and orders for services and supplies" (DARS 37.102-90).

[151] Section 801(c) of FY 2002 NDAA, Pub. L. No. 107-107 (2001).

[152] Researchers quoted a congressional staffer's explanation that "during the war in Iraq, when services contracting went through the ceiling in terms of expenditures, and issues with security firms arose… The committee wanted visibility on what we're spending money on, where we're spending it, and what kinds of functions are being performed." See Nancy Young Moore et al., *A Review of Alternative Methods to Inventory Contracted Services in the Department of Defense,* RAND Corporation (2017): 18, doi: 10.7249/RR1704

In 2005 the Secretary of the Army announced "an Army initiative to obtain better visibility of the contractor service workforce."[153] The Army was already in the process of developing the CMRA, a system for tracking several data elements present in FPDS as well as direct labor hours, which are not reported to FPDS.

In the FY 2008 NDAA, Congress added requirements for DoD to create "inventories and reviews for contracts of services" and make them available to the public as well as Congress.[154] The FY 2011 NDAA provided $4 million for the Air Force and Navy to use the Army's CMRA, "modified as appropriate for Service-specific requirements, for documenting the number of full-time contractor employees (or its equivalent)."[155]

The FY 2012 NDAA changed data collection requirements and also mandated aggregate caps on service contract spending based on data collection.[156] The FY 2014 and FY 2015 NDAAs extended those measures for subsequent years.[157] The Senate Armed Services Committee (SASC), in which the provision originated, justified the caps on service contracts spending by noting,

> *Expected savings from the reduction in staff augmentation services and the civilian workforce freeze could easily be lost if other categories of services contracts are permitted to grow without limitation so that spending can shift to these contracts. Over the last decade, DOD spending for contract services has more than doubled, from $72.0 billion in fiscal year 2000 to more than $150.0 billion.*[158]

The FY 2017 NDAA eliminated earlier requirements that ICS be made publicly available and that the DoD Inspector General and GAO each issue annual reports assessing ICS's accuracy and use in strategic planning. The law also raised the threshold above which DoD must report ICS data on service contracts, from the simplified acquisition threshold to a flat $3 million.[159]

The FY 2018 NDAA added a new section to U.S. Code immediately preceding the ICS section of Title 10.[160] Among other provisions, the section required that DoD ensure "appropriate and sufficiently detailed data are collected and analyzed to support the validation of requirements for services contracts and inform the planning, programming, budgeting, and execution process of the Department of

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[153] Assistant Secretary of the Army – Manpower and Reserve Affairs, Department of the Army memo, *Accounting for Contract Services,* January 7, 2005, accessed February 28, 2018, http://www.asamra.army.mil/scra/documents/SA%20Memo%2007JAN05%20-%20Accounting%20for%20Contract%20Services.pdf.
[154] Section 807 of FY 2008 NDAA, Pub. L. No. 110-181 (2008).
[155] Section 8108 of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10 (2011).
[156] Sections 808 and 936 of the FY 2012 NDAA, Pub. L. No. 112-81 (2011). Section 808 of the FY 2012 NDAA mandated that "the total amount obligated by the Department of Defense for contract services in fiscal year 2012 or 2013 may not exceed the total amount requested for the Department for contract services in the budget of the President for fiscal year 2010." Section 936 modified data collection requirements under 10 U.S.C. § 2330a.
[157] Section 951 of FY 2014 NDAA, Pub. L. No. 113-66 (2013).
[158] Senate Armed Services Committee report to S. 1253, *National Defense Authorization Act for Fiscal Year 2012,* (S.Rept. 112-26, see Section 823 of the Senate bill), June 22, 2011, accessed April 12, 2018, https://www.congress.gov/congressional-report/112th-congress/senate-report/26/1.
[159] Section 812 of FY 2017 NDAA, Pub. L. No. 114-328 (2016). At the time, the simplified acquisition threshold varied based on acquisition type but was generally $150,000.
[160] 10 U.S.C. § 2329.

Defense."[161] The FY 2019 NDAA added clarification to the ICS statute to include applicability to contracts for services "closely associated with inherently governmental functions."[162]

The House-passed version of the bill would have substantially expanded the required applicability of ICS.[163] Instead of requiring ICS data collection for purchases of services in excess of $3 million, the provision would have required ICS data collection for purchases of services in excess of the simplified acquisition threshold.[164] It would also have required DoD to collect data on all nine service contract acquisition portfolio groups defined by Defense Pricing and Contracting, rather than just four of them. These provisions would have reversed changes made under the FY 2017 defense authorization.[165] The changes were not, however, adopted in the bill conference report.

Current Law and Regulation

As of 2018, Title 10 requires DoD to "establish a data collection system to provide management information with regard to each purchase of services by a military department or Defense Agency."[166] This requirement explicitly applies to logistics management services, knowledge-based services, and electronics and communications services.[167] For both IT service contracts and other service contract inventories, data are uploaded to a public DoD website. [168] These provisions apply to all contracts for services as defined under the product and service code system.

Within 90 days of an inventory filing, each DoD component head is required to review and verify the required certifications.[169] Effective starting in FY 2022, DoD is required to submit annual information to Congress on service contracting that "clearly and separately identifies the amount requested for each category of services to be procured."[170]

ICS is completely separate from the Synchronized Predeployment and Operational Tracker system used to track operational support contractors that accompany U.S. forces during overseas deployments.[171] For this reason, modifying ICS and CMRA data-collection processes would not affect the military's ability to track support contractors operating overseas.

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[161] Section 851 of FY 2018 NDAA, Pub. L. No. 115-91 (2017).
[162] Section 819 of Conference Report to Accompany H.R. 5515, *John S. McCain National Defense Authorization Act for Fiscal Year 2019,* July 2018, accessed July 26, 2018, https://docs.house.gov/billsthisweek/20180723/CRPT-115hrpt863.pdf.
[163] H.R. 5515, *John S. McCain National Defense Authorization Act for Fiscal Year 2019,* accessed June 6, 2018, https://www.congress.gov/bill/115th-congress/house-bill/5515/text.
[164] Although the simplified acquisition threshold was raised to $250,000 in the FY 2018 NDAA, the change had not been incorporated into the FAR at the time the House passed the FY 2019 NDAA. At the time of House passage in May 2018, the standard threshold was still listed in regulation as $150,000. See Section 805 of FY 2018 NDAA, Pub. L. No. 115-91 (2017).
[165] See Section 812 of FY 2017 NDAA, Pub. L. No. 114-328 (2016).
[166] 10 U.S.C. § 2330a(a).
[167] Ibid.
[168] Section 813 of FY 2015 NDAA, Pub. L. No. 113-291 (2014). "Inventory of Services Contracts," Defense Procurement and Acquisition Policy, accessed February 20, 2018, https://www.acq.osd.mil/dpap/cpic/cp/inventory_of_services_contracts.html.
[169] 10 U.S.C. § 2330a(d)(2).
[170] 10 U.S.C. § 2329(b).
[171] See Office of the Assistant Secretary of Defense for Logistics & Materiel Readiness, *Synchronized Predeployment and Operational Tracker – Enterprise Suite,* accessed June 12, 2018, https://www.acq.osd.mil/log/ps/.spot.html/Info_Sheet_SPOT-ES_FINAL.pdf.

Civilian Agency ICS Equivalent

In the FY 2010 omnibus appropriations law, Congress required civilian agencies to collect and report data on service contracts in a way that mirrored practices in DoD.[172] Agencies were required to collect data "for each service contract" on the following:

- Descriptions of services purchased and their roles in achieving agency objectives.
- Offices administering and sponsoring the contract.
- Funding sources and dollar amounts obligated.
- Dollar amounts invoiced.
- Contract types and dates of award.
- Contractor names and locations of contract performance.
- Numbers and work locations of contractor and subcontractor employees, expressed as full-time equivalents for direct labor.
- Whether contracts were for personal services.
- Whether contracts were awarded on a noncompetitive basis.

There was no explicit requirement in law that civilian agencies build or deploy data collection systems akin to DoD's CMRA systems, or that they require vendors to enter employee data into such systems.

OMB was tasked with developing and disseminating implementation guidance to executive agencies. A 2010 memorandum noted that the majority of data elements required under the law were already reported and available via FPDS. OMB recognized that three required data elements were not available in FPDS: number of contractor employees, total dollar amount invoiced for services, and descriptions of the role services play in achieving agency objectives. The memorandum added that "separate efforts are being pursued to facilitate a standard, government-wide data collection process for this information so that it may be incorporated into agency inventories beginning in FY 2011."[173]

A 2012 GAO report analyzed developments since the FY 2010 appropriations enactment, and concluded that agencies "did not fully comply with statutory requirements" on service contract inventories.[174] GAO noted that complying with these requirements would necessitate developing new

[172] Section 743 of the Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 (2009).
[173] OMB Memorandum, *Service Contract Inventories,* November 5, 2010, accessed May 15, 2018, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.
[174] GAO, *Civilian Service Contract Inventories: Opportunities Exist to Improve Agency Reporting and Review Efforts, GAO-12-1007,* September 2012, accessed May 15, 2018, https://www.gao.gov/assets/650/648939.pdf.

mandatory contract clause language, which would require contractors to conduct additional data collection and reporting via existing IT systems.[175]

In FY 2014, a rule was finalized requiring agencies to add two new contract clauses to contracts above a set threshold (as of 2018 the threshold was set at $500,000).[176] These clauses require contractors to collect and report the following to a centralized database: (a) contract identification numbers, (b) dollar amounts invoiced, (c) direct labor hours, and (d) related subcontractor data.[177]

Discussion

To assess whether the ICS data collection process is useful, the intended purposes of ICS must be established. Congress has provided indications of ICS's intended purposes in committee reports, hearings, and congressionally requested GAO reports.

Congressional Intent

The SASC has stated that the main purpose for the original 2002 provisions was because DoD

> *has never conducted a comprehensive spending analysis of its services contracts and has made little effort to leverage its buying power, improve the performance of its services contractors, rationalize its supplier base, or otherwise ensure that its dollars are well spent.*[178]

SASC also stated that DoD's professional, administrative, and support service contracts showed "an almost complete failure to comply with basic contracting requirements" and had "barely begun to implement requirements for performance-based services contracting."[179]

In a committee report on the FY 2008 provisions that formally established the ICS reporting process, SASC provided the following as justification:

> *[T]he Department's expenditures for contract services have nearly doubled, but DOD still has not conducted a comprehensive analysis of its spending on these services. The specific criteria and timelines established in this provision for the inventory and review of activities performed by contractors would ensure that such analyses are conducted.*[180]

[175] Ibid, 8.
[176] Federal Acquisition Regulation; Service Contracts Reporting Requirements, Fed. Reg. 78 FR 80369 (Dec. 31, 2013).
[177] FAR 4.17 establishes thresholds and requires contracting officers to include mandatory data collection clauses in service contracts. FAR 52.204-14 requires contractors to collect and enter data on service contracts. FAR 52.204-15 requires contractors to collect and enter data on indefinite-delivery service contracts.
[178] Senate Armed Services Committee, *National Defense Authorization Act for Fiscal Year 2002 Report,* S. Rept. 107-62, September 12, 2001, accessed March 20, 2018, https://www.congress.gov/107/crpt/srpt62/CRPT-107srpt62.pdf.
[179] Ibid.
[180] Senate Armed Services Committee, *National Defense Authorization Act for Fiscal Year 2008 Report,* S. Rept. 110-77, June 5, 2007, accessed March 20, 2018, https://www.congress.gov/110/crpt/srpt77/CRPT-110srpt77.pdf.

At the time the ICS data collection infrastructure was being built, it appears that the congressional intent mainly fell into three categories: improve buying power, improve service contractor performance, and increase DoD transparency to allow for better oversight.[181]

The House Armed Services Committee's Subcommittee on Readiness has also shown a recurring interest in ICS. Subcommittee Ranking Member Madeleine Bordallo clarified in 2012 that an accurate and useful ICS was "imperative" prior to "any further arbitrary cuts in the civilian workforce."[182] Ranking Member Bordallo also questioned U.S. Transportation Command's Gen. William Fraser on DoD's use of ICS to "insource contracted work more cost-effectively performed by civilians."[183] In 2014, Ranking Member Bordallo characterized ICS as "integral to the implementation of a robust total force management policy."[184]

Defense appropriators have also shown an interest in ICS. House Appropriations Committee's defense subcommittee Ranking Member Pete Visclosky has noted that having a "reliable and comprehensive" knowledge of service contracts is important to "help identify and control those costs as we do already with the costs of civilian employees."[185]

In the Operation and Maintenance (O&M) title of the FY 2010 NDAA, Congress penalized all DoD components excluding the Department of the Army for their reported failure to comply with ICS requirements.[186] Non-Army O&M accounts were reduced by a total of $550 million. The House Appropriations Committee stated that this reduction was "directly attributed to the negligence of the Departments of the Navy and the Air Force, and the Defense Components to comply" with ICS requirements under 10 U.S.C. § 2330a.[187]

Committee report language for the FY 2017 NDAA provides additional clarification on why ICS exists. The Senate committee's report for the bill stated that its intended ICS modifications were designed to "clarify the applicability of the contractor inventory requirement to staff augmentation contracts and to reduce data collection and unnecessary reporting requirements."[188] The Senate intent was not to catalog

[181] Data collection infrastructure consists of the original Army CMRA, the component-specific CMRAs, and the associated rules, policies, and processes.
[182] GPO, *Civilian Workforce Requirements—Now and Across the Future Years Defense Program, Hearing before the Subcommittee on Readiness of the Committee on Armed Services, House of Representatives,* July 26, 2012, 4, accessed March 20, 2018, https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg75669/pdf/CHRG-112hhrg75669.pdf.
[183] GPO, *Hearing on National Defense Authorization Act for Fiscal Year 2013 and Oversight of Previously Authorized Programs before the Committee on Armed Services, House of Representatives,* March 7, 2012, 135, accessed March 20, 2018, https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg73438/pdf/CHRG-112hhrg73438.pdf.
[184] GPO, *Defense Reform: Empowering Success in Acquisition, Committee on Armed Services, House of Representatives,* July 10, 2014, 29, accessed March 20, 2018, https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg89508/pdf/CHRG-113hhrg89508.pdf.
[185] GPO, *Department of Defense Appropriations for 2016, Hearings before a Subcommittee of the Committee of Appropriations, House of Representatives,* 340-341, accessed March 20, 2018, https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg97457/pdf/CHRG-114hhrg97457.pdf.
[186] Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118 (2009).
[187] House of Representatives, *Report of the Committee on Appropriations to Accompany H.R. 3326,* July 24, 2009, accessed April 30, 2018, https://www.congress.gov/111/crpt/hrpt230/CRPT-111hrpt230.pdf.
[188] Senate Armed Services Committee, *Report to Accompany S. 2943, National Defense Authorization Act for Fiscal Year 2017,* S.Rept. 114-255, accessed April 2, 2018, https://www.congress.gov/114/crpt/srpt255/CRPT-114srpt255.pdf.

the granular details of every single DoD service contract, but rather to provide Congress with a clearer view of the use of contractors for staff augmentation.

The conference report joint explanatory statement for the FY 2017 NDAA added,

> *The conferees direct the Secretary of the military department or the head of the Defense Agency to focus on the 17 Product Service Codes identified by the Office of Federal Procurement Policy and the Government Accountability Office in report GAO–16–46 as high risk for including services that are closely associated with inherently governmental functions.*[189]

As of 2017, it appears that at least part of the rationale for ICS was to ensure congressional notification in the event that contractors were performing inherently governmental functions.[190]

Intent Behind ICS Within DoD

Many DoD and Military Service offices, particularly in the Department of the Army, were involved in the initial establishment of the policies and IT systems used to implement ICS. There were several reasons why these offices had an interest in creating a well-functioning ICS. One of the most important was the hope that a fully developed ICS would enable more effective total force management throughout DoD.

Total Force Management

Total force management (TFM) is defined in statute as, "Policies and procedures for determining the most appropriate and cost efficient mix of military, civilian, and contractor personnel to perform the mission of the Department of Defense."[191] TFM has been a matter of concern to both DoD and Congress since at least the 1970s.[192] The basic idea of TFM is that DoD should understand the different costs structures associated with different combinations of personnel categories. This understanding will, in theory, allow DoD to run more efficiently across the entire enterprise.

As a core part of TFM, the Under Secretary of Defense for Personnel and Readiness "establishes policy, assigns responsibilities, and prescribes procedures for determining the appropriate mix of manpower (military and DoD civilian) and private sector support."[193] Figure 6-5 displays GAO's assessment of enterprisewide distribution of military, civilian, and contractor personnel in DoD.

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[189] GPO, *National Defense Authorization Act for Fiscal Year 2017, Conference Report to accompany S. 2943,* Rept. 114-840, accessed April 2, 2018, https://www.congress.gov/114/crpt/hrpt840/CRPT-114hrpt840.pdf. The joint explanatory statement references an OMB memo from 2010 and GAO report from 2015, both of which list product service codes focused on administrative support services and IT services. See OMB memorandum, *Service Contract Inventories,* November 5, 2010, accessed April 2, 2018, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf. GAO, *DoD Inventory of Contracted Services: Actions Needed to Help Ensure Inventory Data Are Complete and Accurate, GAO-16-46,* November 2015, accessed April 2, 2018, https://www.gao.gov/assets/680/673731.pdf.

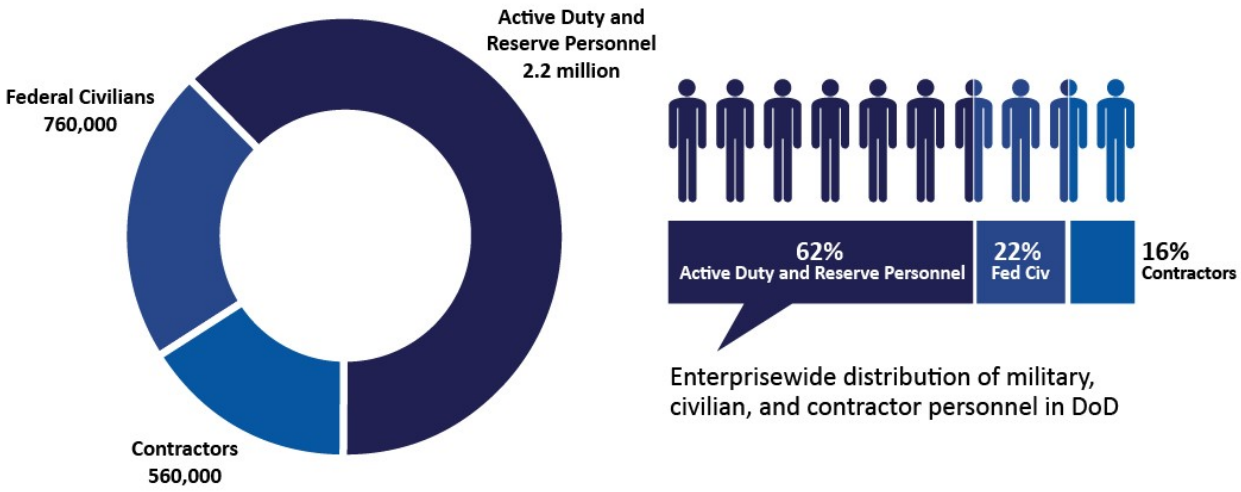
[190] The term "inherently governmental" is defined with extensive examples in FAR Subpart 7.5. In addition to ICS, FPDS reports information on whether each reported contract action is considered inherently governmental.

[191] Total Force Management (TFM) definition from 10 U.S.C. § 129a(a). 10 U.S.C. § 129 and 10 U.S.C. § 2463 also contain TFM-related provisions.

[192] See GAO, *DOD 'Total Force Management' – Fact or Rhetoric?,* January 24, 1979, accessed August 22, 2018, https://www.gao.gov/assets/130/125320.pdf.

[193] Policy and Procedures for Determining Workforce Mix, DoDI 1100.22 (2017).

Figure 6-5. Distribution of DoD Workforce[194]



Some DoD stakeholders consider TFM one of the main purposes for ICS data collection requirements. GAO reported in 2016 that a potential policy revision, proposed by the Under Secretary of Defense for Personnel and Readiness, would "explicitly require use of the inventory to inform budgeting and total force management decisions."[195]

Using bulk services contract data to inform strategic-level decision making would require relatively advanced analytical capabilities. For this reason, usefully applying ICS to TFM decisions might require DoD to further develop its data analytics workforce.

Performance-Based Service Contracting

Congress has explicitly directed that federal procurement regulations, including those applicable to DoD, do the following:

> *Establish a preference for use of contracts and task orders for the purchase of services in the following order of precedence:*
>
> *(1) A performance-based contract or performance-based task order that contains firm fixed prices for the specific tasks to be performed.*
>
> *(2) Any other performance-based contract or performance-based task order.*

[194] GAO, *Civilian and Contractor Workforces: DOD's Cost Comparisons Addressed Most Report Elements but Excluded Some Costs, GAO-18-399,* April 2018, accessed August 22, 2018, https://www.gao.gov/assets/700/691305.pdf.
[195] GAO, *DOD Inventory of Contracted Services: Timely Decisions and Further Actions Needed to Address Long-Standing Issues, GAO-17-17*, October 2016, 33, accessed August 22, 2018, https://www.gao.gov/assets/690/680709.pdf. The policy in question had not yet been revised as of late 2018. See Guidance for Manpower Management, DoDD 1100.4 (2005).

> *(3) Any contract or task order that is not a performance-based contract or a performance-based task order.*[196]

Performance based is defined in law as setting forth contract requirements "in clear, specific, and objective terms with measurable outcomes."[197] Congress has given DoD an explicit mandate to prioritize measuring the quality of outcomes associated with service contracts.

Summary of Intent Behind ICS

Congress has consistently conveyed two major goals behind ICS: improving services acquisition strategy in DoD and improving oversight. The reality of ICS, however, shows that it has not met either of these goals and has imposed substantial costs and administrative burdens on the defense acquisition system. Like many other data collection and reporting requirements, ICS has ultimately manifested itself as a legal compliance requirement rather than a strategic decision-making tool.

GAO Assessments

Several years' worth of GAO analyses show DoD has seen mixed success and limited utility in its collection of ICS data.[198] GAO reported in 2015 that DoD's ICS data collection process suffered from a lack of documentation that resulted in "inventory review processes incorrectly reporting" contract data.[199] The report recommended that DoD "focus increased attention on contracts more likely to include services closely associated with inherently governmental functions during the review process."[200] DoD was devoting too much of its administrative bandwidth to collecting ICS data on contracts unlikely to include inherently governmental services.

At a hearing on the FY 2016 NDAA, defense officials discussed the technical challenges of developing IT infrastructure to implement ICS. Then-Air Force Assistant Secretary for Acquisition William LaPlante said at a hearing on the FY 2016 NDAA,

> *The primary difference in our system versus the Army's system is the maturity of the data and the enabling processes and procedures. The Army's reporting system is more robust since they have been using it for years. The Air Force, DoD fourth estate, and Navy applications have been able to incorporate many of the Army's lessons learned, but are still not 100 percent fully implemented primarily due to contractor reporting 'ramp-up.'*[201]

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[196] See 10 U.S.C. § 2302 note, Improvements in Procurements of Services. This section of U.S. Code originated in Section 821 (Improvements in Procurements of Services) of FY 2001 NDAA, Pub. L. No. 106-398 (2000). Amendments were added in Section 1431 (Additional Incentive for Use of Performance-Based Contracting for Services) of FY 2004 NDAA, Pub. L. No. 108-136 (2003).
[197] 10 U.S.C. § 2302 note.
[198] See, for example, GAO, *Defense Acquisitions: Continued Management Attention Needed to Enhance Use and Review of DOD's Inventory of Contracted Services, GAO-13-491,* May 2013, accessed March 1, 2018, https://www.gao.gov/assets/660/654814.pdf.
[199] GAO, *DoD Inventory of Contracted Services: Actions Needed to Help Ensure Inventory Data Are Complete and Accurate, GAO-16-46,* November 2015, accessed February 28, 2018, https://www.gao.gov/assets/680/673731.pdf.
[200] Ibid.
[201] GPO, *Department of Defense Authorization for Appropriations for Fiscal Year 2016 and the Future Years Defense Program, Hearing before the Committee on Armed Services, United States Senate,* April 22, 2015, accessed March 20, 2018, https://www.gpo.gov/fdsys/pkg/CHRG-114shrg99481/pdf/CHRG-114shrg99481.pdf.

Then-Army Assistant Secretary for Acquisition, Logistics, and Technology Heidi Shyu added to Assistant Secretary LaPlante's comments by listing some of the major technical costs to implementing ICS.

> *First, the Department lacks sufficient dedicated resources to successfully manage a common reporting application. To remedy this, representatives from the Army and other military departments are currently working with the Acting Assistant Secretary of Defense (Readiness and Force Management) to redefine and re-scope the missions, functions, organizational placement and composition of the Total Force Management Support Office (TFMSO). Second, the Department lacks a methodology to consistently identify Closely Associated with Inherently Governmental (CAIG) functions. Some of the inventory review processes may not be sufficient to accurately identify CAIG functions. Consistent methodologies must be established across the Department of Defense as an initial step in developing and applying a common reporting application.*[202]

Even assuming perfect success at solving the technological challenges in ICS data collection, getting vendors to report information to CMRA systems poses a separate challenge. In 2014, DoD proposed an acquisition rule that would have added a new, mandatory contract clause to defense service contract regulations.[203] The new clause would have required the entry of ICS data on prime contracts and subcontracts into CMRAs, but it was not finalized and was withdrawn in December 2016.[204]

In October 2016, GAO reiterated past recommendations on ICS. The report pointed out that although the Army's contractor manpower data software was completed and functional, DoD lacked an enterprisewide system and associated business processes. GAO reported that DoD was considering the development and deployment of an enterprisewide CMRA, but awaiting the results of a study by the RAND National Defense Research Institute.[205]

[202] Ibid.
[203] Defense Federal Acquisition Regulation Supplement: Service Contract Reporting (DFARS Case 2012-D051), Fed. Reg. 79 FR 32522 (Jun. 5, 2014).
[204] Timetable information from OMB, Office of Information and Regulatory Affairs, Regulation Identifier Number (RIN) 0750-AI24, withdrawn December 28, 2016, accessed March 20, 2018, https://www.reginfo.gov.
[205] GAO, *DoD Inventory of Contracted Services: Timely Decisions and Further Actions Needed to Address Long-Standing Issues, GAO-17-17,* October 2016, accessed March 1, 2018, https://www.gao.gov/assets/690/680709.pdf.

GAO's Standing Recommendations on ICS

GAO reports list several open recommendations related to ICS, some of which are described as not implemented and others partially implemented. They include the following:

- "Provide updated information in certification letters on how [military departments] resolved the instances of contractors performing inherently governmental functions or unauthorized personal services in prior inventory reviews."[206]
- "Revise annual inventory review guidance to clearly identify the basis for selecting contracts to review and to provide approaches the components may use to conduct inventory reviews that ensure the nature of how the contract is being performed is adequately considered. If DOD intends for components to review less than 100 percent of its contracts, then the guidance should clearly identify the basis for selecting which contracted functions should be reviewed."[207]
- "Approve a plan of action, with timeframes and milestones, for rolling out and supporting a department-wide data collection system as soon as practicable after December 1, 2014. Should a decision be made to use or develop a system other than the Enterprise-wide Contractor Manpower Reporting Application system currently being fielded, document the rationale for doing so and ensure that the new approach will provide data that satisfies the statutory requirements for the inventory."[208]
- "Identify an accountable official within the departments with responsibility for leading and coordinating efforts across their manpower, budgeting, and acquisition functional communities and, as appropriate, revise guidance, develop plans and enforcement mechanisms, and establish processes."[209]
- "Provide clear instructions, in a timely manner, on how the services requirements review boards are to identify whether contract activities include closely associated with inherently governmental functions."[210]
- "Require acquisition officials to document, prior to contract award, whether the proposed contract action includes activities that are closely associated with inherently governmental functions."[211]
- "Ensure that military departments and defense agencies review, at a minimum, those contracts within the product service codes identified as requiring heightened management attention and as more likely to include closely associated with inherently governmental functions."[212]
- "Clearly identify the longer term relationships between the support office, military departments, and other stakeholders."[213]

A March 2018 GAO report cited manpower officials who noted some benefits of ICS, crediting it with helping them to analyze cost factors as well as respond to questions from Congress and DoD

[206] Ibid, 29.
[207] Ibid. 30.
[208] Ibid.
[209] Ibid.
[210] Ibid.
[211] Ibid.
[212] Ibid, 31.
[213] Ibid.

leadership. Officials also, however, noted that ICS was in many cases "too outdated to help inform strategic decisions."[214] The report cited the Air Force as an example of relatively low strategic utility:

> *Under the program objective memorandum (POM) process, the Air Force identifies future budget requests and workforce needs 2 years before the beginning of a fiscal year, whereas the most recent inventory data available may already be 2 years old when that process starts. To illustrate the issue, the officials noted that they were already planning for the 2020 POM in early fiscal year 2018, although the fiscal year 2016 inventory was not yet available. As a result, if the Air Force were to use inventory data to plan for the 2020 POM, they would have to rely on fiscal year 2015 inventory data.*[215]

Utility of ICS to Policymakers

The RAND study, released in 2017, represents one of the most comprehensive and up-to-date assessments of ICS reporting requirements. The authors concluded that ICS, in general, "falls short of meeting the needs of Congress and DoD."[216]

The authors interviewed both congressional staffers and DoD personnel to hear their perceptions of the usefulness of ICS. Congressional staffers stated that the ICS format is "not useful and hinders assessment of the data."[217] The data reporting was described as "too detailed and would be more useful if it were synthesized before reporting."[218] The congressional intent behind 10 U.S.C. § 2330a appears not to have been a collection of detailed data at the transaction level, but rather an analysis of DoD's service contracts at the aggregate level.

The data that would be needed for such an analysis is already reported to existing systems by all Military Services and Defense Agencies. For the purpose of service contract data analysis, the ICS IT systems akin to the Army's CMRA and its successors may be unnecessary. A short annual report providing an overview of DoD service contracts could be completed solely with currently-available non-ICS, non-CMRA tools and data systems. Historically, however, Congress has regularly expressed the view that existing data reporting systems are inadequate.

Redundant Data Collection

Redundancies in service contract data collection have spurred complaints from both acquisition personnel and DoD contractors. Many of the data elements collected via ICS processes are already available in FPDS and the System for Award Management (SAM, a governmentwide repository of contractor company information).

The 2017 RAND report on ICS noted government requirements for vendors to "enter a significant amount of overlapping data into CMRA and SAM."[219] The report also noted that each one of the

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[214] GAO, *DOD Contracted Services: Long-Standing Issues Remain about Using Inventory for Management Decisions, GAO-18-330,* March 2018, accessed April 2, 2018, https://www.gao.gov/assets/700/690954.pdf.
[215] Ibid.
[216] Nancy Young Moore et al., *A Review of Alternative Methods to Inventory Contracted Services in the Department of Defense,* RAND Corporation (2017), doi: 10.7249/RR1704.
[217] Ibid, xiv.
[218] Ibid.
[219] Ibid, 40.

customized, component-specific versions of CMRA has "its own login information and password, with various inconsistencies across the systems."[220]

A 2017 GAO report reviewed the quality of DoD's ICS data on personal services contracts. The report noted that relevant ICS data is also reported in FPDS, but found that discrepancies between the two information collection processes showed an "absence of accurate data."[221]

Underlying Data Incompatibility

In addition to the problem of collecting redundant data in multiple systems, CMRAs have an underlying data architecture that is incompatible with preexisting contracting data systems. CMRA is designed to collect data on contract performance, specifically the number of full-time equivalents, whereas FPDS and related systems are designed to collect data on contract actions. This distinction may appear to be a subtle; however, from a data science perspective it results in a need for customized interfaces and human specialists to convert from one data architecture into another.

Assuming there is a net benefit to ensuring collection of accurate data on the number of people associated with service contracts, the solution may be to add data elements and/or machine-to-machine interfaces to existing IT systems rather than implementing ICS through the development of new IT systems.

Conclusions

ICS, although designed with the good intention of enabling strategic decision making in DoD's acquisition of services, has not achieved this goal. ICS and the IT systems that enable it are focused largely on legal compliance, not utility or accuracy.[222]

ICS does not appear to add substantial value, but it does impose costs. The development and continued maintenance of CMRA systems, like for any business software system, require time and money. ICS compels acquisition professionals to dedicate time that would otherwise be used for more directly acquisition-related tasks. Vendors must also allocate limited resources to calculating and entering data on contractor FTEs. This effort indirectly increases contract costs to the government.

Although the costs imposed by ICS data collection are potentially nontrivial, there is little value added from a large spreadsheet of raw data. The data collection process may, in fact, reduce value by diverting high-level attention away from what really matters. The focus on how many people work on a given contract, rather than the performance of the contract, may lead to a reduction in strategic thinking about how to get more value out of services contracts. One expert said that in focusing largely on numbers of people, Congress has for years been "asking the wrong question."[223]

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[220] Ibid.
[221] GAO, *Federal Contracting: Improvements Needed in How Some Agencies Report Personal Services Contracts, GAO-17-610,* July 2017, accessed March 20, 2018, https://www.gao.gov/assets/690/686179.pdf.
[222] One acquisition professional, discussing ICS and CMRA systems, said, "Is the data useful? My guess is it isn't… We were living just fine before it, we'd be living just fine without it." Air Force contracting officer, discussion with Section 809 Panel, April 2018.
[223] Military department acquisition official, discussion with Section 809 Panel, August 2018.

DoD should provide Congress and other oversight bodies with more intelligible and useful information on services contracts. Congress should direct DoD to develop and propose a Services Contracting Reporting and Analysis System as a replacement for the existing ICS requirements. The proposal should include suggested statutory authorization language, a funding requirements estimate, and policy implementation language, including addressing contractor reporting requirements. It should be specifically designed to support and integrate with DoD's total workforce management system and acquisition requirements development processes.

Implementation

Legislative Branch

- Direct DoD to develop and propose a Services Contracting Reporting and Analysis System as a replacement for the existing ICS requirements.
- Direct DoD to develop proposed statutory authorization language, a funding requirements estimate, and proposed policy implementation language, including addressing contractor reporting requirements, for the new system.

Executive Branch

- Comply with the new requirement by developing suggested statutory authorization language, a funding requirements estimate, and policy implementation language for a new Services Contracting Reporting and Analysis System.
- Design the new system specifically to support and integrate with DoD's total workforce management system and acquisition requirements development processes.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

RECOMMENDATIONS 71 THROUGH 73 SHARE THE COMMON THEME: ADOPTION OF AN AUDIT PROFESSIONAL PRACTICE GUIDE

Recommendation 71: Adopt a professional practice guide to support the contract audit practice of DoD and the independent public accountants DoD may use to meet its contract audit needs, and direct DoD to establish a working group to maintain and update the guide.

Problem

DCAA provides professional services and skilled advice to DoD contracting officers. With the introduction of independent public accountants (IPAs) into these oversight functions, the quality and

consistency of advice contracting officers receive will depend on the quality and consistency of how oversight professionals interpret and apply foundational standards that guide their work.

Background

Although professional standards are common in the auditing profession, none of them have been developed or interpreted for the unique purpose of federal government contract oversight. DCAA's *Contract Audit Manual* provides a good foundation, but it lacks the collaborative inputs, perspectives, and interpretations of knowledgeable professionals outside DCAA and the government. This point is important because IPAs and other qualified professional services firms are playing an increasingly important role in the government's oversight of federal government contractors.

Discussion

Because professional standards generally establish principles rather than rules, they are subject to interpretation. DoD's oversight professionals will benefit from a uniform, collaborative interpretation of certain professional standards as they apply to government contract oversight. Without a professional practice guide (PPG), contracting officers will be underserved and likely confused by inevitable inconsistencies among audit and advisory reports issued by DCAA, DCMA, and IPAs. Professional standards of importance that require a collaborative interpretation on how to apply the standards in the contract oversight environment include (among many others) materiality, risk, internal controls, independence, objectivity, sufficient evidence, and reliance on the work of others.

Conclusions

The Section 809 Panel's *Volume 1 Report* concluded that a PPG would be beneficial and supplemental to existing guidance for professionals involved in the business of government contract auditing. As written by the Section 809 Panel, the PPG (see Attachment 6-1) provides information on how to interpret and apply specific auditing concepts for government contract audits to assist government auditors, private-sector auditors, contracting officers, and other stakeholders involved in the audit process. Although these concepts are established in auditing literature, the PPG focuses on how the concepts can be applied for the unique purpose of federal government contract oversight. A working group of subject-matter experts in contract auditing developed the guide for the panel. The team included members from key stakeholder communities, including Section 809 Panel representatives, DCAA, GAO, AICPA, DCMA, and industry. Members of the team worked collaboratively to consider and address concerns that have been raised by Congress and others.

The PPG provides the requisite guidance to address Congress's direction to the Section 809 Panel in the FY 2018 NDAA, Section 803, with respect to numeric materiality. The PPG sets forth clear materiality guidelines that help oversight professionals plan their work and provide the information contracting officers need to make reasonable business decisions. What may be material to a particular business decision will be influenced by a variety of qualitative and quantitative considerations, recognizing that the contracting officer's role is to manage DoD's risk, rather than avoid it. The cost of DoD's oversight, including adverse effects on the timeliness of decision making, must be balanced with expected benefits of that oversight. The Cost Accounting Standards (CAS) Board's administrative regulations establish a variety of *qualitative* materiality considerations appropriate for and applicable to any business decision affecting contract costs/prices.

Besides materiality, the PPG addresses an internal controls framework for audits of contractor accounting systems. As discussed below, adoption of the internal controls framework for review of accounting systems requires amendments to statute and the DFARs, and the Section 809 Panel provides the appropriate language in support of the amendments.

In the Section 809 Panel's *Volume 1 Report*, Recommendation 14 provided for DCAA to incentivize contractor compliance and manage risk efficiently through robust risk assessment. The PPG provides a risk model that should be employed by DCAA. Although, DCAA has historically used a risk-based approach to determine which contractors are subject to incurred cost audits, as part of the PPG working group, DCAA has embraced an expanded risk model to include additional risk factors that further refine and improve the process.

The *Volume 1 Report* noted that DCAA plays an important role within DoD's system of acquisition internal controls. When these controls are operating effectively and efficiently, they provide DoD reasonable assurance that contract prices and cost reimbursements are *free of material unallowable costs*. This concept, established by the COSO Internal Control Framework and incorporated into GAO's *Standards for Internal Control in the Federal Government* (i.e., *Green Book*), is fully compatible with the FAR guiding principle of shifting focus from *risk avoidance* to *risk management*. To accomplish the desired outcome of both the federal government's internal control framework and the FAR's Guiding Principles, it is important to recognize DCAA's role in developing and embracing the enhanced risk model.

Implementation

Legislative Branch

- Direct DoD to adopt the PPG as guidance in support of DoD's contract audit practice and the practice of IPAs that the Department may use in support of its contract audit needs. In adopting the PPG, the Congress should ensure that DoD establishes a collaborative process for future maintenance of the guide to include changes to the guide. Specifically, direct the Secretary of Defense to charter a PPG working group (PPGWG), chaired by DCAA/DCMA for the purpose of ensuring the same collaborative process is used for changes to the guide as was established by the Section 809 Panel. As part of this direction, the PPG does not take the place of federal regulations or auditing standards. Direct the Secretary of Defense to charter a working group similar to the Section 809 Panel, that is exempt from FACA, although the proceedings and decisions of the panel would be posted on the DCAA website.

Executive Branch

- Adopt the PPG as guidance in support of DoD's contract audit practice and the practice of IPAs that the Department may use in support of its contract audit needs. In doing so, the Secretary of Defense should charter a PPGWG, chaired by DCAA/DCMA for the purpose of ensuring the same collaborative process is used for changes to the guide as was established by the Section 809 Panel. The process should ensure that the PPG stays current with changes in the practice and that changes to the guide are considered collaboratively by a group of experts in

the field of contract auditing. Specifically, the Section 809 Panel recommends the following approach to long-term support of the PPG.

  - The Secretary of Defense should charter a PPGWG with five permanent representatives:
    - A representative of the DCAA appointed by the Director of DCAA.
    - A representative of the DCMA appointed by the Director of DCMA.
    - A representative of the U.S. GAO appointed by the Comptroller General of the United States.
    - A representative of industry nominated by CODSIA and agreed on by a majority of the representatives from DCAA, DCMA, and GAO.
    - A representative from the American Institute of Certified Public Accountants and agreed on by a majority of the representatives from DCAA, DCMA, and GAO.

- Rotate the committee chair position biennially between DCAA and DCMA. The chair is responsible for scheduling and recording proceedings and decisions made by working group members. The committee members do not have terms but changes to membership on the committee should be re-assessed by the collective members on an annual basis. The appointees from the DCAA, DCMA, GAO, and AICPA will be automatically removed from the working group should they leave their organizations. The working group will meet not less than semi-annually and otherwise as determined necessary by the members of the committee. The working group shall have an indefinite termination date.

- Administer the PPG at DCAA as follows:

  - Self-initiate minor revisions due to spelling and grammatical errors.
  - Make substantive changes as agreed on by a majority of the PPG working group members.
  - Maintain the most recent version of the PPG on the DCAA public website.

- Adopt substantive revisions based on a majority vote of working group members. Substantive revisions are defined as changes to the guides meaning, adding new context to existing concepts in the guide or adding or deleting information in the guide.

Note: Explanatory report language and draft legislative and regulatory text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

Recommendation 72: Replace 18 system criteria from DFARS 252.242-7006, Accounting System Administration, with an internal control audit to assess the adequacy of contractors' accounting systems based on seven system criteria.

Problem

DoD is not obtaining timely assurance that internal controls for defense contractors' accounting systems are properly designed and functioning.[224] Ensuring effective internal controls is one of the most efficient ways to protect the government's interest, reduce risk, and improve performance.

Background

Accounting business systems make up much of the business systems in DoD's Contractor Business Analysis Repository (CBAR). In addition to being the most prevalent contractor system, it is a critical system for ensuring the government's interests are protected when doing business through flexibly priced contracts.

FAR 16.301-3, Limitations, recognizes the criticality of the accounting system by requiring contractors to maintain an adequate accounting system for determining cost applicable to contracts awarded on the basis of cost. In addition, FAR subpart 32.5, Progress Payments Based on Costs, and FAR 32.503, Post Award Matters, contain multiple provisions requiring an adequate accounting system and controls. Even prospective contractors wanting to do business with the federal government must have the necessary accounting and operational control structure to be deemed responsible in accordance with FAR 9.104-1, General Standards.

To do business with the government, contractors must demonstrate capability to meet the requirements outlined in the Standard Form 1408, Pre-Award Survey of a Prospective Contractor Accounting System. This preaward system review should not be confused with the reviews required by the DFARS Business System rule that tests the design and capability of the system, as well as whether controls are in place and functioning properly.

Discussion

In its *Volume 1 Report*, the Section 809 Panel recommended that DoD replace the system criteria in DFARS 252.242-7006, Accounting System Administration, with an internal control audit to assess the adequacy of contractors' accounting systems. The panel chartered a working group to develop a PPG and asked the working group to review and refine the panel's previously recommended accounting system criteria and the internal controls framework for assessment of contractor accounting systems.

Conclusions

As recommended in the Section 809 Panel's original recommendation in its *Volume 1 Report,* DoD should embrace an internal control framework for accounting system audits and has refined the framework necessary to implement the recommendation. An internal control audit framework based on a body of professional standards developed to address SOX 404(b) serves as a foundation to help meet the government's objectives to obtain assurance that contractors have effective internal controls

[224] DCAA, email to Section 809 Panel Staff, December 18, 2017. The email indicated that DCAA completed eight accounting system audits in FY 2016.

for their business systems. Starting with this framework eliminates the need to develop uniquely defined criteria and terminology, which in turn reduces the time needed to make this framework operational.

Using the private-sector-established internal control audit framework will resolve a consistent complaint expressed in Section 809 Panel meetings with stakeholders that the DFARS accounting system criteria were not objective and measurable because of the current terminology used in the business system rule. Internal control audits should be performed as the basis for assessing the adequacy of defense contractors' accounting systems because these audits provide the following:

- An engagement framework used in the private sector that is well established and understood.
- More useful and relevant information to the acquisition team, contracting officer, and contractor.
- Clear and objective criteria for accounting system requirements.

The framework's standards and criteria also satisfy the requirement at Section 893 (a) of the FY 2017 NDAA to develop "clear and specific business system requirements that are identifiable and made publicly available."[225]

Implementation

Legislative Branch

- There are no statutory changes required for this recommendation.

Executive Branch

- Amend the DFARs to replace the system criteria from DFARS 252.242-7006, Accounting System Administration, with an internal control audit framework to assess the adequacy of contractors' accounting systems. The envisioned internal control audits will focus on assessing the key controls that ensure government objectives are being met. Auditors' conclusions on the effectiveness of the key controls are essential information for contracting officers and contractors to evaluate whether the government's interests are adequately protected. Specifically, auditors will evaluate whether key internal controls are in place and operating to provide reasonable assurance of the following:
  - Direct costs and indirect costs are classified in accordance with contract terms, FAR, Cost Accounting Standards (CAS) and other regulations, as applicable.
  - Direct costs are identified and accumulated by contract in accordance with contract terms, FAR, CAS and other regulations, as applicable.
  - Methods are established to accumulate and allocate indirect costs to contracts in accordance with contract terms, FAR, CAS and other regulations, as applicable.

[225] Section 893 of FY 2017 NDAA, Pub. L. No. 114–AS328 (2016).

- General ledger control accounts accurately reflect all transactions recorded in subsidiary ledgers and/or other information systems that either integrate or interface with the general ledger including, but not limited to, timekeeping, labor cost distribution, fixed assets, accounts payable, project costs, and inventory.
- Adjustments to the general ledger, subsidiary ledgers, or other information systems bearing on the determination of contract costs (e.g. adjusting journal entries, reclassification journal entries, cost transfers, etc.) are done for reasons that do not violate contract terms, FAR, CAS, and other regulations, as applicable.
- Identification and treatment of unallowable costs are accomplished in accordance with contract terms, FAR, CAS, and other regulations, as applicable.
- Billings are prepared in accordance with contract terms, FAR, CAS, and other regulations, as applicable.

Note: Draft regulatory text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

Recommendation 73: Revise the definition of business system deficiencies to more closely align with generally accepted auditing standards.

Problem

The definition of the term significant deficiency for contractor business systems in Section 893 of the FY 2011 NDAA and the DFARS does not align with generally accepted auditing standards for evaluating and reporting on internal control deficiencies. This lack of consistency creates confusion regarding the identification, severity, meaning, and resolution of deficiencies.

Background

The FY 2011 NDAA and DFARS definition for *significant deficiency* describes it as materially affecting DoD officials' and contractor's ability to rely on information produced by the business system that is needed for management purposes. The term in generally accepted auditing standards for a deficiency of this severity, that is, a deficiency that is material, is *material weakness.* Generally accepted auditing standards also use the term *significant deficiency,* but to describe a deficiency that is less severe than a *material weakness*. The use of the same term to mean different levels of severity of a deficiency creates confusion about the meaning of significant deficiency among contractors, independent public accountants performing SOX 404(b) audits, government auditors, and the acquisition community.

The FY 2011 NDAA and the DFARS regulations provide for only a significant deficiency, but in reality, the contractor business system could have a number of deficiencies that range from trivial to severe. Reporting deficiencies by different levels of severity, and in a manner that aligns with established auditing standards, will allow contracting officers to make informed decisions on the acceptability of the business system

Discussion

The FY 2011 NDAA, Section 893, and DFARS 252.242-7005, Contractor Business Systems, define *significant deficiency* as "a shortcoming in the system that materially affects the ability of officials of the Department of Defense and the contractor to rely on information produced by the system that is needed for management purposes." The term and its definition are mismatched relative to *g*enerally accepted auditing standards, which have a two-tiered approach to evaluating and reporting business system deficiencies. As shown here, the statutory and regulatory definition above better aligns with the private-sector, Public Company Accounting Oversight Board, *GAO Yellow Book*, and Securities and Exchange Commission definitions of material weakness:

> *Material weakness. A deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the entity's financial statements will not be prevented, or detected and corrected, on a timely basis. A reasonable possibility exists when the likelihood of an event occurring is either reasonably possible, meaning the chance of the future event occurring is more than remote but less than likely, or is probable.*

> *Significant deficiency. A deficiency, or a combination of deficiencies, in internal control over financial reporting that is less severe than a material weakness yet important enough to merit attention by those charged with governance. (AICPA, Professional Standards, AU-C section 265, Communicating Internal Control Related Matters Identified in an Audit)*

Financial statement audits and examination engagements conducted in accordance with GAO, Government Auditing Standards 2018 Revision, (paragraphs 6.29 and 7.42), refers to use of the terms material weakness reporting on internal control deficiencies. The paragraph also references the AICPA, Professional Standards, AU-C section 265, for consistent use of the terminology.

Conclusions

The definition for system deficiencies in the FY 2011 NDAA, Section 893, and DFARS regulation require revision to be more consistent with the definitions in generally accepted auditing standards that apply to different types of engagements (e.g., inspection, attestation, and performance).

Statutory Revision

In the FY 2011 NDAA, Section 893, the term *significant deficiency* and its definition need to be stricken and replaced with the term *material weakness* and its definition as follows:

- *Material Weakness:* A deficiency, or combination of deficiencies, in internal control over risks related to Government contract compliances or other shortcomings in the system, such that there is a reasonable possibility that a material noncompliance will not be prevented, or detected and corrected, on a timely basis. A reasonable possibility exists when the likelihood of an event occurring is either reasonably possible, meaning the chance of the future event occurring is more than remote but less than likely, or is probable.

DFARS Revision

In the DFARS regulations (e.g., Accounting System Administration 252.242-7006, Contractor Business Systems 252.242-7005), the term *significant deficiency* and its definition should be stricken and replaced with the term *material weakness* and its definition. Additionally, the regulations should include new terms and their respective definitions for *significant deficiency* and *other deficiency*.

The definition of material weakness, significant deficiency, and other deficiency is applicable to any type of engagement (e.g., attestation, inspection) that is designed to test internal controls or compliance with a specific criterion. For an audit or inspection designed to test compliance with specific criteria, a deficiency can occur due to either internal control defect or a system shortcoming. A shortcoming in this regard would occur if a business system lacks a capability or element of functionality required by the system criteria. The revised DFARS language for business system deficiencies is as follows:

- *Material Weakness:* A deficiency, or combination of deficiencies, in internal control over risks related to Government contract compliances or other shortcomings in the system, such that there is a reasonable possibility that a material noncompliance will not be prevented, or detected and corrected, on a timely basis. A reasonable possibility exists when the likelihood of an event occurring is either reasonably possible, meaning the chance of the future event occurring is more than remote but less than likely, or is probable.

- *Significant Deficiency*: A deficiency, or combination of deficiencies, in internal control over risks related to Government contract compliance or other shortcomings in the system that is less severe than a material weakness yet important enough to merit the attention of those charged with governance.

- *Other Deficiency*: A deficiency, or combination of deficiencies, in internal control over Government contract compliance or other shortcomings in the system that have a clearly trivial, or inconsequential, effect on the ability of the business system to prevent or detect and correct, material noncompliances on a timely basis.

The *other deficiency* definition acknowledges the possibility that a business system deficiency, or combination of systems deficiencies, may have a clearly trivial effect on the quality of information produced by the contractor's business systems. Clearly trivial represents the inverse of *material* whether judged by any criteria of size, nature, or circumstances. Other deficiencies will not impact the audit opinion or conclusions and will not be included in the audit report. These deficiencies may be communicated to the contracting officer using email or other method of communication.

The revisions introduce new terms, such as material noncompliance and misstatement and a new definitions for acceptable contractor business system that are not currently in the DFARS but are important to understanding the revised business system deficiency definitions. As a result, and in conjunction with the revised DFARS deficiency definitions, the following definitions should be added to the DFARS to enhance understanding and provide clarity to stakeholders:

- Material Noncompliance: A misstatement in the information provided to the Government (e.g., billings, incurred cost submissions, pricing proposals, etc.) that will materially influence,

and may adversely impact the economic or management decisions of the users of the information.

- Misstatement: Information provided to the Government does not comply with contract terms and applicable federal regulations such as the Federal Acquisition Regulations (FAR) and Cost Accounting Standards (CAS).

- Acceptable Contractor Business System: Contractor business systems that comply with the criteria of applicable business system clauses and does not contain a material weakness that would affect the ability of officials of the Department of Defense to rely on information produced by the business system that is needed for management purposes.

Implementation

Legislative Branch

- Revise and replace the definition for *significant deficiency* in Section 893 of the FY 2011 NDAA, Section 893, with the new definitions of *material weakness*.

- Define *material weakness* as a deficiency, or combination of deficiencies, in internal control over risks related to government contract compliances or other shortcomings in the business system, such that there is a reasonable possibility that a material noncompliance will not be prevented, or detected and corrected, on a timely basis. A reasonable possibility exists when the likelihood of an event occurring is either reasonably possible, meaning the chance of the future event occurring is more than remote but less than likely, or is probable.

Executive Branch

- Revise the Business System DFARS sections (for all systems with the significant deficiency defined) to replace the term *significant deficiency* with the new definitions of material weakness, significant deficiency, and other deficiency as follows:

  - Significant Deficiency: A deficiency, or combination of deficiencies, in internal control over risk related to Government contract compliance or other shortcomings in the business system that is less severe than a material weakness yet important enough to merit the attention of those charged with governance.
  - Other Deficiency: A deficiency, or combination of deficiencies, in internal control over Government contract compliance or other shortcomings in the business system that have a clearly trivial, or inconsequential, effect on the ability of the business system to prevent or detect and correct, material noncompliances on a timely basis.

- Define *material weakness* as a deficiency, or combination of deficiencies, in internal control over risks related to Government contract compliances or other shortcomings in the business system, such that there is a reasonable possibility that a material noncompliance will not be prevented, or detected and corrected, on a timely basis. A reasonable possibility exists when the likelihood of an event occurring is either reasonably possible, meaning the chance of the future event occurring is more than remote but less than likely, or is probable.

- Revise the Business System DFARS sections (for all systems) to include the definitions:
  - Material Noncompliance: A misstatement in the information provided to the Government (e.g. billings, incurred cost submissions, pricing proposals, etc.) that will materially influence, and may adversely impact the economic or management decisions of the users of the information.
  - Misstatement: Information provided to the Government does not comply with contract terms and applicable federal regulations such as the Federal Acquisition Regulations (FAR) and Cost Accounting Standards (CAS).
  - Acceptable Contractor Business System (DFARS Revision): Means contractor business systems that complies with the criteria of applicable business system clauses and does not contain a material weakness that would affect the ability of officials of the Department of Defense to rely on information produced by the system that is needed for management purposes.

Note: Explanatory report language and draft legislative and regulatory text can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

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Department of Defense

Professional Practice Guide

Audits and Oversight of Defense Contractor Costs and Internal Controls

FIRST EDITION
January 2019

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INTRODUCTION

The Section 809 Panel developed this Professional Practice Guide (PPG) as a supplement to existing guidance for professionals involved in Department of Defense (DoD) procurement contract auditing. A Section 809 Panel working group collaboratively developed this guide to provide additional information regarding how to interpret and apply specific auditing concepts for government contract audits to assist auditors, contracting officers, and other stakeholders involved in the audit process. It is intended to assist professionals with delivering high quality, consistent financial audit and advisory services to contracting officers.

Independent public accountants (IPAs) and other qualified professional services firms play an increasingly important role in the government's oversight of federal government contractors. Although professional standards are common across the auditing profession—applicable to both public and private organizations—these standards were not developed or interpreted for the unique purpose of federal government contract oversight. To address this need, the Section 809 Panel assembled a working group of subject matter experts in the fields of contract auditing and compliance, professional standards, and audit resolution. The Section 809 Panel wishes to thank the working group members for their dedication and generous contribution of time and energy toward the development of the guide. The working group consisted of representatives from the following organizations.

- Defense Contract Audit Agency
- Defense Contract Management Agency
- US Government Accountability Office
- American Institute of Certified Public Accountants
- Aerospace Industries Association
- Baker Tilly Virchow Krause, LLP

The working group evaluated a variety of professional standards to identify concepts that may benefit from collaborative interpretation as they apply in a contract oversight environment, including risk, materiality, audits of internal controls, independence, objectivity, sufficient evidence, and reliance on the work of others. Given the Section 809 Panel's limited statutory term, the working group prioritized its work to focus on risk, materiality, and audits of internal controls. Accordingly, these three concepts are addressed in this first edition of the PPG.

Although these concepts are well established in auditing literature, this guide focuses on how the concepts should be used for the purpose of federal government contract oversight. It describes how these concepts are to be applied in the context of government contract audits and provides practical examples and best practices to help auditors perform audits.

Maintenance

The Section 809 Panel recommends the Secretary of Defense charter and reconstitute a Professional Practice Guide Working Group, chaired by both DCAA and DCMA on a biennial rotation, to ensure the same collaborative process is used for changes and additions to the PPG as was established by the Section 809 Panel. The process should ensure that the PPG remains current and that additional topical areas are considered collaboratively by a diverse group of experts in the field of contract auditing and compliance. Specifically, the Section 809 Panel recommends that the Working Group should have five permanent representatives, including a representative from each of the following:

- Defense Contract Audit Agency (DCAA), appointed by the director of DCAA.
- Defense Contract Management Agency (DCMA), appointed by the director of DCMA.
- Government Accountability Office (GAO), appointed by the Comptroller General of the United States.
- Industry, nominated by *Council of Defense and Space Industry Associations* (CODSIA) and agreed on by a majority of the representatives from DCAA, DCMA, and GAO.
- American Institute of Certified Public Accountants, agreed on by a majority of the representatives from DCAA, DCMA, and GAO.

The chair of the Working Group (i.e., either DCAA or DCMA, biennially) is responsible for scheduling and recording proceedings and decisions made by Working Group. The Working Group members do not have terms, but membership may be assessed annually by the collective members and changes made based on this assessment. The appointees from DCAA, DCMA, GAO, and AICPA will be automatically removed from the Working Group should they leave their respective organizations. The Working Group will meet not less than semi-annually and otherwise as determined necessary by the members. The Working Group shall have an indefinite termination date.

The PPG will be made available to the public in the *Guidance* section of DCAA's website. New Editions of the PPG will be announced internally within DCAA by a Memorandum for Regional Directors, a copy of which will also be published promptly on DCAA's website.

Overview

The PPG provides information on how to interpret and apply specific auditing concepts to audits of government contract costs and compliance-related internal controls. This guide will assist government auditors, private-sector auditors, contracting officers, contractors, and other stakeholders better understand the audit process.

Financial and business system oversight of defense contractors is a crucial function of DoD's system of acquisition internal controls. This oversight function performs both preventive and detective control activities, designed to reasonably ensure DoD's contractors comply with a variety of contract requirements. These contract requirements allow DoD's procuring and administrative contracting officers to exercise good stewardship of taxpayer dollars, as well as deliver timely, high-quality goods and services to warfighters and accomplish other operations critical to DoD's mission.

The PPG recognizes, in Chapter 1, that a more robust *risk assessment* process will allow DoD to deploy its limited resources more effectively. The PPG further recognizes, in Chapter 2, that DoD can deploy its resources more efficiently, without harming effectiveness, through a common understanding of *materiality*. Finally, in Chapter 3, the PPG recognizes that a common framework will streamline and bring consistency to DoD's *audits of contractor systems of internal control* over government contract compliance.

This guide recognizes that systems of internal control are not expected to provide absolute assurance that specified objectives are met. The costs of attaining absolute assurance are generally greater than the benefits attained from such assurance, and there are inherent limitations in any system of internal control due to factors such as human error and the uncertainty inherent in judgment. This first edition of the PPG focuses on this axiom with respect to both DoD's system of acquisition internal control and contractors' systems of internal control over government contract compliance.

Chapter 1, Incurred Cost Risk Assessment, establishes guidance that DCAA will use to focus its limited resources when auditing costs incurred by contractors on flexibly priced defense contracts. This chapter implicitly acknowledges that (a) DCAA is an important element of DoD's system of acquisition internal controls, (b) DCAA does not have sufficient resources to audit every DoD contractor, and (c) adding more oversight resources would likely produce diminishing returns relative to the increased cost. The risk assessment process also incentivizes larger contractors to achieve or maintain compliant cost accounting and effective accounting system internal controls, such that they can reduce their assessed risk profile and, thus, audit frequency.

Chapter 2, Engagement Materiality Framework, addresses Congress's direction to the Section 809 Panel in the FY 2018 NDAA, Section 803, with respect to numeric materiality for audits of incurred cost. This chapter sets forth clear materiality guidelines that help oversight professionals plan their work and provide the information contracting officers need to make reasonable business decisions. What may be material to a particular business decision will be influenced by a variety of qualitative and quantitative considerations, recognizing that the contracting officer's role is to manage DoD's risk, rather than avoid risk. The cost of DoD oversight, including adverse effects on timeliness of decision making, must be balanced with expected benefits of that oversight. Guidance in this chapter should be used in conjunction with the Cost Accounting Standards Board's (CASB's) administrative regulations (48 CFR 9903.305) that establish a variety of materiality considerations appropriate for any DoD business decision concerning contract costs/prices.

Chapter 3, Audits of Internal Controls over Government Contract Compliance, introduces a body of professional standards based on an internal control audit framework and developed to address the requirements of Sarbanes-Oxley Act (SOX) Section 404(b). This framework serves as the means by which DoD will obtain reasonable assurance that contractors have effective internal controls over their business systems as they relate to government contract compliance. Internal control audits will be the basis for assessing adequacy of defense contractor accounting systems. These audits are well established and understood by the auditing profession. They will also provide more useful, relevant information to the acquisition team, contracting officers, and contractors.

References to the *Government Auditing Standards* 2018 Revision in this guide refer to attestation engagements and performance audits performed once the 2018 revision becomes effective. For attestation engagements, it is for periods ending on or after June 30, 2020. For performance audits, it is for audits beginning on or after July 1, 2019. For all engagements performed prior to the respective effective dates of the 2018 revision, the auditor should refer to the 2011 revision of the *Government Auditing Standards*.

CHAPTER 1: RISK ASSESSMENT

The Need for Risk Assessment

DoD's system of acquisition internal controls is subject to the same economic constraints as those faced in other government agencies, organizations, and corporations. Increasing resources become necessary to achieve desired risk levels approaching zero (i.e., absolute risk avoidance).

DCAA serves many roles within DoD's system of acquisition internal controls. Chief among them is DCAA's role as auditor of costs incurred by, and reimbursed to, commercial companies that perform flexibly-priced defense procurement contracts. DoD cannot reimburse commercial companies for their contract performance costs unless they comply with contract terms and conditions.

Each year, thousands of commercial companies incur costs while performing flexibly-priced defense contracts. Accordingly, this Chapter establishes a risk assessment framework intended to focus DCAA's finite resources such that DoD's risk is appropriately managed.

Risk Assessment Framework

The foundation for this risk assessment framework rests on the materiality concepts introduced in Chapter 2 of the PPG, insofar as it aligns increasing risk levels with the annual costs incurred by contractor business units (as represented on annual final indirect cost rate proposals, also referred to as incurred cost proposals (ICPs)). As annual costs increase, so does the likelihood of being audited.

The risk assessment framework also takes into consideration several qualitative factors that may either increase or decrease the likelihood of being selected for audit. The risk assessment framework provides incentives for contractors to achieve or maintain compliant cost accounting and internal controls over government contract compliance. It also provides disincentives for those contractors who have not.

The risk assessment framework provides for three levels, or *strata* of risk: low, medium, and high. These levels are based on a contractor business unit's Auditable Dollar Volume[1] (ADV). Within each risk strata, contractor ICPs fall within specified ranges of ADV and may be selected for audit based on the stratum's criteria. Each stratum is also affected by specific risk questions that affect the frequency of the contractor being audited. This aligns audit frequency with the performance of the contractor with regards to the history of questioned costs and status of business systems. The questions differ for each stratum but relate to the following risk factors:

- The significance of historic questioned costs.
- The existence of specific Department concerns.
- The status of the business systems.
- The existence of uncorrected system deficiencies (if any).
- The existence of significant accounting or organizational changes (e.g., merger).

For contractors with final indirect cost rate proposals for which total incurred cost on DoD flexibly priced contracts is equal to or greater than $1 Billion of ADV, DoD will conduct an audit regardless of the above factors. For all other final indirect cost rate proposals, the frequency of audit should decrease

[1]ADV is the sum of all of the costs on flexibly-priced contracts for a contractor during a given fiscal year

provided the risk factors are met. The risk assessment framework is provided below and available on the DCAA website.

Table 1. Risk Assessment Framework

	Low Risk Strata	Medium Risk Strata	High Risk Strata
	< 100M	$100M-$500M	> $500M
Sampling Notes	N/A	$100M–$250M: Audit every 5th year if not selected during sampling process > $250M–$500M: Audit every 4th year if not selected during sampling process.	$1B or more: Audit > $500M–<$1B, if the answer to each of the question below is No, the contactor's ICP will move to the medium risk category with the possibility of being sampled for audit in that year. Must be audited every other year.
Risk Assessment Protocol	For contractors with < $5M ADV, answer questions 1 and 2 below. For contractors with $5M to <$100M ADV, answer all three questions below. 1) Assess the risk of incurred cost proposal using the questions (below). 2) If risk assessment identifies no areas of concern, the incurred cost proposal placed into sampling strata for chance of being selected. 3) If risk assessment identifies area of concern, the incurred cost proposal will be audited.	For contractors with $100M–$250M in ADV, was a determination letter used to close the prior four contractor fiscal years? (A YES response indicates proposal must be audited regardless of initial risk.) For contractors with > $250M–$500M in ADV, was a determination letter used to close the prior three contractor fiscal years? (A YES response indicates proposal must be audited regardless of initial risk.) 1) Assess the risk of incurred cost proposal using the six questions (below). 2) If risk assessment identifies no areas of concern, the incurred cost proposal placed into sampling strata for chance of being selected. 3) If risk assessment identifies area of concern, the incurred cost proposal will be audited.	For contractors with > $500M and <$1B in ADV, was a determination letter used to close the prior contractor fiscal year? (A YES response indicates proposal must be audited regardless of initial risk.) For contractors with $1B or more in ADV, an audit must be conducted every contractor fiscal year. 1) Assess the risk of incurred cost proposal using the six questions below. 2) If risk assessment identifies no areas of concern, the incurred cost proposal placed into sampling strata for chance of being selected. 3) If risk assessment identifies area of concern, the incurred cost proposal will be audited.
Risk Assessment Results	ICPs with ADV <5M placed in low risk strata sampling universe for sampling if the answers to questions 1 and 2 below are NO. Note: The regional Audit Manager must approve the performance of an audit. ICPs with ADV $5M – <100$M in low risk strata sampling universe if the answers to all the questions below are No.	ICPs with ADV of $100M–$500M placed in medium risk sampling universe for sampling if the answers to all six questions below are NO.	ICPs with ADV of > $500M–$1B placed in medium risk sampling universe for sampling if the answers to all six questions below are NO.
Question 1	Are there significant Questioned costs in the last completed incurred cost audit?	Are there significant Questioned costs in the last completed incurred cost audit?	Are there significant Questioned costs in the last completed incurred cost audit?
Question 2	Are there any Department concerns from the DCMA, COR, PCOs, or DCAA, etc. with a significant impact on this ICP?	Are there any Department concerns from the DCMA, COR, PCOs, or DCAA, etc. with a significant impact on this ICP?	Are there any Department concerns from the DCMA, COR, PCOs, or DCAA, etc. with a significant impact on this ICP?
Question 3	Does the contractor have a preaward accounting system survey that resulted in an *unacceptable* opinion, or a disapproved accounting system due to a postaward accounting system audit?	Does the contractor have a preaward accounting system survey that resulted in an *unacceptable* opinion, or a disapproved accounting system due to a postaward accounting system audit?	Does the contractor have a preaward accounting system survey that resulted in an *unacceptable* opinion, or a disapproved accounting system due to a postaward accounting system audit?
Question 4	N/A	Does the contractor have any business system deficiencies relevant to incurred costs for the year subject to audit?	Does the contractor have any business system deficiencies relevant to incurred costs for the year subject to audit?
Question 5	N/A	Does the contractor have any significant account practice changes in the year subject to audit?	Does the contractor have any significant account practice changes in the year subject to audit?
Question 6	N/A	Has the contractor experienced significant organizational changes in the year subject to audit?	Has the contractor experienced significant organizational changes in the year subject to audit?

CHAPTER 2: MATERIALITY IN AUDITS OF INCURRED COSTS

This chapter presents guidelines and a framework for determining materiality for use in audits of incurred costs. However, this framework and the recommended materiality thresholds are not a substitute for professional judgment.

Materiality and Significance in Incurred Cost Audits

The term *incurred cost audit* means an audit of charges to the government by a contractor under a flexibility priced contract.[2] These charges are reported annually by contractor business units, in a final indirect cost rate proposal (also referred to as an incurred cost proposal), as required by FAR 52.216-7. This proposal represents the subject matter of the incurred cost audit. The risk to the government and others who rely on this information is that amounts are materially misstated due to contractors' noncompliance with contract terms or federal regulations. If the incurred cost proposal is not materially compliant and complete, it could adversely affect decision making by those who use the information.

The objectives of an incurred cost audit are to (a) provide assurance that contractors' incurred cost proposals can be relied on to settle final indirect cost rates and (b) communicate any misstatements that may affect contract cost reimbursements. Contract costs that do not comply with contract terms, federal regulations, or agreements are referred to in audits of contract costs as *misstatements*. An incurred cost audit is designed to identify material (or significant, as explained below) misstatements, based on both quantitative considerations (amount) and qualitative considerations (nature).

A material misstatement, as used throughout this guide, means misstatements, including omissions, individually or in the aggregate, that could reasonably be expected to influence relevant decisions of intended users that are made based on the subject matter. Materiality, by definition, is more than just a number and is considered in the context of qualitative factors and, when applicable, quantitative factors. The relative importance of qualitative factors and quantitative factors when considering materiality in a particular engagement is a matter for the practitioner's professional judgment.[3]

Audits of incurred costs can be performed using standards for performance audits (GAO, *Government Auditing Standards* 2018 revision), and standards for attestation examination engagements (AICPA, *Professional Standards*, Statements on Standards for Attestation Engagements). The definition of materiality is drawn from the attestation examination standards but is not limited to only these types of engagements. For the remainder of this document use of *materiality* is based on this definition. The Government Auditing Standards define *significance* for performance audits (FY 2018 Yellow Book, paragraph 8.15) as

> *The relative importance of a matter within the context in which it is being considered, including quantitative and qualitative factors. Such factors include the magnitude of the matter in relation to the subject matter of the audit, the nature and effect of the matter, the relevance of the matter, the needs and interests of an objective third party with knowledge of the relevant information, and the matter's effect on the audited program or activity. Professional judgment assists auditors when evaluating the significance*

[2] The term 'flexibly priced contract' has the meaning given the term 'flexibly-priced contracts and subcontracts' in part 30 of the Federal Acquisition Regulation (section 30.001 of title 48, Code of Federal Regulations).

[3] Paragraph A15 of AT-C section 205, *Examination Engagements (AICPA,* Professional Standards, *AT-C sec. 205)*

> *of matters within the context of the audit objectives. In the performance audit requirements, the term significant is comparable to the term material as used in the context of financial statement engagements.*

The definition of *significant* for performance audits is similar to the definition of *materiality* for attestation examination engagements. For purposes of this document, these terms may be used interchangeably.

Both the terms *materiality* and *significance* refer to characteristics of the subject matter that are important, or relevant, to the users of the information. The terms *significant cost element* or *significant account* in this chapter refer to items that require further evaluation, and possibly testing, due to the potential of material misstatements based on quantified materiality, qualitative characteristics, other risk factors, variability, or stated concerns of the contracting officer. During the planning and fieldwork phase of the audit, *significance* is used in the context of a potential risk of misstatement (quantitative or qualitative) in a cost element or account that is more than clearly trivial. During the reporting phase of the audit, *material* or *significant* misstatements will affect the auditor's opinion or conclusion.

Compatibility of Commercially Accepted Standards for Risk and Materiality

The commercial concepts of risk and materiality are compatible with the objectives of contract cost auditing. They represent auditors' professional responsibility to determine *what matters* (i.e., the risk that costs do not comply with contract terms and federal regulations) and *how much matters* (i.e., materiality) in the context of a particular audit. What and how much matters depends on the use of the audited information.

With respect to financial statement audits of for-profit companies, the owners, potential investors, and banks use audited financial information to make investment and lending decisions. With respect to contract cost audits, contracting officers use audited financial information to negotiate contract prices, reimburse contract costs, and evaluate a contractors' compliance with contract terms. To ensure the integrity of information on which economic decisions will be made, organizations (in the context of financial statements of for-profit companies) and contracting officers (in the context of procurement contracts) use auditors to provide assurance on that information.

Commercial standards of risk and materiality conceptually apply to contract cost audits, yet the process in which they are applied is viewed through the lens of contracting officers and their responsibility to expend public funds fairly and reasonably. Auditors' evaluation of what matters (i.e., risk or significance) is made in the context of the engagement type and contracting officers' (or other government customers') needs. The auditors' assessment of what matters is also a necessary precondition to determining how much matters (i.e., materiality).

Materiality in the Context of Contract Cost Audits

The concepts of materiality and significance expressly acknowledge that some degree of imperfection is acceptable to the users of financial information. This point is emphasized throughout the commercial and government auditing standards, regulations for the oversight of financial markets, FAR and the Cost Accounting Standards (CAS). This chapter discusses materiality, consistent with commercial standards, as a guide to help auditors when performing audits of incurred contract costs.

Materiality, in the context of contract costs, represents the government's acknowledgement, consistent with the Federal Acquisition System's Guiding Principles, that there is an acceptable level of imprecision when determining or settling fair and reasonable contract prices. *Material* misstatements, individually or in aggregate, would reasonably be expected to influence the economic decisions of the government.[4] *Immaterial* misstatements would not adversely affect the economic decisions of the government as a buyer of goods and services in the commercial marketplace.

Commercial standards of risk and materiality provide for both *qualitative* and *quantitative* considerations. In the context of government contract costs, an auditor is concerned with both the nature (i.e., quality) and the amount (i.e., quantity) of a cost.

Audits of incurred contract costs generally focus on cost allowability and the completeness of contractors' cost representations. Contract cost auditors evaluate contractors' cost accounting and presentation for compliance with contract terms, FAR Part 31 cost principles (and CAS, as applicable), and other agreements between contractors and the government (e.g., advance agreements). Auditors are encouraged to discuss quantitative and qualitative materiality considerations with contracting officers or other government customers to obtain their perspectives on what is important to them. For example, auditors may be informed by contracting officers of the importance of a certain aspect of the information, such as a cost element or account, which auditors may take into consideration in their determination of materiality.

Definitions

For the purposes of this PPG, the terms below are defined as follows:

Table 2. Audit Terminology

Term	Definition
Total Subject Matter Amount	The incurred cost claimed on flexibly priced contracts during the fiscal year. It includes different categories of contract cost such as labor, materials, other direct costs, indirect costs, and is adjusted for certain types of contracts and activity such as commercial contracts. The FY 2018 NDAA, Section 803, defines *incurred cost audit* as an audit of charges to the government by a contractor under a flexibly priced contract. See Appendix B for additional information.
Accounts	Records used to group same or similar types of financial transactions during a fiscal period. An expense account's balance at the end of a fiscal period reflects the total dollar amount of transactions recorded to that account. For example, a labor expense account will include individual transactions associated with amounts paid to employees.
Cost Element	Represents the summation of accounts of a similar character and type that is included in the total subject matter. For example, the direct materials cost element is comprised of all material costs on government contracts, and may include, for example, accounts for direct purchases, allocations from company owned inventory, and allocations for material factors. The cost element is similar to a line item in financial statements.

[4] The FY2018 NDAA, Section 803, defines *numeric materiality standard* as "a dollar amount of misstatements, including omissions, contained in an incurred cost audit that would be material if the misstatements, individually or in the aggregate, could reasonably be expected to influence the economic decisions of the Government made on the basis of the incurred cost audit."

Term	Definition
Significant Cost Element or Account	Represents a cost element or account that requires further evaluation and testing due to quantified materiality, qualitative characteristics, other risk factors, variability, or stated concerns of the contracting officer, and is applicable to any type of engagement performed. Significance is relevant in the planning and reporting phases of the audit.
Materiality	In general, misstatements, including omissions, are considered to be material if, individually or in the aggregate, they could reasonably be expected to influence relevant decisions of intended users that are made based on the subject matter. Materiality is considered in the context of qualitative factors and, when applicable, quantitative factors. The relative importance of qualitative factors and quantitative factors when considering materiality in a particular engagement is a matter for the practitioner's professional judgment.[5]
Quantified Materiality	The numeric representation of materiality that is calculated based on the total audit subject matter. It is used in planning to identify significant cost elements. Quantified materiality is similar to planning materiality used in financial statement audits.
Adjusted Materiality	The amount or amounts set by the auditor at less than quantified materiality to reduce to an appropriately low level the probability that the aggregate of uncorrected and undetected misstatements exceeds materiality for the incurred cost proposal, taken as a whole. It also refers to the amount or amounts set by the auditor at less than the materiality level or levels for particular classes of transactions, account balances, or disclosures. Adjusted materiality is similar to performance materiality used in financial statement audits.
Quantitative Materiality Factors	Quantitative factors relate to the magnitude of misstatements or questioned costs relative to the reported amounts for those aspects of the subject matter, if any, which are expressed numerically or otherwise related to the numeric values.[6]
Qualitative Materiality Factors	Risk and qualitative materiality factors are understood in the context of the subject matter as relating to, or measured by, the quality of subject matter rather than its quantity. Qualitative materiality factors can include whether the misstatement affects compliance with laws or regulations, the result of an intentional act (i.e., fraud), and importance to the users of the information regardless of dollar amount.[7] For planning purposes, the auditor may design audit procedures to address risk of potential material noncompliance related to these qualitative factors. For reporting purposes, and after completion of fieldwork, the actual misstatements should be evaluated for significance based on these qualitative factors in addition to quantitative factors.
Nominal Reporting Amount	The nominal reporting amount is an amount at which any adjustment (misstatements or noncompliance) taken individually would be immaterial regardless of other factors. It is used during the reporting of results to determine the impact of certain qualitative amounts that are significant based on nature but so small in value they are still considered immaterial. Regardless, although not included in the audit report, these items are separately communicated to the contracting officer in a summary of misstatements. The nominal reporting amount is similar to the nominal amount used in financial statement audits.
Misstatement	When the contract costs that are billed, or reported, to the government do not comply with contract terms and federal regulations such as FAR and CAS. The primary source of misstatements for incurred cost audits is cost type (FAR 31.205), contract clauses, cost reasonableness, and cost allocation (FAR 31.201 to 31.204 or CAS if applicable). When a misstatement is identified, it is typically referred to as a noncompliance that can be measured as a dollar amount of questioned contract costs.

[5] Paragraph A15 of AT-C section 205
[6] Paragraph A19 of AT-C section 205
[7] Paragraph A18 of AT-C section 205

Engagement Materiality Framework

The Engagement Materiality Framework describes the process for calculating and using materiality throughout the audit process and is organized by phases of the audit, as follows:

Table 3. Engagement Materiality Framework

Audit Phase	Engagement Materiality Framework Step
Planning	1) Calculate quantified materiality
Planning	2) Identify significant cost elements
Planning	3) Identify significant accounts within significant cost elements 4) Consider the use of adjusted material in sampling and tolerable error 5) Determine the nature, timing, and extent of audit procedures on significant cost elements and accounts considering risk and materiality.
Fieldwork	6) Perform testing procedures and document results.
Conclusion and Reporting	7) Evaluate misstatements based on quantitative and qualitative materiality characteristics. 8) Report or communicate misstatements, in compliance with Government Auditing Standards.

Step 1: Calculate Quantified Materiality

Quantified materiality relates to the magnitude of misstatements relative to reported amounts for those aspects of the subject matter, if any, that are expressed numerically or otherwise related to numeric values. Use of quantified materiality is appropriate for audits of incurred cost because the total subject matter can be measured as a numeric value. Quantified materiality is used in the planning phase of the audit to identify significant cost elements and affects use of adjusted materiality during fieldwork (Engagement Materiality Framework Step 3). The process to calculate qualified materiality includes the following:

- ***Define Total Audit Subject Matter:*** The audit subject matter is expressed numerically, and for purposes of the materiality calculation, includes the total subject matter upon which an auditor will be expressing an opinion and providing assurance.
- ***Calculate Quantified Materiality:*** Quantified materiality is based on auditor judgment and is influenced by industry benchmarks, reasonableness, and the needs of the users of the information. It represents the amount, or percentage, of the Total Audit Subject Matter that can be misstated and influence the decisions of those who use the information.

Commercially accepted practices for determining quantitative materiality involve the application of percentages to elements of financial information. For example, a financial statement auditor may use 5 percent of net income, or 0.5 percent of net assets, as a benchmark for quantitative materiality. If net income is $1,000,000, then, in an auditor's judgement, misstatements of more than $50,000 (5 percent) individually, or in the aggregate, would likely influence the economic decisions of financial statement users. If net income is $100,000,000, then misstatements of more than $500,000 (5 percent) individually, or in the aggregate, would likely influence the economic decisions of financial statement users.

As the examples above show, commercially accepted materiality benchmarks tend to maintain their proportionality as financial values increase. This proportionality occurs because financial statement users need assurance that the financial statements fairly represent a company's financial position in accordance with GAAP. It is not necessarily the dollar value of misstatements that matters to financial statement users; rather, it is whether the financial statements fairly represent the company's performance within an acceptable margin of imperfection.

Recommended materiality thresholds are provided below that are consistent with industry norms and acceptable for use in incurred cost audits. The practical application of quantified materiality is not limited to these thresholds as auditor judgment with consideration of qualitative factors, risk, and variability have an impact.

The materiality thresholds recommended below adjust (by algebraic equation) downward as the amount of cost subject to audit increases. Because contract audits involve contractors' costs that may be reimbursed with public funds, applying a static benchmark could produce unacceptably large materiality thresholds. For example, 5 percent of $100,000 (or $5,000) is perceived much differently than that same percentage applied to $1,000,000,000 (or $50,000,000). In this instance, it would be more appropriate to use a threshold of 0.5 percent for $1,000,000,000 because the resulting materiality threshold of $5,000,000 is more aligned with the government's economic decision-making responsibility.

Recommended Materiality Thresholds for Incurred Cost Audits

Table 4. Incurred Cost Audit Proposals Subject Matter

Subject Matter Cost	$100K	$1M	$10M	$100M	$500M	$1B	> $1B
Materiality Amount	$5,000	$28,117	$158,686	$889,140	$2,973,018	$5,000,000	*Varies*
Materiality Percentage	5%	2.81%	1.58%	0.89%	0.59%	0.50%	0.50%

For Incurred Cost Proposal Audit Subject Matter from $1 to $1,000,000,000 use:

- Materiality Threshold = $5,000 x ((Total Subject Matter / $100,000) ^ .75)

For Incurred Cost Proposal Audit Subject Matter greater than $1,000,000,000 use:

- Materiality Threshold percentage of 0.50 percent

Quantified materiality does not change due to the type of engagement performed (e.g., examination or performance audit). Professional judgments about quantitative materiality are made in light of contract dollars subject to audit (i.e., engagement subject matter) and are not affected by the level of assurance. Materiality is based on the needs of those who use the information irrespective of the type of engagement performed.

The application of quantified materiality neither limits auditor judgment nor places restrictions on what an auditor can test based solely on dollar value. Rather, the quantified materiality amount is

intended to create a consistent threshold that helps an auditor calibrate the nature, timing, and extent of audit procedures relative to the unique risks and qualitative considerations of each engagement. It is considered in the context of qualitative factors and, when applicable, quantitative factors. The relative importance of qualitative factors and quantitative factors when considering materiality in a particular engagement is a matter of the practitioner's professional judgment.[8]

The example below illustrates a basic quantified materiality calculation. The total subject matter represents all costs for flexibly priced contracts (i.e., engagement subject matter), whether direct or indirect, of $200,500. The total subject matter is then multiplied by the quantified materiality formula to compute the materiality amount used during the audit.

Figure 1. Illustrative Basic Quantified Materiality Calculation

$8,425 = $5,000 x (($200,500/$100,000) ^.75)

The quantified materiality amount is $8,425, which is 4.2% of the total engagement subject matter ($8,425/$200,500).

Incurred Cost Submission:	**Total**
Direct Labor	$100,000
Direct Materials	$50,000
Other Direct Costs	$10,000
Overhead	$20,000
G&A Expense	$20,500
Total Subject Matter (a)	$200,500
Materiality Threshold (b)	4.2%
Materiality (c)	$8,425

Step 2: Identify Significant Cost Elements

A significant cost element is identified by quantified materiality, qualitative materiality characteristics, and other risk factors. The process for determining a significant cost element is as follows:

- ***Quantified Materiality:*** The auditor should identify all cost elements equal to or greater than quantified materiality as significant.
- ***Risk and Qualitative Factors:*** The auditor should consider risk and qualitative factors for all cost elements less than quantified materiality. Cost elements may still be considered significant and subject to testing procedures based on risk factors and qualitative characteristics such as a

[8] Statements on Standards for Attestation Engagements (SSAE) Number 18; AT-C 205.A15.

history of identified misstatements, nature of particular costs, and needs of the users of the audited information.

- ***Variability:*** The auditor may use judgment and incorporate variability, or unpredictability, in the selection of cost elements to test. For example, an auditor has elected to not test a cost element for the last 2 years due to an immaterial balance. In the current year, and to ensure variability and unpredictability in the testing approach, the auditor may select the cost element for testing. This prevents a pattern from forming and discourages the contractor from recording misstatements in cost elements that have a history of not being tested.

The following example compares the quantified materiality amount of $134,200 to the cost elements within the subject matter. The materiality amount was calculated by including the total subject matter of $8,036,024 in the materiality threshold equation. The associated materiality threshold percentage is 1.67 percent ($134,200/$8,036,024). In the example, an auditor would identify the cost elements of direct labor, direct materials, subcontracts, overhead, and general and administrative costs as significant based on quantified materiality.

Table 5. Comparison of Quantified Materiality to Cost Elements

Cost Element	Amount	> Materiality of $134,200
Direct Labor	$2,441,657	**YES**
Travel	$54,092	NO
Direct Materials	$188,716	**YES**
ODC	$11,175	NO
Subcontracts	$3,329,051	**YES**
Indirect Overhead	$1,138,408	**YES**
G&A (Value Added)	$872,925	**YES**
Total Subject Matter	$8,036,024	
Materiality Threshold	1.67%	
Materiality	**$134,200**	

A *YES* in the table above means that the cost element is significant and should be further evaluated at the account level, but it does not automatically mean the entire amount will be tested. An auditor is responsible for auditing significant costs elements based on materiality or other factors, but the nature, timing, and extent of audit procedures may vary based on auditor judgment.

The cost elements that are less than the quantified materiality amount may be tested due to qualitative materiality characteristics, other risk factors, or if, in an auditor's judgment, they may contain immaterial misstatements that could be material in the aggregate. The following examples illustrate an auditor's potential qualitative considerations relative to the travel cost element, which is less than the quantified materiality amount. In this example, the auditor did not identify qualitative or risk concerns for the ODC cost element, which is also less than the quantified materiality amount:

- The contractor's travel cost element has a history of misstatements, which have been investigated in the past, and is a stated concern of the contracting officer. If the user of the information (i.e. the contracting officer) considers a particular cost element to be significant based on qualitative facts and circumstances, then an auditor may evaluate it at the account level in the same manner as any other significant cost element.

- The contractor's travel cost element has no history of misstatements, and the contracting officer did not express any concerns in this area. However, the travel cost element was not tested in the prior 2 years. The auditor could test the travel cost element to ensure variability and unpredictability in the audit approach, regardless of whether the risk and qualitative characteristics indicate no testing may be appropriate.

The body of work necessary to support the opinion, or audit conclusions, is generally met with the testing of cost elements and accounts with values greater than materiality or adjusted materiality. The use of qualitative or other risk factors to identify significant cost elements should be based on actual, objective, and measurable facts and circumstances such as history of questioned costs, and needs of the users of the audited information. Absent these objective factors, the auditor is expected to adhere to materiality thresholds. The auditor should document the justification for deviating from the materiality thresholds. See Appendix A for unique considerations regarding indirect costs.

Step 3: Identify Significant Accounts

A significant account is identified by adjusted materiality (as explained below), qualitative materiality characteristics, and other risk factors. The process for identifying significant accounts is as follows:

(1) ***Adjusted materiality***: The auditor should identify all accounts equal to or greater than adjusted materiality as significant.

(2) ***Risk and Qualitative Factors***: The auditor should consider qualitative factors for all account balances less than adjusted materiality. Accounts may still be considered significant and subject to testing procedures based on risk and qualitative factors such as a history of misstatements, sensitivity, and needs of the users of the audited information.

(3) ***Variability*****:** The auditor should incorporate an element of variability in the selection of accounts to test. For example, an auditor elected not to test an account for the last 2 years due to an immaterial balance. In the current year, and to ensure variability and unpredictability of the testing approach, an auditor may select the account for testing. This prevents a pattern from forming and discourages the contractor from recording misstatements in accounts that have a history of not being tested.

An auditor will use *adjusted materiality* to identify significant accounts subject to audit evaluation. Quantified materiality represents the total amount the subject matter can be misstated without misleading the users of the information. Adjusted materiality is less than quantified materiality. Unless quantified materiality is adjusted at the account level, an auditor would have limited ability to identify immaterial misstatements that, in the aggregate, become material or are material by their nature even if immaterial in amount.

Adjusted materiality is used at a more discrete level in the books and records and is applied to accounts that make up the cost elements. For purposes of selecting accounts for audit testing, adjusted materiality can be stated as 20 percent to 80 percent of quantified materiality based on audit risk, the nature (or sensitivity) of transactions relative to specific cost allowability criteria, other substantive procedures performed (i.e., whether controls are tested), and the needs of the users of audited information.

The following are key concepts with the application of adjusted materiality:

- Adjusted materiality is applied to the accounts within significant cost elements.
- Once an account is selected, an auditor will test the transactions that sum to the account balance.
- Adjusted materiality is determined separately for each significant cost element.

See Appendix A for guidance on how to calculate adjusted materiality for indirect costs where the government's participation is less than 100 percent.

Adjusted materiality can be used as tolerable error (or tolerable misstatement) for the purpose of statistical sample selection (see the Step 4, Engagement Materiality Framework). The following table provides examples of justifications for degrees of adjustment to the quantified materiality for the purpose of calculating adjusted materiality:

Table 6. Justifications for Degrees of Adjustment to the Quantified Materiality

Percent Adjustment	Examples
(80%) Reduction in Quantified Materiality	▪ The cost element has a history of material misstatements in multiple accounts. ▪ The contractor is unwilling to correct prior-year material misstatements in subsequent proposals. ▪ The contractor is currently in litigation for historical costs in the same cost element and accounts. ▪ The contracting officer has significant concerns regarding the cost element that increase the sensitivity and importance.
(50%) Reduction in Quantified Materiality	▪ The cost element and multiple accounts have a history of material misstatements. ▪ Management is responsive with correcting misstatements in subsequent proposals. ▪ The contracting officer has concerns regarding the cost element that increase the sensitivity and importance.
(20%) Reduction in Quantified Materiality	▪ The cost element and accounts have limited to no instances of historical material misstatements on an aggregated basis. ▪ The reduction is to reduce to an appropriately low level the probability that the aggregate of uncorrected and undetected misstatements exceeds total quantified materiality.

The following example illustrates how to calculate adjusted materiality: Based on professional judgment, an auditor elects to reduce the quantified materiality by 20 percent (see Figure 2). If the adjusted materiality is reduced by 20 percent, the remainder represents 80% of the quantified materiality amount (100 percent - 80 percent = 20 percent reduction). The adjustment materiality is calculated by multiplying the quantified materiality of $1,025 by 80 percent (100 percent - 20 percent), for an adjusted materiality amount of $820.

Figure 2. Calculated Adjusted Materiality Illustration

Quantified Materiality	$1,025
Adjustment (less):	(20 percent)
Adjusted Materiality:	$820

Use of materiality to identify significant amounts becomes more relevant at the account level in the books and records, which make up cost elements. The higher the level aggregation of costs, the more likely that the cost will be selected.

The table below illustrates the practical application of materiality at lower levels of cost in the books or records, or at the account level. The quantified materiality is compared to the cost elements rather than the account level (as indicated by *N/A*), whereas adjusted materiality is compared at the account level (as indicated by *N/A* at the cost element level). Please note that, even if the direct material cost element is greater than quantified materiality, it may not be necessary to test each account in the cost element.

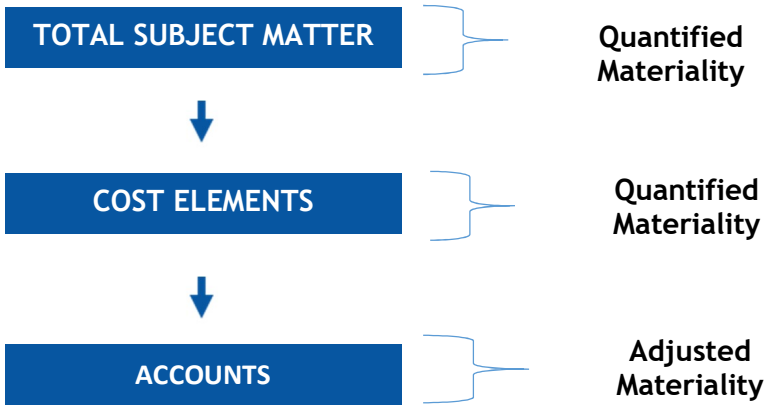
Application of adjusted materiality at the account level identifies three of the six accounts as being material and, thus, needing to be tested. The body of work necessary to support an audit is generally met when an auditor tests cost elements and accounts with values greater than quantified or adjusted materiality. Cost elements and accounts with balances below adjusted materiality (i.e., those with a *NO* response below) may still be subject to testing based on an auditor's judgment, risk factors, qualitative factors, or variability.

Table 7. Application of Materiality at Lower Levels of Cost

Category	Description	Amount	> Materiality $1,025	> Adjusted Materiality $820
Subcontracts	Cost Element	$750	NO	N/A
Direct Materials	Cost Element	$5,000	YES	N/A
Direct Materials Acct X1	Account	$850	N/A	**YES**
Direct Materials Acct X2	Account	$450	N/A	NO
Direct Materials Acct X3	Account	$980	N/A	**YES**
Direct Materials Acct X4	Account	$500	N/A	NO
Direct Materials Acct X5	Account	$350	N/A	NO
Direct Materials Acct X6	Account	$1,870	N/A	**YES**

Think of it as follows:

Figure 3. Application of Materiality at Lower Levels of Cost



An auditor may combine accounts of the same or substantially similar nature when applying adjusted materiality. For example, a contractor records engineering labor in separate general ledger accounts by project, but the combination of these accounts results in a homogenous amount that is subject to the same audit criteria. Although the contractor separated these like costs into separate accounts for operational or cost accounting purposes, an auditor may combine them for assessing adjusted materiality and testing purposes if that approach makes sense for the audit.

Step 4: Statistical Sampling and Consideration of Tolerable Error Based on Adjusted Materiality

An auditor may use adjusted materiality when determining the tolerable misstatement (or tolerable error) for statistical sample size determination.

An incurred cost audit cannot be completed *effectively and efficiently* by testing 100 percent of all transactions in the subject matter. For this reason, the auditing profession uses statistical sampling to test a representative portion of a transaction population that is sufficient to determine whether the total population is fairly stated.

Although statistical sampling techniques are outside the scope of the document, an important element of statistical sampling is *tolerable misstatement*. Tolerable misstatement represents the total amount of error an auditor is willing to accept in the statistical sample. When auditors use statistical sampling, they are incorporating materiality into the audit. See the AICPA Statistical Sampling guide for additional information.

There is an interrelationship between adjusted materiality, tolerable misstatement, and audit sampling. By using adjusted materiality (converted to a percentage of the transaction population value) as tolerable misstatement, statistical sample sizes will be commensurate with the size of the population in relation to the overall subject matter, audit risk, and materiality. The higher the tolerable misstatement, the lower the sample size.

In practice, an auditor will remove transactions greater than adjusted materiality from the population and test 100 percent of these amounts separately. The remainder of the transactions within the

population would then be subject to the statistical sampling process. If the value of the remaining population (after removing transactions with values greater than adjusted materiality) is less than adjusted materiality, then an auditor may judge it immaterial and forego further statistical sampling. Generally, when the remaining population has an aggregate value greater than adjusted materiality, the transactions will be subjected to audit procedures. This process accounts for the aggregated nature of misstatements to the overall assessment of adjusted materiality.

Steps 5 and 6: Determine the Nature, Timing, and Extent of Audit Procedures; Perform Audit Procedures; Document Results

These steps represent the planning process and fieldwork related to the nature, timing, and extent of audit procedures based on the risk of material misstatement and the Audit Risk Model (inherent risk, control risk, and detection risk), if applicable. The concepts of quantified materiality and adjusted materiality should be considered, as set forth in this chapter, in this part of the audit process.

The auditor should document the basis for materiality and the method of determining materiality.

Step 7: Reporting Audit Results

An auditor can use quantified materiality as a guide for determining the existence of one or more material misstatements when forming an audit opinion, or audit conclusion, on the subject matter. An auditor will summarize all misstatements and compare them individually, and in the aggregate, to quantified materiality.

For example, in the instances of an attestation engagement if the aggregate amount of identified misstatements is less than quantified materiality, then an auditor may issue an unqualified opinion provided, however, that no *quantitatively immaterial* misstatements are *qualitatively material*. If the aggregate of all misstatements is greater than quantified materiality, or if one or more misstatements are qualitatively material, an auditor will issue a qualified or adverse opinion, as applicable. This same process can be used to evaluate scope limitations and disclaimer of opinion.

A few key points for attestation engagements include the following:

- If misstatements individually or in the aggregate exceed quantified materiality, they will result in a qualified opinion, but not necessarily an adverse opinion. An adverse opinion is appropriate if material misstatements are so pervasive that the subject matter, taken as a whole, is not reliable.

- The dollar value of some misstatements may be greater than the value of the underlying misstated transaction. For example, a misstated direct labor cost may draw allocable indirect costs. In this instance, an auditor should evaluate the fully-absorbed value of the misstatement relative to quantified materiality.

- The dollar value of some misstatements may be less than the value of the underlying misstated transaction. Indirect cost misstatements should be adjusted for participation percentages to normalize the amount to account for the proportion of the cost that is allocated to a contractor's work outside of the engagement subject matter. For example, an auditor identifies a $500,000 misstatement in an indirect cost pool with a government participation percentage of 20 percent.

The actual effect of the misstatement on the engagement subject matter (i.e., indirect costs allocated to the government contracts) is $100,000 ($500,000 * 20 percent). In this instance, an auditor should evaluate the value of the indirect cost misstatement, after adjustment for government participation, relative to quantified materiality.

- Although qualitative factors are discussed below, it is important to emphasize that some misstatements may be considered material and affect the audit opinion regardless of dollar value.

Quantified materiality is based on the presumption that misstatements, individually or in the aggregate, that exceed that amount would influence the judgment of a reasonable person using the audited financial information with knowledge of the uncorrected misstatements.

An auditor's assessment of materiality requires consideration of both quantitative and qualitative factors in the context of the *total mix* of information available to the users of the audited financial information. As a result, qualitative factors, such as the existence of expressly unallowable costs or evidence of irregularities, could be material facts within the *total mix* of information regardless of dollar value.

The following table sets forth examples of qualitative considerations unique to incurred costs audits that may result in quantitatively immaterial misstatements being considered material and, in turn, affect the audit opinion or audit conclusion. The information below is intended to be illustrative of relevant qualitative factors, rather than exhaustive.

Table 8. Examples of Qualitative Considerations Unique to Incurred Costs Audits

Qualitative Factor	Explanation
Expressly Unallowable Indirect Costs	According to FAR 52.242-3, the inclusion of expressly unallowable indirect costs, when identified, explicitly contradicts the contract terms and subjects the contractor to penalties. The pervasive existence of this form of misstatement creates a higher level of sensitivity and risk when reporting audit results. The determination of a material misstatement is at the auditor's judgment, but generally these misstatements should be evaluated for materiality with less emphasis on the quantified materiality.
Specific Contract Terms	The audit criteria applicable to audits of incurred costs represent contract terms that incorporate specific elements of the FAR, CAS, and so forth. In addition to these regulations, certain contracts may have unique clauses, such as cost limitations on certain activities and the disallowance of certain types of costs such as overtime. Because these unique clauses establish the specific desires of a particular government customer, quantitatively immaterial but pervasive misstatements in this regard may be viewed as material to that customer.

Other relevant qualitative factors may relate to the audit subject matter and the needs of the acquisition community. For example, a contractor may have significant restructuring costs, purchase accounting for an acquisition, overseas operations, or other issues that have qualitative considerations that differ from the ones identified above but are just as relevant. The nominal reporting amount can be considered for reporting misstatements due to qualitative factors.

Step 8: Report or Communicate Misstatements

The auditor should report or communicate, as appropriate, both material and immaterial misstatements to the contracting officer in accordance with Government Auditing Standards (FY 2018 Yellow Book, paragraphs 7.46 and 9.38):

> *When auditors detect instances of noncompliance with provisions of laws, regulations, contracts, and grant agreements that do not warrant the attention of those charged with governance, the auditors' determination of whether and how to communicate such instances to audited entity officials is a matter of professional judgment.*

For incurred cost audits, the need for communicating immaterial information is important because it can result in the transfer of funds between the contractor and government. For example, $5,000 of questioned direct cost not only may impact the audit opinion or conclusion, but also represents an amount that may be recovered by the government. These amounts should be communicated to the contracting officer to facilitate appropriate disposition.

CHAPTER 3: AUDITS OF INTERNAL CONTROL OVER GOVERNMENT CONTRACT COMPLIANCE

Government Perspective on the Importance of Internal Controls

For government officials to manage programs and contracts effectively, they must be able to rely on information produced by the contractor. The ability of contractors to produce materially accurate information depends on the design and operating effectiveness of their business system internal controls. Without internal controls, it could be difficult for contractors to produce reliable and timely information. Although no internal control system can provide absolute assurance that the information will never include material errors or misstatements, an effective system of internal controls over contractor business systems can substantially reduce the risk of error and misstatements.

Obtaining timely assurance that contractors have effective internal controls is an essential component of all cost-effective compliance frameworks. Consideration of how recently a business system audit was performed and the results is a critical part of the DoD's own system of acquisition internal controls. Effective contractor internal controls permit most additional audits and reviews to be performed more efficiently and timely. Obtaining assurance about internal controls effectiveness is one of the most efficient ways to protect the Government's interest, reduce risk, and improve timeliness.

Defining Internal Controls

Internal controls are the responsibility of the contractor. The auditor will test the internal controls and provide an opinion, or conclusion, on whether they are suitably designed and operating effectively.

Internal controls are defined as a process, affected by the entity's board of directors, management, and other personnel designed to provide reasonable assurance regarding the achievement of objectives relating to operations, reporting, and compliance.[9] This definition emphasizes the achievement of objectives. For companies or organizations with Government contracts, the objective is to bill, or report, contract costs in compliance with contract terms and federal regulations. The relationship between objective, risks, and internal controls is as follows:

- An objective defines what the contractor wants to achieve,
- A risk represents a situation, circumstance, or event that the contractor wants to avoid (i.e., an occurrence that results from not achieving the objective), and
- Internal control activities are procedural steps designed and performed to prevent, or detect and correct, the occurrence of a risk such that the objective is achieved.

An internal control framework should generally address five components: control environment, risk assessment, control activities, information and communication, and monitoring activities. However, the extent of implementation by the contractor is dependent on size and complexity and is explained in greater detail in the subsection on Internal Controls Frameworks. These components are introduced in the Committee of Sponsoring Organizations (COSO) of the Treadway Commission Internal Control—

[9] The Committee of Sponsoring Organizations (COSO) of the Treadway Commission Internal Control—Integrated Framework (May 2013)

Integrated Framework (May 2013) framework and have been recognized and accepted by the AICPA, and the Government Accountability Office.

The only way to determine if internal controls are suitably designed and operating effectively is to test them. It is not appropriate to presume that a contractor has effective internal controls based on the results of audits that do not test internal controls. The existence of a material misstatement in an audit of contract costs does indicate an internal control deficiency. However, the converse is not true. The absence of a material misstatement does not provide the requisite assurance regarding the effectiveness of a contractor's systems and internal controls. The severity of an internal control deficiency is determined by assessing the likelihood that it will result in a material misstatement and is not contingent on whether a material misstatement has occurred. While the contractor may bill or report costs that comply with contract terms in any one period, if the contractor's internal controls are ineffective, the internal controls cannot provide reasonable assurance that a material mistake, fraud, or management override will be prevented or detected and corrected timely. An accounting system that lacks effective internal controls has a greater likelihood of billing or reporting costs that are not compliant with contract terms and federal regulations.

Internal Control Frameworks

The type of internal control framework and the extent of adoption is at the discretion of the contractor. The Committee of Sponsoring Organizations (COSO) of the Treadway Commission has developed an Internal Control—Integrated Framework (May 2013) which has gained broad acceptance in the private sector and is widely used around the world. The federal government has developed a similar framework that adapts the COSO Internal Control – Integrated Framework principles and addresses the unique government environment in the *Standards for Internal Control in the Federal Government* (GAO-14-704G), which is commonly referred to as the *Green Book*.

An internal controls framework assists management, board of directors, external stakeholders, and others interacting with the entity in their respective duties regarding internal control without being overly prescriptive. It does so by providing both understanding of what constitutes a system of internal control and insight into when internal control is being applied effectively[10]. For accounting system audits related to government contract costs, the auditor does not test the internal controls framework, but rather, tests the internal controls. Regardless, it is important to acknowledge the fact that the internal controls and framework are, by definition, inter-related and a poorly implemented framework may result in ineffective internal controls.

Whether or not a contractor adopts an internal control framework often relates to a contractor's size and complexity. Contractors design and implement control activities relative to their own risks, size, complexity and other relevant factors. For example, a large public company may have adopted an internal control framework (e.g. COSO) to define and meet its control objectives. In contrast, a smaller company with less complex operations may not be aware of formal internal control frameworks, but nevertheless have internal controls commensurate with its size, complexity, and other relevant factors. Auditors are encouraged to understand the contractor's business, the environment in which it operates, the software systems it uses for accounting purposes, how accounting-related business processes are

[10] COSO Internal Control – Integrated Framework, Executive Summary, May 2013

performed, and the contractor's employees either responsible for or participating in those processes. This chapter creates no requirement that the contractor adopt the COSO or any other internal controls framework.

For every contractor, regardless of size, each component of an internal control framework (e.g. control environment, risk assessment, control activities, etc.) will likely be reflected in the manner by which management runs its business (regardless of whether or not management has consciously or formally adopted an internal control framework). Because every business is unique, the auditor should approach an internal control audit using an internal control framework as a means to understand each contractor's unique accounting system controls. Auditors should not expect contractor internal controls to function identically or even at the same level for every company.[11]

Concept of Reasonable Assurance

The contractor is responsible for designing and operating effective business processes and internal controls to, provide reasonable assurance that the cost information is reliable and complies with contract terms and federal regulations, as applicable. The concept of "reasonable assurance" recognizes that the cost of achieving greater assurance will, at some point, exceed the benefit of the higher assurance. This concept is acknowledged in the Federal Acquisition Regulation Guiding Principles[12]. The concept of reasonable assurance as it relates to systems of internal control also recognizes that it is not possible to declare with absolute certainty that an error or misstatement will not occur. For example, the system is operated by people and people inevitably make mistakes, systems breakdown, and organizations change. In addition, intentional misconduct, like fraud and collusion, can prevent controls from working as intended regardless of how well the controls were designed.

For the auditor, evaluating whether or not a contractor's accounting system internal controls provide reasonable assurance is inherently dependent on each contractor's unique facts and circumstances. In this regard, Public Company Accounting Oversight Board's (PCAOB) definition of reasonable assurance is instructive. In the context of an internal control audit over financial reporting, reasonable assurance means that there is a remote likelihood that material misstatements will not be prevented or detected and corrected on a timely basis. Although not absolute assurance, reasonable assurance is, nevertheless, a high level of assurance. This concept can be applied to audits of contractor accounting system internal controls relative to the criteria contained in DFARS 252.242-7006, Accounting System Administration.

Contractor Internal Controls

The internal controls and business processes are the responsibility of the contractor. This section is designed to provide information on certain aspects of the contractor's internal controls and the scaling of risk.

The objective of the accounting system is to record, accumulate, and summarize financial transactions related to financial reporting, performance reporting, and government contracts (i.e. costs comply with

[11] COSO Internal Control over Financial Reporting – Guidance for Smaller Public Companies, dated June 2006

[12] FAR 1.102-2(c)(2), "To achieve efficient operations, the [Federal Acquisition] System must shift its focus from "risk avoidance" to one of "risk management." The cost to the taxpayer of attempting to eliminate all risk is prohibitive."

contract terms and federal regulations). This objective statement is broad and refers to the entire accounting system. The accounting system includes many different types of costs (e.g. labor, materials) that represent different operational activities and distinct business processes. For example, the business processes and internal controls for labor cost are different when compared to other cost elements such as travel.

Contractor Objectives and Business Processes

The contractor will design and implement business processes that achieve operational and financial objectives. The accounting system, as defined at DFARS 252.242-7006, is the collection of accounting methods, procedures, and controls established to gather, record, classify, analyze, summarize, interpret, and present accurate and timely financial data for reporting in compliance with applicable laws, regulations, and management decisions.

The accounting system should be designed to meet the contractor's objectives and incorporate the necessary internal control activities to reasonably assure that those objectives are met. Whether the contractors accounting system is already established, or is in the process of being newly implemented, the following diagram illustrates how to evaluate a business process and identify its internal controls.

Figure 4. Evaluating a Business Process and Identifying Internal Controls

- ***Objectives*:** Through business process walkthroughs and inquiries, the auditor identifies the contractor's objectives related to operations, reporting (e.g., financial statements, incurred cost proposals) and compliance. The overall objective for government contracts is for costs to be billed, or reported, to the government in compliance with contract terms and federal regulations.

- ***Risk Assessment*:** The process for identifying and analyzing risks forms the basis for determining how risks should be managed to achieve the entity's objectives.[13] The risk assessment process consists of

  - considering the business processes, *or how things are done*,
  - identifying the risks that the objective will not be achieved,
  - estimating the significance of the risks,
  - assessing the likelihood of the risks occurring, and

[13] Risk Assessment definition from the Committee of Sponsoring Organizations of the Treadway Commission (COSO), Internal Control – Integrated Framework (2013).

  - deciding what actions to implement to address those risks.

- ***Internal Control Activities:*** The contractor will implement internal control activities based on the risk assessment and business process to mitigate the risk of not meeting the objectives.

Contractor Objectives for Government Contracts and Scaling of Risk

In simplified terms, risk is the inverse of an objective. The following are the different categories of risk from the perspective of the accounting system:

- ***Accounting System Criteria and Risk:*** The Accounting System Criteria represents the overall objectives of an accounting system. The associated risk, or the potential for not meeting these objectives, is global across the entire contractor for government contracts and applicable to every cost element billed or reported to the Government.

- ***Process Objectives and Risks:*** Process risks are defined at the process level. They are based on the Accounting System Criteria but defined in the context of the costs and business process.

The Accounting System Criteria are the benchmarks used to measure whether the objective has been achieved. If the system has implemented internal controls that mitigate the risks of the Accounting System Criteria not being met, the contractor and the government can state the system was suitably designed to mitigate the risks of noncompliance with the overall objective.

The following table shows the interrelationship among the objective, Accounting System Criteria, and the risks of not achieving the objective:

Table 9. Interrelationships among Objective, Accounting System Criteria, and Risk of Not Achieving Objective

Accounting System Criteria	Risk
(1) Classification of direct costs and indirect costs in accordance with contract terms, FAR, CAS and other regulations, as applicable.	Contract costs are not properly classified as direct and indirect in accordance with contract terms, FAR, CAS, and other regulations, as applicable.
(2) Identification and accumulation of direct costs by contract in accordance with contract terms, FAR, CAS and other regulations, as applicable.	Direct contract costs are not identified and accumulated to the correct contract in accordance with contract terms, FAR, CAS, and other regulations, as applicable.
(3) Methods to accumulate and allocate indirect costs to contracts in accordance with contract terms, FAR, CAS and other regulations, as applicable.	Indirect costs are not accumulated and allocated to contracts in accordance with contract terms, FAR, CAS, and other regulations, as applicable.
(4) General ledger control accounts that accurately reflect all transactions recorded in subsidiary ledgers or other information systems that either integrate or interface with the general ledger including, but not limited to, timekeeping, labor cost distribution, fixed assets, accounts payable, project costs, and inventory.	The general ledger does not reflect transactions recorded in subsidiary ledgers or other information systems that integrate or interact with the general ledger.
(5) Adjustments to the general ledger, subsidiary ledgers, or other information systems bearing upon the determination of contract costs (e.g. adjusting journal entries, reclassification journal entries, cost transfers, etc.) for reasons that do not violate contract terms, FAR, CAS, and other regulations, as applicable.	Adjustments made to the general ledger from whatever source violate contract terms, FAR, CAS, or other regulations, as applicable.
(6) Identification and treatment of unallowable costs in accordance with contract terms, FAR, CAS and other regulations, as applicable.	Unallowable costs are not identified in the accounting system and not properly resolved in accordance with contract terms, FAR, CAS, or other regulations, as applicable.
(7) Billings prepared in accordance with contract terms, FAR, CAS and other regulations, as applicable.	Billings are not prepared in accordance with contract terms, FAR, CAS, or other regulations, as applicable.
Objective: The contractor bills and reports costs that comply with contract terms and government regulations such as FAR and the CAS, if applicable.	

To implement internal control activities, the risks must be defined and understood in the context of the business processes and costs. Business processes and internal controls are designed to mitigate the risks of noncompliance with the Accounting System Criteria. The level and nature of the documentation will vary based on the size of the contractor and the complexity of the control.

Contractor Risk Assessment and Internal Control Activities

This section refers to contractors' assessment of risk and the implementation of internal controls for their own processes. The auditors' risk assessment process, performed as part of the internal controls audit, is different and discussed in a section below.

Contractors are responsible for assessing risk and implementing internal controls to address those risks. The risk assessment links global risks of not meeting the Accounting System Criteria to business processes, process risk, and internal control activities. If contractors have documented risk assessment

to meet the criteria of the accounting system, this may be useful to the auditor and should be requested. The risk assessment process, formality, and its associated documentation is at the discretion of the contractor. It is possible for a contractor to have effective internal controls without formally documenting a risk assessment.

A common method used in the risk assessment process is to ask the question, *What can go wrong?* in the context of the government risks and the accounting system. The basis for this question is the inherent in the Accounting System Criteria for government contract risk. When contractors design the business process, this question may be asked, and the internal control activities designed to mitigate the risk. Likewise, auditors will follow a similar process when evaluating design of contractors' internal controls, but it is important to make the distinction that business processes and internal controls are the sole responsibility of contractors. Auditors' role is to evaluate the effectiveness of contractors' internal controls in mitigating the risks. The internal controls audit is a useful tool for the contractor in determining whether the internal controls are sufficient.

An internal control activity is defined as an action established through policies and procedures that helps ensure management's goal of achieving its objectives and mitigating the risks is attained.

There are different types of internal control activities:

- Manual internal control activities are performed by the contractor personnel using the software application or on hard copy documents; for example, the review and sign-off of a journal entry.
- Automated internal control activities are imbedded in software applications used to process business transactions. For example, the feature in the timekeeping system that limits the charge codes to certain personnel based on work location and position title.
- Manual and automated internal control activities can be either preventative or detective in design and operation.
- Information Technology General Computer Controls, which apply to many applications affect compliance with the Accounting System Criteria and internal controls.
- If contractors outsource a significant business process, such as processing payroll or another service, the internal controls over this service should be evaluated as part of the overall internal controls assessment.
- Entity-level controls function at higher levels in the organization; are generally not process or cost element specific; and include controls over the control environment, monitoring, and controls over management control. For example, a business unit general manager reviews actual indirect cost rates compared to provisional indirect rates.
- Process-level internal control activities are designed and placed in operation at the business process and cost element level. For example, the review and approval of a timesheet is a process level internal control for the labor cost element.

Auditors and Testing of Internal Controls

The objective of an internal controls audit of the accounting system is to determine if internal controls are effective in mitigating the risk of the noncompliance with contact terms and federal regulations. The audit subject matter is the contractor internal controls related to government contract risk and the audit criteria is defined by the Accounting System criteria.

The definition of the accounting system is broad and includes all costs that are recorded, accumulated, and reported (i.e. billed to government contracts) by the contractor, but this does not mean the auditor must test every aspect of the contractor accounting system:

- The auditor should focus on the government contract compliance risks (i.e., Accounting System Criteria).
- The auditor should focus on testing the internal controls related to material, or significant, cost elements.
- The auditor should test the internal controls that are the most effective at mitigating the risks of noncompliance. These are generally referred to as *key internal controls*.

Additionally, considering internal control in the context of a comprehensive internal control framework, such as Standards for Internal Control in the Federal Government or COSO Internal Control—Integrated Framework can help auditors to determine whether underlying internal control deficiencies exist as the root cause of findings.[14]

During the planning phase of the audit, the auditor should obtain an understanding of the significant cost elements billed, or reported, through the accounting system and associated contractor business processes and internal controls. The auditor should request the contractor risk assessment (if available) and discuss with the contractor. Significant cost elements are determined based on dollar value (quantitative), qualitative characteristics, or importance to the contracting officer.

The contractors accounting system and business processes may be complex. The top-down approach can be used in the planning phase of the audit to align auditors' efforts with significant costs to the government. The approach begins with the identification of significant cost elements in the contractor billing or final indirect cost rate proposal (e.g., incurred cost proposal). For each significant cost element, auditors focus on the entity-level controls and works down to the accounts, business processes, and process-level controls. The auditor verifies his or her understanding of the risks and business processes to address the risk of material noncompliance. This process is a holistic approach to internal controls in which auditors focus on the total process and other mitigating controls. It also allows for auditors to consider the materiality of the cost element and potential error when determining the severity of the internal control deficiency.

For a cost element, auditors obtain an understanding of the process and internal control activities by performing a walkthrough which traces the transactions through the accounting system. This

[14] GAO, Auditing Standards revision 2018, paragraph 8.130.

walkthrough includes noting the reason for an action to record the cost, performance of the action that creates the costs, a description of how the action and the associated cost is tracked, and the internal control activities. The walkthrough is typically performed in the planning phase of the audit and is documented in a sequential order from the initial transactions to the accumulation of the cost on the books and records and can include multiple policies and procedures.

Not all internal controls are equal in importance. Auditors should identify key internal controls for each cost element and associated business process. Key internal controls are the primary means for providing reasonable assurance that contract costs comply with contract terms and federal regulations. If the key internal controls are designed and functioning, then the risks should be mitigated. In contrast, if the key internal controls are not functioning, then the compensating internal controls should be tested to ensure the risk is mitigated (mitigating internal controls). Every business process will have key and non-key internal controls. From an audit perspective, it is generally acceptable to only test key internal controls if the key controls are suitably designed and functioning.

Auditors should develop audit procedures to test the design and functioning (referred to as operating effectiveness in the attestation standards) of internal controls aligned with each of the accounting system criteria:

- ***Internal Control Design:*** The auditor should test the design effectiveness of controls by determining whether the contractor's controls, if they were operated as designed by persons possessing the necessary authority and competence to perform the control effectively, would satisfy the company's control objectives and effectively prevent or detect errors or fraud that could result in material noncompliance.
  - Procedures auditors perform to test design effectiveness include a mix of inquiry of appropriate personnel, observation of the company's operations, and inspection of relevant documentation. Walkthroughs that include these procedures ordinarily are sufficient to evaluate design effectiveness.
- ***Internal Control Operation:*** Auditors should test the operating effectiveness of a control by determining whether the control is operating as designed and whether the person performing the control possesses the necessary authority and competence to perform the control effectively.
  - A smaller, less complex contractor might achieve its control objectives in a different manner from a larger, more complex organization. For example, a smaller, less complex contractor might have fewer employees in the accounting function, limiting opportunities to segregate duties and leading the company to implement alternative controls to achieve its control objectives. In such circumstances, auditors should evaluate whether those alternative controls are effective.
  - In some situations, particularly in smaller companies, a company might use a third party to provide assistance with certain financial reporting functions. When assessing the competence of personnel responsible for a company's financial reporting and associated controls, the auditor may take into account the combined competence of company personnel and other parties that assist with functions related to government contract costs.

- Procedures auditors perform to test operating effectiveness include a mix of inquiry of appropriate personnel, observation of the company's operations, inspection of relevant documentation, and reperformance of the control.

Contractor may have internal controls tested by different auditors during the year, such as financial statement auditors, internal auditors, and government auditors. The auditor performing the business system audit (the *primary* auditor) may use the work of other auditors; doing so can increase audit efficiency, and may reduce the contractor compliance burden, but has limitations. The primary auditor has the sole responsibility for the opinion, or conclusion expressed, and that responsibility is not reduced by using the work of other auditors. The primary auditor should determine that the work performed by others is sufficient and appropriate for use in the audit. The other auditors must be independent of the subject matter, competent, and objective. The mere fact that other auditors performed internal control testing does not automatically imply that the work can be used by the primary auditor. See the AICPA Professional Standards, *Standards on Attestation Engagements*, and GAO, Government Auditing Standards 2018 revision, for additional information on using the work of others.

Hierarchy of Internal Control Deficiencies

A deficiency in internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct (a) impairments of effectiveness or efficiency of operations, (b) misstatements in financial or performance information, or (c) noncompliance with provisions of laws, regulations, contracts, or grant agreements on a timely basis. A deficiency in design exists when (a) a control necessary to meet the control objective is missing or (b) an existing control is not properly designed so that even if the control operates as designed, the control objective is not met. A deficiency in operation exists when a properly designed control does not operate as designed or when the person performing the control does not possess the necessary authority or qualifications to perform the control effectively.[15]

A misstatement represents information provided to the government that does not comply with contract terms and applicable federal regulations, such as the FAR and CAS. A material misstatement could reasonably be expected to influence, and may adversely affect, the economic or management decisions of information users. A material misstatement will normally result in a material noncompliance because all misstatements are due to a noncompliance with contract terms or federal regulations. A *material noncompliance* is defined as:

> *A misstatement in the information provided to the Government (e.g. billings, incurred cost submissions, pricing proposals, etc.) that will materially influence, and may adversely impact the economic or management decisions of the users of the information.*

For a compliance audit designed to test specific system related criteria, a deficiency can occur due to either internal control deficiencies or system shortcomings. A shortcoming pertains to a noncompliance

[15] Paragraph .07 of AU-C section 265, *Communicating Internal Control Related Matters Identified in an Audit* (*AICPA,* Professional Standards, *AU-C sec. 265)*.

with system criteria, and not necessarily internal controls, although it is unlikely one would exist without the other. For accounting systems, internal control deficiencies are categorized by severity as material weakness, significant deficiency, and other deficiency. The categorization is irrespective of the type of engagement (e.g., attestation, inspection) that is performed to test internal controls or compliance with a specific system criterion. The system deficiencies are as follows:

- ***Material Weakness*:** A deficiency, or combination of deficiencies, in internal control over risks related to Government contract compliance or other shortcomings in the system, such that there is a reasonable possibility that a material noncompliance will not be prevented, or detected and corrected, on a timely basis. A reasonable possibility exists when the likelihood of an event occurring is either reasonably possible, meaning the chance of the future event occurring is more than remote but less than likely, or is probable.

- ***Significant Deficiency*:** A deficiency, or combination of deficiencies, in internal control over Government contract compliance or other shortcomings in the system that is less severe than a material weakness yet important enough to merit the attention of those charged with governance.

- ***Other Deficiency*:** A deficiency, or combination of deficiencies, in internal control over Government contract compliance or other shortcomings in the system that have a clearly trivial, or inconsequential, effect on the ability of the business system to detect and correct errors on a timely basis.

The *other deficiency* definition acknowledges the possibility that a system deficiency, or combination of systems deficiencies, may have a clearly trivial effect on the quality of information produced by the contractor's business system. Clearly trivial represents the inverse of *material* whether judged by any criteria of size, nature, or circumstances. Other deficiencies will not affect the audit opinion or conclusions and will not be included in the audit report. These deficiencies may be communicated to contracting officers using email or other communication methods.

Not all deficiencies rise to the level of a material weakness. Auditors should evaluate the deficiency in the context of the overall system, materiality, whether it is systematic or pervasive, and the existence of mitigating controls. These factors are described below:

- ***Materiality:*** To be a material weakness, the internal control deficiency can result in a material noncompliance which could reasonably be expected to influence, and may adversely impact, the economic or management decisions of the users of the information. For example, the auditor identifies several internal control deficiencies in the travel cost process. The travel costs are immaterial in relation to other costs at the contractor and generally represent a small percentage of costs billed or reported. In this instance, the travel costs will never result in a material weakness, because it is impossible for an immaterial cost element to have a misstatement that rises to the level of a material noncompliance. The internal control deficiencies should be evaluated for categorization as a significant deficiency or other deficiency.

- ***Systematic and Pervasive***: One of the factors in determining whether a system deficiency is material depends on whether it is systematic or pervasive. Some internal control deficiencies

have a limited impact to one or only a few cost elements and will not result in a material noncompliance. When the control deficiency affects only one type of cost (e.g., labor or material cost), the severity is evaluated based on the materiality of that specific cost element. Another factor is the frequency of occurrence based on whether the root cause of the deficiency represents a unique situation or one that occurs frequently.

- ***Mitigating Controls:*** If the auditor discovers an internal control deficiency, the next step is to determine if there are other controls that are designed and in operation to mitigate the risks related to the deficient internal control. If this is the case, the severity of the internal control deficiency should be evaluated against the existence of other internal controls and may be determined as having no impact on the overall system.

Reporting Requirements for Internal Control Deficiencies

Contracting officers will use internal controls audit results to determine if the accounting system is approved or disapproved. The key factor in this determination is whether the business system is acceptable and materially complies with the Accounting System Criteria. An acceptable business system is defined as a contractor business system that materially complies with the criteria of the applicable business system clauses and does not contain a material weakness that would affect the ability of DoD officials to rely on information produced by the system.

When auditors identify findings, they should plan and perform procedures to develop the criteria, condition, cause, and effect of the findings to the extent that these elements are relevant and necessary to achieve the audit objectives.[16] The report should provide enough information to allow the contracting officer to make an informed decision. Stating something is wrong and providing no supporting information is not sufficient. Contracting officers need to be informed of the finding, but the cause and effect provide the information necessary to determine the next course of action. The effect takes into account materiality, whether the finding is systematic or pervasive, and mitigating controls. The following provides a summary of the report note elements:

- ***Criteria:*** The Accounting System Criteria (see above) applicable to the overall accounting system and significant cost elements. Criteria identify the required or desired state or expectation with respect to the program or operation and provide a context for evaluating evidence and understanding the findings, conclusions, and recommendations in the report. For internal controls, the criteria should be framed in the context of the cost element, business process, and accounting system criteria.

- ***Condition:*** The condition is a situation that exists and is discovered during the audit. For a system deficiency, the condition is due to either internal controls or other shortcomings in the system. For example, the auditor sampled 50 invoices for evidence of an approval control and identified 10 out of 50 as lacking approval.

- ***Cause:*** The cause is the factor or factors responsible for the deficiency. For internal controls, the cause can be due to the design or operation, and for shortcomings the cause could be due to a

[16] GAO, FY 2018 Yellow Book, paragraph 7.19

noncompliance with a prescribed contract term or a deviation in the contractors documented policy and procedures. The cause is the factor or factors responsible for the difference between the condition and the criteria, and may also serve as a basis for recommendations for corrective actions. Common factors include poorly designed policies, procedures, or criteria and inconsistent, incomplete, or incorrect implementation.

- ***Effect or Potential Effect:*** The effect or potential effect is the outcome or consequence resulting from the difference between the condition and the criteria. The severity of the system deficiency as a material weakness, significant deficiency, or other deficiency is correlated to the effect or potential effect. Effect or potential effect may be used to demonstrate the need for corrective action in response to identified problems or relevant risks.

APPENDIX A: CONSIDERATION OF MATERIALITY AND INDIRECT COSTS

Indirect costs are allocated to contracts by using indirect cost rates, which represent a pool of indirect costs divided by a cost base of a contractor's direct and/or indirect activities. Indirect costs are, by definition, costs that cannot be directly allocated to contracts. A contractor's final indirect cost rate proposal (i.e., incurred cost proposal) contains several schedules that identify these pools and bases.

Participation Percent: Because indirect costs are not directly charged to contracts, they are allocated over a base of costs representing business activities that may include a mix of commercial and competitively award fixed price work, as well as flexibly-priced government contracts. Therefore, the indirect costs allocated to flexibly priced government contracts may be less than the total amount of the respective indirect cost pool(s). The participation percentage for each final indirect cost pool reflects the proportion of flexibly-priced government contract activity within the allocation base to the total of all activity in the allocation base. For example, if a general and administrative (G&A) cost base is $1,000,000 and the cost of activity on flexibly priced government contracts is $100,000 of the base, then the participation percent is 10 percent ($100,000/$1,000,000). This affects the audit approach for indirect costs because adjusted materiality should take into account the participation percent.

See the FAR and CAS for additional information on indirect costs and rates.

The following steps should be followed by an auditor when calculating adjusted materiality for indirect costs:

- The auditor will calculate quantified materiality and determine whether the indirect cost elements are significant.
- From the perspective of quantified materiality, the significance of indirect costs is based on the contribution of those costs to the total subject matter.
- If the specific indirect cost element is immaterial, then the auditor may perform limited procedures.

The example below includes direct and indirect cost elements with a total subject matter amount of $8,219,400. The subject matter amount is the summation of all costs direct and indirect. Quantified materiality is calculated using the total subject matter and the materiality formula in this chapter, which results in a benchmark of $136,490, or 1.66 percent of the subject matter ($136,490/$8,219,400). An auditor will compare the quantified materiality to the cost elements and determine whether they are significant. Using this approach, the cost elements of direct labor, subcontracts, overhead indirect costs, and G&A costs are considered quantitatively material. Note, an auditor may still consider certain quantitatively immaterial cost elements to be material based on their professional judgment concerning risk and qualitative factors.

Figure 5. Example with Indirect Costs

Incurred Cost Proposal		> Materiality $136,490 (YES/NO)
Direct Costs:		
Direct Labor	$ 5,000,000	**YES**
Direct Materials	$ 100,000	NO
Other Direct Costs	$ 80,000	NO
Subcontracts	$ 1,000,000	**YES**
Indirect Costs:		
Overhead	$ 1,112,400	**YES**
General and Administrative	$ 927,000	**YES**
Total Subject Matter:	$ 8,219,400	
Materiality Threshold:	**$ 136,490**	

For the calculation of adjusted materiality, an auditor should revise quantified materiality for the indirect costs 'participation percent' to identify significant accounts. The table below compares the costs allocated to flexibly priced government contracts (i.e., subject matter) to the total costs in the pool, which, when divided together, yields the participation percent.

Table 10. Comparison of Costs Allocated to Flexibly Priced Government Contracts

Indirect Costs:	Total Subject Matter	Total Cost in Pool	Participation Rate
Overhead	$1,112,400	$11,124,000	10%
General and Administrative	$927,000	$11,587,500	8%

Based on the above calculation the government participation percent for overhead costs is 10 percent and G&A costs is 8 percent. An auditor may now revise the quantified materiality for the participation percent. This aligns the materiality for the engagement to the total cost in the pools. Because the government participates in these pools, 10 percent and 8 percent, respectively, misstatements (individually or in the aggregate) in the overhead and G&A pools would have to exceed $1,364,898 and $1,706,122, respectively, to yield a $136,490 misstatement on flexibly priced government contracts.

Table 11. Revised Materiality Calculations

Indirect Costs:	Participation Percent	Materiality	Revised Materiality
Overhead	10%	$136,490	$1,364,898
General and Administrative	8%	$136,490	$1,706,122

The revised materiality amount for the overhead cost is calculated by dividing the quantified materiality of $136,490 by 10 percent. The revised materiality amount for general and administrative cost is calculated by dividing the quantified materiality of $136,490 by 8 percent.

- Calculate adjusted materiality using the revised quantified materiality (see above) and in the same manner as Step 3 of the Engagement Materiality Framework. The adjusted materiality will be used for the identification of significant accounts that comprise the indirect cost rate pool.

The following example uses a reduction of 20 percent to calculate adjusted materiality.

Table 12. Materiality Adjusted by 20 Percent

Indirect Costs:	Revised Materiality	Adjustment	Adjusted Materiality
Overhead	$ 1,364,898	20%	$ 1,091,918
General and Administrative	$ 1,706,122	20%	$ 1,364,898

- Based on adjusted materiality, determine which accounts are quantitatively material. Evaluate the accounts for factors such as risk, qualitative factors, and variability. Determine the nature, timing, and extent of testing.

The following example compares the adjusted materiality amount of $1,091,918 to accounts in the overhead cost pool. This illustration lists only three accounts of many. Based on adjusted materiality, only the labor account is considered significant. The process for the general and administrative accounts is the same as the overhead accounts.

Table 13. Comparison of Adjusted Materiality to Accounts in Overhead Cost Pool

Overhead Pool Accounts		Amount	> Adjusted Materiality (YES/NO)
6001	Labor	$ 3,000,000	**YES**
6002	Operating Supplies	$ 900,000	NO
6003	Computer & Data Process Supply	$ 100,000	NO
XXXX	…….	…….	…….
		$ 11,124,000	

Auditors are responsible for determining the nature, timing, and extent of audit procedures for the labor account. Note, auditors may consider accounts less than adjusted materiality to be significant based on their professional judgment of risk and qualitative factors.

APPENDIX B: TOTAL SUBJECT MATTER

From an audit perspective, the total subject matter is defined as the information on which the auditor provides an opinion (i.e., assurance) or conclusion. For incurred cost audits, the subject matter is defined as cost claimed on flexibly priced contracts during the year and includes different categories of cost such as labor, materials, other direct costs, and indirect costs. For time and material (T&M) contracts, the definition of flexibly priced contracts includes the material portion, but it is not uncommon to test both materials and labor (e.g., labor categories and labor hours) as part of the incurred cost audit due to audit efficiency.

Section 803 of the FY 2018 NDAA, defines *flexibly priced contract* the same as the term *flexibly-priced contracts and subcontracts* in FAR Part 30 (Section 30.001 of Title 48, CFR).

Total subject matter generally includes the following:

- The direct and indirect cost of flexibly priced prime contracts and subcontracts awarded by DoD.
- The direct and indirect costs of flexibly priced prime contracts and subcontracts awarded by an agency other than DoD and the agency has agreed to the audit.
- The amount billed on prime T&M contracts that are awarded by DoD.
- The amount billed on prime T&M contracts that are awarded by an agency other than the DoD and the agency has agreed to the audit.

Total subject matter generally excludes the following:

- The direct and indirect cost of flexibly priced contracts and subcontracts awarded by agencies other than DoD that have not agreed to the audit.
- The amount billed for prime T&M contracts awarded by agencies other than DoD that have not agreed to the audit.
- Amounts for contracts that are not flexibly priced such as firm-fixed-price contracts.
- Amounts for nongovernment activity such as commercial activities.

Section 6
Streamlining and Improving Compliance

Implementation Details

Recommendation 62

RECOMMENDED REPORT LANGUAGE

SEC. ___. LIMITATION ON REQUIRED FLOW DOWN OF CONTRACT CLAUSES TO SUBCONTRACTORS PROVIDING COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES.

This provision would amend section 2375 of title 10, United States Code, and section 1906 of title 41, United States Code, to require the consolidation of Federal Acquisition Regulation (FAR) mandatory subcontracting flow-down clauses into a single clause. The committee notes that currently the increasingly large number of flow-down clauses often leads to confusion for many contractors, especially for small or non-traditional companies.

The provision would also prohibit federal agencies from requiring any other FAR clauses to be flowed down to commercial subcontracts. The committee notes that the Defense Federal Acquisition Regulation Supplement (DFARS) 252.244-7000 does not specifically identify the Defense Department's prime contract clauses required to be flowed down to subcontracts for commercial items. The regulation instead relies on prime contractors or higher-tier subcontractors to determine flow-down applicability on a clause-by-clause basis. The committee further notes the current government contracting environment leads to prime contractors either taking a very conservative approach to tailoring flowdowns or not tailoring them at all. These approaches may result in improper compliance requirement burdens which impede the efficiency of the defense acquisition system, and serve as a barrier to entry for non-traditional businesses.

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SEC. ___. LIMITATION ON REQUIRED FLOWDOWN OF CONTRACT CLAUSES TO SUBCONTRACTORS PROVIDING COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES.

(a) CONTRACT CLAUSES REQUIRED IN THE FEDERAL ACQUISITION REGULATION.—Section 1906(c) of title 41, United States Code, is amended by adding at the end the following new paragraph:

"(5) LIMITATION ON CLAUSES.—

"(A) An executive agency may not require that a clause be included in a subcontract for commercial products and services other than a clause required by a provision of law that is not on the list included in the Federal Acquisition Regulation under paragraph (2).

"(B) The Federal Acquisition Regulation shall provide for implementation of all provisions of law applicable to subcontracts for commercial products and services through—

"(i) a single clause applicable to contracts for commercial products and services; and

"(ii) a single clause applicable to contracts for noncommercial products and services.".

(b) CONTRACT CLAUSES REQUIRED IN THE DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT.—Section 2375(c) of title 10, United States Code, is amended—

(1) by redesignating paragraph (4) as paragraph (5); and

(2) by inserting after paragraph (3) the following new paragraph (4):

"(4)(A) The Secretary of Defense may not require that a defense-unique clause be included in a subcontract for commercial products and services other than a clause required by a provision of law, or a contract clause requirement, that is not on the list included in the Defense Federal Acquisition Regulation Supplement under paragraph (2).

"(B) The Defense Federal Acquisition Regulation Supplement shall provide for implementation of all defense-unique provisions of law and contract clause requirements that are applicable to subcontracts for commercial products and services through—

"(i) a single clause applicable to contracts for commercial products and services; and

"(ii) a single clause applicable to contracts for noncommercial products and services.".

(c EFFECTIVE DATES.—(1) Paragraph (5)(A) of section 1906(c) of title 41, United States Code, as added by subsection (a), and paragraph (4)(A) of section 2375(c) of title 10, United States Code, as added by subsection (b), shall apply with respect to solicitations issued by the Government after the end of the 120-day period beginning on the date of the enactment of this Act.

(2) The Federal Acquisition Regulation shall be updated to implement paragraph (5)(B) of section 1906(c) of title 41, United States Code, as added by subsection (a), and the Defense Federal Acquisition Regulation Supplement shall be updated to implement paragraph (4)(B) of section 2375(c) of title 10, United States Code, as added by subsection (b), not later than the end of the 180-day period beginning on the date of the enactment of this Act.

Title 41, United States Code

§1906. List of laws inapplicable to procurements of commercial items

(a) DEFINITION.—In this section, the term "Council" has the meaning given that term in section 1301 of this title.

(b) CONTRACTS.—

(1) INCLUSION IN FEDERAL ACQUISITION REGULATION.—The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercial items. A provision of law properly included on the list pursuant to paragraph (2) does not apply to purchases of commercial items by an executive agency. This section does not render a provision of law not included on the list inapplicable to contracts for the procurement of commercial items.

(2) LAWS ENACTED AFTER OCTOBER 13, 1994.—A provision of law described in subsection (d) that is enacted after October 13, 1994, shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Council makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the applicability of the provision.

(c) SUBCONTRACTS.—

(1) Definition.—In this subsection, the term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. The term does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Federal Government and other parties and are not identifiable to any particular contract.

(2) INCLUSION IN FEDERAL ACQUISITION REGULATION.—The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to subcontracts under a contract or subcontract for the procurement of commercial items. A provision of law properly included on the list pursuant to paragraph (3) does not apply to those subcontracts. This section does not render a provision of law not included on the list inapplicable to subcontracts under a contract for the procurement of commercial items.

(3) PROVISIONS TO BE EXCLUDED FROM LIST.—A provision of law described in subsection (d) shall be included on the list of inapplicable provisions of law required by paragraph (2) unless the Council makes a written determination that it would not be in the best interest of the Federal Government to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision.

(4) WAIVER NOT AUTHORIZED.—This subsection does not authorize the waiver of the applicability of any provision of law with respect to any subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

(5) LIMITATION ON CLAUSES.—

(A) An executive agency may not require that a clause be included in a subcontract for commercial products and services other than a clause required by a provision of law that is not on the list included in the Federal Acquisition Regulation under paragraph (2).

(B) The Federal Acquisition Regulation shall provide for implementation of all provisions of law applicable to subcontracts for commercial products and services through—

(i) a single clause applicable to contracts for commercial products and services; and

(ii) a single clause applicable to contracts for noncommercial products and services.

(d) COVERED LAW.—A provision of law referred to in subsections (b)(2) and (c) is a provision of law that the Council determines sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that—

(1) provides for criminal or civil penalties; or

(2) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

(e) PETITION.—A person may petition the Administrator to take appropriate action when a provision of law described in subsection (d) is not included on the list of inapplicable provisions of law as required by subsection (b) or (c) and the Council has not made a written determination pursuant to subsection (b)(2) or (c)(3). The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Council makes a determination pursuant to subsection (b)(2) or (c)(3) within 60 days after the petition is received.

Title 10, United States Code

§2375. Relationship of commercial item provisions to other provisions of law

(a) Applicability of Government-wide Statutes.-(1) No contract for the procurement of a commercial item entered into by the head of an agency shall be subject to any law properly listed in the Federal Acquisition Regulation pursuant to section 1906(b) of title 41.

(2) No subcontract under a contract for the procurement of a commercial item entered into by the head of an agency shall be subject to any law properly listed in the Federal Acquisition Regulation pursuant to section 1906(c) of title 41.

(3) No contract for the procurement of a commercially available off-the-shelf item entered into by the head of an agency shall be subject to any law properly listed in the Federal Acquisition Regulation pursuant to section 1907 of title 41.

(b) Applicability of Defense-unique Statutes to Contracts for Commercial Items.-(1) The Defense Federal Acquisition Regulation Supplement shall include a list of defense-unique provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to contracts for the procurement of commercial items. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to purchases of commercial items by the Department of Defense. This section does not render a provision of law or contract clause requirement not included on the list inapplicable to contracts for the procurement of commercial items.

(2) A provision of law or contract clause requirement described in subsection (e) that is enacted after January 1, 2015, shall be included on the list of inapplicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition, Technology, and Logistics makes a written determination that it would not be in the

best interest of the Department of Defense to exempt contracts for the procurement of commercial items from the applicability of the provision or contract clause requirement.

(c) Applicability of Defense-unique Statutes to Subcontracts for Commercial Items.-(1) The Defense Federal Acquisition Regulation Supplement shall include a list of provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to subcontracts under a Department of Defense contract or subcontract for the procurement of commercial items. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to those subcontracts. This section does not render a provision of law or contract clause requirement not included on the list inapplicable to subcontracts under a contract for the procurement of commercial items.

(2) A provision of law or contract clause requirement described in subsection (e) shall be included on the list of inapplicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition, Technology, and Logistics makes a written determination that it would not be in the best interest of the Department of Defense to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision or contract clause requirement.

(3) In this subsection, the term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. The term does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract.

(4)(A) The Secretary of Defense may not require that a defense-unique clause be included in a subcontract for commercial products and services other than a clause required by a provision of law, or a contract clause requirement, that is not on the list included in the Defense Federal Acquisition Regulation Supplement under paragraph (2).

(B) The Defense Federal Acquisition Regulation Supplement shall provide for implementation of all defense-unique provisions of law and contract clause requirements that are applicable to subcontracts for commercial products and services through—

(i) a single clause applicable to contracts for commercial products and services; and

(ii) a single clause applicable to contracts for noncommercial products and services.

~~(4)~~ **(5)** This subsection does not authorize the waiver of the applicability of any provision of law or contract clause requirement with respect to any first-tier subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

(d) Applicability of Defense-unique Statutes to Contracts for Commercially Available, Off-the-shelf Items.-(1) The Defense Federal Acquisition Regulation Supplement shall include a list of provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to Department of Defense contracts for the procurement of commercially available off-the-shelf items. This section does not render a provision of law or

contract clause requirement not included on the list inapplicable to contracts for the procurement of commercially available off-the-shelf items.

(2) A provision of law or contract clause requirement described in subsection (e) shall be included on the list of inapplicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition, Technology, and Logistics makes a written determination that it would not be in the best interest of the Department of Defense to exempt contracts for the procurement of commercially available off-the-shelf items from the applicability of the provision or contract clause requirement.

(e) Covered Provision of Law or Contract Clause Requirement.-A provision of law or contract clause requirement referred to in subsections (b)(2), (c)(2), and (d)(2) is a provision of law or contract clause requirement that the Under Secretary of Defense for Acquisition, Technology, and Logistics determines sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law or contract clause requirement that-

(1) provides for criminal or civil penalties;

(2) requires that certain articles be bought from American sources pursuant to section 2533a of this title, or requires that strategic materials critical to national security be bought from American sources pursuant to section 2533b of this title; or

(3) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

Recommendation 63

RECOMMENDED REPORT LANGUAGE

SEC. ___. SUPPLY CHAIN RISK MITIGATION POLICIES TO BE IMPLEMENTED THROUGH REQUIREMENTS GENERATION PROCESS.

This provision would amend section 807 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 2302 note). The amendment would require the Defense Department to develop tools for supply chain risk mitigation policies through the requirements generation process, rather than through the Defense Acquisition Regulation (DAR) Council process, as is currently done.

The committee notes that supply chain risk issues have grown in importance as the United States defense acquisition supply base has become increasingly global. The committee further recognizes that supply chain risk mitigation is requirements-specific and that recent attempts to create supply chain risk mitigation policy through the DAR Council may result in policy that is not adequately tailored or tailorable to the requirement.

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SEC. ___. SUPPLY CHAIN RISK MITIGATION POLICIES TO BE IMPLEMENTED THROUGH REQUIREMENTS GENERATION PROCESS.

(a) PROCESS FOR ENHANCED SUPPLY CHAIN SCRUTINY.—Subsection (b) of section 807 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 2302 note) is amended—

(1) by redesignating paragraphs (5) through (9) as paragraphs (6) through (10), respectively; and

(2) by inserting after paragraph (4) the following new paragraph (5):

"(5) Development of tools for implementing supply chain risk mitigation policies through the requirements generation process rather than through the Defense Acquisition Regulation Council process.".

(b) TECHNICAL AMENDMENT.—Subsection (a) of such section is amended by striking "Not later than" and all that follows through "the Secretary" and inserting "The Secretary".

(c) EFFECTIVE DATE.—Not later than the end of the 90-day period beginning on the date of the enactment of this Act, the Secretary of Defense shall revise the process established under section 807 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 2302 note) to implement paragraph (5) of subsection (b) of that section, as added by subsection (a)(2).

Changes to Existing Law: This proposal would change existing law as follows:

Section 807 of the National Defense Authorization Act for Fiscal Year 2018
(Public Law 115-91; 10 U.S.C. 2302 note)

SEC. 807. PROCESS FOR ENHANCED SUPPLY CHAIN SCRUTINY.

(a) PROCESS.—~~Not later than 90 days after the date of the enactment of this Act, the~~ **The** Secretary of Defense shall establish a process for enhancing scrutiny of acquisition decisions in order to improve the integration of supply chain risk management into the overall acquisition decision cycle.

(b) ELEMENTS.—The process under subsection (a) shall include the following elements:

(1) Designation of a senior official responsible for overseeing the development and implementation of the process.

(2) Development or integration of tools to support commercial due-diligence, business intelligence, or otherwise analyze and monitor commercial activity to understand business relationships with entities determined to be threats to the United States.

(3) Development of risk profiles of products or services based on commercial due-diligence tools and data services.

(4) Development of education and training curricula for the acquisition workforce that supports the process.

(5) Development of tools for implementing supply chain risk mitigation policies through the requirements generation process rather than through the Defense Acquisition Regulation Council process.

~~(5)~~ **(6)** Integration, as needed, with intelligence sources to develop threat profiles of entities determined to be threats to the United States.

~~(6)~~ **(7)** Periodic review and assessment of software products and services on computer networks of the Department of Defense to remove prohibited products or services.

~~(7)~~ **(8)** Synchronization of the use of current authorities for making supply chain decisions, including section 806 of Public Law 111–383 (10 U.S.C. 2304 note) or improved use of suspension and debarment officials.

~~(8)~~ **(9)** Coordination with interagency, industrial, and international partners, as appropriate, to share information, develop Government-wide strategies for dealing with significant entities determined to be significant threats to the United States, and effectively use authorities in other departments and agencies to provide consistent, Government-wide approaches to supply chain threats.

~~(9)~~ **(10)** Other matters as the Secretary considers necessary.

(c) NOTIFICATION.—Not later than 90 days after establishing the process required by subsection (a), the Secretary shall provide a written notification to the Committees on Armed Services of the Senate and House of Representatives that the process has been established. The notification also shall include the following:

(1) Identification of the official designated under subsection (b)(1).

(2) Identification of tools and services currently available to the Department of Defense under subsection (b)(2).

(3) Assessment of additional tools and services available under subsection (b)(2) that the Department of Defense should evaluate.

(4) Identification of, or recommendations for, any statutory changes needed to improve the effectiveness of the process.

(5) Projected resource needs for implementing any recommendations made by the Secretary.

Recommendation 64

RECOMMENDED REPORT LANGUAGE

SEC. ___. MODIFICATIONS TO DOMESTIC PURCHASING PREFERENCE REQUIREMENTS.

This section would amend section 2375 title 10, United States Code, by adding a new paragraph to exclude Department of Defense purchases of commercial products from the Buy American Act requirements of section 8302, title 41, United States Code. This section would further amend title 10, United States Code, by including an exception to the Berry Amendment for Defense Department purchases of commercial products at section 2533a. Such section would be further amended to include a public interest exception identical to the exception established under the Buy American Act in title 41, United States Code, section 8302, and in title 10, United States Code, section 2533.

The committee is aware that domestic purchasing preferences, notably the Buy American Act and the Berry Amendment, can undermine the Department of Defense's ability to field the most innovative technologies to the warfighter in a rapid, cost-effective, and efficient manner. Granting exceptions to domestic purchasing preferences for commercial goods will enable the Department to expand opportunities to obtain new and innovative products from commercial and non-traditional suppliers while continuing to protect its defense-unique acquisitions. Additionally, the committee notes that allowing the Defense Department to grant public interest exceptions to the Berry Amendment will ensure that it can access advanced, state-of-the-art technology.

This section would also make an amendment to section 8302(b)(2), title 41, United States Code, to codify the commercial information technology (IT) exception.

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SEC. ___. MODIFICATIONS TO DOMESTIC PURCHASING PREFERENCE REQUIREMENTS.

(a) EXCEPTIONS FOR DEPARTMENT OF DEFENSE PURCHASES OF COMMERCIAL ITEMS.—

(1) BUY AMERICAN ACT.—Section 2375(a) of title 10, United States Code, is amended by adding at the end the following new paragraph:

"(4)(A) No contract for the procurement of a commercial item or (effective January 1, 2020) a commercial product entered into by the Secretary of Defense or the Secretary of a military department shall be subject to section 8302 of title 41.

"(B) No subcontract under a contract described in subparagraph (A) entered into by the Secretary of Defense or the Secretary of a military department shall be subject to section 8302 of title 41.".

(2) BERRY AMENDMENT.—

(A) EXCEPTION FOR COMMERCIAL ITEMS.—Subsection (i) of section 2533a of such title is amended to read as follows;

"(i) EXCEPTION FOR COMMERCIAL ITEMS.—Subsection (a) does not apply to contracts and subcontracts for the procurement of commercial items.".

(B) CONFORMING AMENDMENT.—Subsection (a) of such section is amended by striking "Except as provided in subsections (c) through (h)," and inserting "Except as provided in subsections (c) through (i),".

(b) PUBLIC INTEREST EXCEPTION TO BERRY AMENDMENT.—Section 2533a of such title, as amended by subsection (a)(2), is further amended—

(1) by striking "(c) AVAILABILITY EXCEPTION.—" and inserting "(2) AVAILABILITY EXCEPTION.—";

(2) by realigning paragraph (2), as so designated, two ems to the right; and

(3) by inserting immediately before that paragraph the following:

"(c) PUBLIC INTEREST AND AVAILABILITY EXCEPTIONS.—

"(1) PUBLIC INTEREST EXCEPTION.—Subsection (a) does not apply to the procurement of an item described in subsection (b) to the extent that the Secretary of Defense or the Secretary of the military department concerned determines that applicability of subsection (a) to that procurement would be inconsistent with the public interest.".

(c) CODIFICATION OF RECURRING APPROPRIATIONS PROVISION.—Section 8302(b)(2) of title 41, United States Code, is amended—

(1) by striking "and" at the end of subparagraph (B);

(2) by striking the period at the end of subparagraph (C) and inserting "; and"; and

(3) by adding at the end the following new subparagraph:

"(D) to information technology (as defined in section 11101 of title 40) that is a commercial item (as defined in section 103 of this title) or, effective January 1, 2020, that is a commercial product or commercial service (as defined in sections 103 and 103a, respectively, of this title).".

Recommendation 65

RECOMMENDED REPORT LANGUAGE

SEC. ___. THRESHOLD FOR APPLICABILITY OF CERTAIN SOCIOECONOMIC LAWS TO DEPARTMENT OF DEFENSE CONTRACTS.

This section would amend title 10, United States Code, by inserting a new section 2338a to establish a "socioeconomic labor threshold" of $2 million. This threshold would apply to the Davis-Bacon Act, the Walsh-Healey Public Contracts Act, and the Services Contract Act.

The committee is concerned that the Davis-Bacon Act, the Walsh-Healey Public Contracts Act, and the Service Contract Act may negatively affect Department of Defense acquisitions in several ways, including cost inflation and administrative burden. The committee notes that the thresholds for these laws have not been increased since their enactment. The committee does not recommend repealing these laws or waiving their applications to defense contracts. The committee notes that raising the relevant acquisition thresholds to $2 million will strike a balance between lessening the burden on contract actions and continuing to uphold the intent of these laws for Defense Department contracts.

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SEC. ___. INCREASE IN THRESHOLD FOR APPLICATION OF SOCIOECONOMIC STATUTES TO THE DEPARTMENT OF DEFENSE.

(a) IN GENERAL.—Chapter 137 of title 10, United States Code, is amended by inserting after section 2338 the following new section:

"§2338a. Threshold for applicability of certain socioeconomic laws to Department of Defense contracts

"(a) DAVIS-BACON ACT.—For purposes of the application of the Davis-Bacon Act to contracts entered by the Department of Defense, the amount in effect under section 3142(a) of title 40 is the Department of Defense socioeconomic threshold.

"(b) WALSH-HEALEY ACT.—For purposes of the application of the Walsh-Healey Act to contracts entered by the Department of Defense, the amount in effect under section 6502 of title 41 is the Department of Defense socioeconomic threshold.

"(c) SERVICE CONTRACT ACT.—For purposes of the application of the Service Contract Act to contracts entered by the Department of Defense, the amount in effect under section 6702(a)(2) of title 41 is the Department of Defense socioeconomic threshold.

"(d) DEFINITIONS.—In this section:

"(1) The term 'Davis-Bacon Act' means subchapter IV of chapter 31 of title 40.

"(2) The term 'Walsh-Healey Act' means chapter 65 of title 41.

"(3) The term "Service Contract Act' means chapter 67 of title 41.

"(4) The term "Department of Defense socioeconomic threshold' means $2,000,000.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2388 the following new item:

"2338a. Threshold for applicability of certain socioeconomic laws to Department of Defense contracts.".

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Recommendation 66

RECOMMENDED REPORT LANGUAGE

SEC.___. PURPOSE OF PROVIDING FOR REVIEW OF PROCUREMENT ACTIONS OF THE DEPARTMENT OF DEFENSE THROUGH THE GENERAL ACCOUNTING OFFICE PROCUREMENT PROTEST SYSTEM AND THROUGH CAUSES OF ACTION BEFORE THE UNITES STATES COURT OF FEDERAL CLAIMS.

This provision would create a new section 2317 of title 10, United States Code, to establish a purpose statement for bid protests filed in response to Department of Defense procurement actions or proposed procurement actions. This purpose statement would recognize the role protests play in the acquisition system and would apply to bid protests filed at any of the available forums. The committee recognizes that protest actions present an opportunity for the Defense Department to remedy violations of procurement related statutes and regulations when identified by interested parties. The committee notes that bid protests and bid protest jurisdictions have evolved over time without there being a clear statement of purpose to ensure the integrity of the acquisition system. The committee also notes that the bid protest process must exhibit certain attributes to be an effective component of the acquisition system.

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SEC. ___. PURPOSE OF PROVIDING FOR REVIEW OF PROCUREMENT ACTIONS OF THE DEPARTMENT OF DEFENSE THROUGH THE GENERAL ACCOUNTING OFFICE PROCUREMENT PROTEST SYSTEM AND THROUGH CAUSES OF ACTION BEFORE THE UNITES STATES COURT OF FEDERAL CLAIMS.

(a) PURPOSE OF PROCUREMENT PROTEST SYSTEM AS APPLICABLE TO DEPARTMENT OF DEFENSE.—Chapter 137 of title 10, United States Code, is amended by inserting after section 2316 the following new section:

"§ 2317. Purpose of procurement protest procedures

"The purpose of Congress in providing for review of procurement actions of the Department of Defense through the procurement protest system under subchapter V of chapter 35 of title 31 and through causes of action under section 1491(b) of title 28 was to enhance confidence in the Department of Defense contracting process by providing—

"(1) a means, based on protests or actions filed by interested parties, for identification of violations of procurement statutes and regulations in a timely, transparent, and effective manner; and

"(2) a means for timely, transparent, and effective resolution of any such violation.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2316 the following new item:

"2317. Purpose of procurement protest procedures.".

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RECOMMENDED REGULATORY REVISIONS

SUBPART 233.1--PROTESTS

(Revised November 18, 2013)

233.102 General.

(a) The purpose of the review of procurement actions of the Department of Defense through the procurement protest system at the agency and before the Government Accountability office and at the Court of Federal Claims is to enhance confidence in the Department of Defense contracting process by—

(1) providing a means, based on protests or actions filed by interested parties, for violations of procurement statutes and regulations in a timely, transparent, and effective manner; and;

(2) a means for timely, transparent, and effective resolution of any such violation.

(b) If the Government exercises the authority provided in 239.7305(d) to limit disclosure of information, no action undertaken by the Government under such authority shall be subject to review in a bid protest before the Government Accountability Office or in any Federal court (see subpart 239.73).

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Recommendation 67

RECOMMENDED REPORT LANGUAGE

SEC. ___. TIMELINESS RULES FOR FILING AND DECIDING DEPARTMENT OF DEFENSE BID PROTEST CAUSES OF ACTION AT THE UNITED STATES COURT OF FEDERAL CLAIMS AND LIMITATION TO ACTIONS NOT ALREADY FILED WITH THE GENERAL ACCOUNTING OFFICE AS A BID PROTEST.

This section would amend section 1491 of title 28, United States Code, and section 3556 of title 31, United States Code, to ensure that procurement bid protests, based on substantially the same grounds, may be filed at either the Government Accountability Office (GAO) or the United States Court of Federal Claims (COFC), but not both. The amendment addresses pre-award protests in section 1491(b)(3)(B)(ii) of title 28 and post-award protests in section 1491(b)(3)(B)(iii) of title 28. The committee notes that the existing bid protest system allows for challenges at the level of the procuring agency, the GAO, or the COFC. The committee notes that there is currently nothing to prevent a company from protesting an award at the GAO, receiving an unfavorable result, and protesting the same award at the COFC with the expectation of a different result.

The committee further notes that the long time delays associated with re-litigating the same or substantially the same matter can impede the efficiency of the defense acquisition system. These time delays were addressed in the final report of the advisory panel established under section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92). This section would also require the COFC to render judgement on Department of Defense protest actions within 100 days, whenever the court orders or the parties agree to suspend contract award or performance while the protest action is being litigated. The committee notes that this time limit for rendering a decision is consistent with time limits for GAO and the direction in section 1491(b)(3) of title 28 for the Court to provide expeditious resolution of actions related to national defense and national security.

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SEC. ___. TIMELINESS RULES FOR FILING AND DECIDING DEPARTMENT OF DEFENSE BID PROTEST CAUSES OF ACTION AT THE UNITED STATES COURT OF FEDERAL CLAIMS AND LIMITATION TO ACTIONS NOT ALREADY FILED WITH THE COMPTROLLER GENERAL AS A BID PROTEST.

(a) JURISDICTION.—Section 1491(b) of title 28, United States Code, is amended—

(1) in paragraph (1), by inserting ", subject to paragraph (3)(B)" before the period at the end; and

(2) in paragraph (3)—

(A) by inserting "(A)" after "(3)"; and

(B) by adding at the end the following new subparagraph:

"(B) In the case of a procurement action of the Department of Defense, the following limitations apply to actions before the United States Court of Federal Claims:

"(i) The Court does not have jurisdiction over an action objecting to a solicitation by the Department of Defense for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement by the Department of Defense if the interested party had previously filed a bid protest with the Comptroller General based on substantially the same objection to a solicitation, proposed award, or award of a contract or alleged violation of statute or regulation.

"(ii) The Court does not have jurisdiction over an action objecting to a Department of Defense solicitation for bids or proposals that is not instituted before bid opening or the time set by the Department of Defense for receipt of proposals.

"(iii) The Court does not have jurisdiction over an action objecting to a proposed award or award of a Department of Defense contract or an alleged violation of statute or regulation in connection with a procurement or proposed procurement action that is not instituted within 10 days of the interested party becoming aware, or should have become aware, of the basis for the action. In a case in which a debriefing is required, an objection was first submitted to the agency as an agency level protest, or both, the interested party may file an action at the Court within 10 days of the agency's action on the protest or completion of the debriefing, whichever is later.

"(iv) In any action under this subsection with respect to a procurement action of the Department of Defense, the Court shall render judgement within 100 days of the Court ordering, or the parties agreeing, that performance of the contract that is the subject of the action be suspended or that award of the contract that is the subject of the action be suspended.".

(b) TECHNICAL CORRECTIONS TO REFLECT PRIOR SUNSET.—Paragraph (1) of such section is further amended—

(A), by striking "Both the" in the first and second sentences and inserting "The"; and

(B) by striking "and the district courts of the United States" in the first and second sentences.

(c) CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Section 3556 of title 31, United States Code, is amended—

(A) by striking "agency or to file an action in" and inserting "agency. If a protest is filed under this subchapter with the Comptroller General, an action based on substantially the same protest grounds may not also be filed at"; and

(B) by striking the last sentence.

(2) SECTION HEADING AMENDMENT.—The heading of such section, and the item relating to such section in the table of sections at the beginning of chapter 35 of such title, are amended by striking the semicolon and the last four words.

(f) EFFECTIVE DATE.—The amendments made by this section shall apply to any cause of action filed 120 days or more after the date of the enactment of this Act.

Changes to Existing Law: This proposal would amend section 1491(b) of title 28, United States Code, and section 3556 of title 31, United States Code, as follows:

TITLE 28, UNITED STATES CODE

* * * * * * *

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a) ***

(b)(1) ~~**Both the**~~ **The** Unites States Court of Federal Claims ~~**and the district courts of the United States**~~ shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. ~~**Both the**~~ **The** United States Court of Federal Claims ~~**and the district courts of the United States**~~ shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded**, subject to paragraph (3)(B).**

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3)**(A)** In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(B) In the case of a procurement action of the Department of Defense, the following limitations apply to actions before the United States Court of Federal Claims:

(i) The Court does not have jurisdiction over an action objecting to a solicitation by the Department of Defense for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement by the Department of Defense if the interested party had previously filed a bid protest with the Comptroller General based on substantially the same objection to a solicitation, proposed award, or award of a contract or alleged violation of a statute or regulation.

(ii) The Court does not have jurisdiction over an action objecting to a Department of Defense solicitation for bids or proposals that is not instituted before bid opening or the time set by the Department of Defense for receipt of proposals.

(iii) The Court does not have jurisdiction over an action objecting to a proposed award or award of a Department of Defense contract or an alleged violation of statute or regulation in connection with a procurement or proposed procurement action that is not instituted within 10 days of the interested party becoming aware, or should have become aware, of the basis for the action. In a case in which a debriefing is required, an objection was first submitted to the agency as an agency level protest, or both, the interested party may file an action at the Court within 10 days of the agency's action on the protest or completion of the debriefing, whichever is later.

(iv) In any action under this subsection with respect to a procurement action of the Department of Defense, the Court shall render judgement within 100 days of the Court ordering, or the parties agreeing, that performance of the contract that is the subject of the action be suspended or that award of the contract that is the subject of the action be suspended.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A–76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) ***

TITLE 31, UNITED STATES CODE

* * * * * * *

§3556. Nonexclusivity of remedies~~; matters included in agency record~~

This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency**. If a protest is filed under this subchapter with the Comptroller General, ~~or to file~~** an action **based on substantially the same protest grounds may not also be filed at ~~in~~** the United States Court of Federal Claims. ~~In any such action based on a procurement or proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review.~~

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Recommendation 68

RECOMMENDED REPORT LANGUAGE

SEC. ___. THRESHOLD FOR REVIEW OF PROCUREMENT ACTIONS OF THE DEPARTMENT OF DEFENSE THROUGH THE GENERAL ACCOUNTING OFFICE PROCUREMENT PROTEST SYSTEM AND CAUSES OF ACTION BEFORE THE UNITED STATES COURT OF FEDERAL CLAIMS.

This section would amend section 1491 of title 28, United States Code, and section 3552 of title 31, United States Code. These sections, as amended, would allow companies to protest only the award of Department of Defense procurements at or above $75,000 in expected value to the Government Accountability Office or the United States Court of Federal Claims. Protests of procurements below this amount would be addressed solely at the procuring agency level. The committee expects these amendments to mitigate the problem identified by a 2018 Department of Defense-funded study finding that agencies often spend more taxpayer dollars processing and defending a protest than the actual value of the procurement.

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SEC. ___. THRESHOLD FOR REVIEW OF PROCUREMENT ACTIONS OF THE DEPARTMENT OF DEFENSE THROUGH THE GENERAL ACCOUNTING OFFICE PROCUREMENT PROTEST SYSTEM AND CAUSES OF ACTION BEFORE THE UNITES STATES COURT OF FEDERAL CLAIMS.

(a) GAO BID PROTESTS.—Section 3552(a) of title 31, United States Code, is amended by adding at the end the following new sentence: "A protest may not be filed under this subchapter with respect to an action of the Department of Defense unless the value (or anticipated value) of the contract or proposed contract (or other matter in question) is greater than $75,000.".

(b) JUDICIAL ACTIONS.—Section 1491(b) of title 28, United States Code, is amended by adding at the end the following new paragraph:

"(7) There is jurisdiction over an action described in paragraph (1) in the case of a proposed contract, or a proposed award or the award of a contract, or of a procurement or proposed procurement of the Department of Defense only if the value (or anticipated value) of the matter in question is greater than $75,000.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to any protest or cause of action filed after the end of the 120-day period beginning on the date of the enactment of this Act.

Changes to Existing Law: This proposal would amend section 3556 of title 31, United States Code, and section 1491(b) of title 28, United States Code, as follows:

TITLE 31, UNITED STATES CODE

* * * * * * *

§3552. Protests by interested parties concerning procurement actions

(a) A protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter. **A protest may not be filed under this subchapter with respect to an action of the Department of Defense unless the value (or anticipated value) of the contract or proposed contract (or other matter in question) is greater than $75,000.**

(b) ***

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TITLE 28, UNITED STATES CODE

* * * * * * *

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a) ***

(b)(1) Both the Unites States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded

(2) ***

* * * * * * *

(7) There is jurisdiction over an action described in paragraph (1) in the case of a proposed contract, or a proposed award or the award of a contract, or of a procurement or proposed procurement of the Department of Defense only if the value (or anticipated value) of the matter in question is greater than $75,000.

Recommendation 69

RECOMMENDED REPORT LANGUAGE

SEC. ___. REVISION TO INFORMATION THAT DEPARTMENT OF DEFENSE IS REQUIRED TO PROVIDE IN POST-AWARD DEBRIEFINGS.

This section would amend section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 2305 note) to expand what is required to be disclosed by the Department of Defense as part of a mandatory debriefing of offerors and when those debriefings are required. The Department would be required to provide the written technical evaluation of the offeror requesting a debriefing as part of the debriefing. The requirement to provide a debriefing when requested would also be expanded to all awards in excess of $10,000,000.

The committee notes that the Federal Acquisition Regulation already requires the information contained in the written technical evaluation to be provided to offerors that request a debriefing. A 2018 Department of Defense-funded study indicates that, in practice, complete information is often not provided to offerors. The committee expects that providing more complete information to offerors would lead to improved proposals on future acquisitions and reduce protests that often result from a lack of information.

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SEC. ___. REVISION TO INFORMATION THAT DEPARTMENT OF DEFENSE IS REQUIRED TO PROVIDE IN POST-AWARD DEBRIEFINGS.

(a) THRESHOLD FOR DEBRIEFINGS AND REQUIRED DISCLOSURES.—Section 818(a) of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 2305 note) is amended—

(1) in the matter preceding paragraph (1)—

(A) by striking "Not later than" and all that follows through "revise the" and inserting "The Secretary of Defense shall ensure that"; and

(B) by striking "to require that all required post-award debriefings" sand inserting "requires than any required post-award debriefing of an offeror"; and

(2) in paragraph (1)—

(A) by striking "in excess of $100,000,000" and inserting "for which a debriefing is required pursuant to paragraph (2)"; and

(B) by striking "and, in the case of" and all that follows through "such disclosure" and inserting "and of the written technical evaluation by the agency of the offeror requesting the debriefing".

(b) EFFECTIVE DATE.—The Secretary of Defense shall revise the Department of Defense Supplement to the Federal Acquisition Regulation to implement the amendments made by subsection (a) not later than the end of the 180-day period beginning on the date of the enactment of this Act.

Changes to Existing Law: This proposal would change existing law as follows:

National Defense Authorization Act for Fiscal Year 2018
(Public Law 115-91; 10 U.S.C. 2305 note)

SEC. 818. ENHANCED POST-AWARD DEBRIEFINGS.

(a) ~~Not later than 180 days after the date of the enactment of this Act [Dec. 12, 2017], the~~ **The** Secretary of Defense shall ~~revise~~ **ensure that** the Department of Defense Supplement to the Federal Acquisition Regulation ~~to require~~ **requires** that ~~all required post-award debriefings~~ **any required post-award debriefing of an offeror**, while protecting the confidential and proprietary information of other offerors, include, at a minimum, the following:

(1) In the case of a contract award ~~in excess of $10,000,000~~, **for which a debriefing is required pursuant to paragraph (2)**, a requirement for disclosure of the agency's written source selection award determination, redacted to protect the confidential and proprietary information of other offerors for the contract award, ~~and, in the case of a contract award in excess of $10,000,000 and not in excess of $100,000,000 with a small business or nontraditional contractor, an option for the small business or nontraditional contractor to request such disclosure~~ **and of the written technical evaluation by the agency of the offeror requesting the debriefing**.

(2) A requirement for a written or oral debriefing for all contract awards and task or delivery orders valued at $10,000,000 or higher.

(3) Provisions ensuring that both unsuccessful and winning offerors are entitled to the disclosure described in paragraph (1) and the debriefing described in paragraph (2).

(4) Robust procedures, consistent with section 2305(b)(5)(D) of title 10, United States Code, and provisions implementing that section in the Federal Acquisition Regulation, to protect the confidential and proprietary information of other offerors.

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RECOMMENDED REGULATORY REVISIONS

SUBPART 215.5—PREAWARD, AWARD, AND POSTAWARD NOTIFICATIONS, PROTESTS, AND MISTAKES

(Added November 18, 2013)

215.503 Notifications to unsuccessful offerors.

If the Government exercises the authority provided in 239.7305(d), the notifications to unsuccessful offerors, either preaward or postaward, shall not reveal any information that is determined to be withheld from disclosure in accordance with section 806 of the National Defense Authorization Act for Fiscal Year 2011, as amended by section 806 of the National Defense Authorization Act for Fiscal Year 2013 (see subpart 239.73).

215.506 Postaward debriefing of offerors.

(a) At a minimum, the debriefing information shall include—

(1) a copy of the source selection document redacted to protect proprietary information of offerors other than the offeror being debriefed; and

(2) a copy of the written technical evaluation of the offeror being debriefed.

~~(c)~~ (b) If the Government exercises the authority provided in 239.7305(d), the debriefing shall not reveal any information that is determined to be withheld from disclosure in accordance with section 806 of the National Defense Authorization Act for Fiscal Year 2011, as amended by section 806 of the National Defense Authorization Act for Fiscal Year 2013 (see subpart 239.73).

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Recommendation 70

RECOMMENDED REPORT LANGUAGE

SEC. ___. IMPROVED SYSTEM FOR DATA COLLECTION ON SERVICE CONTRACTING TO REPLACE CURRENT INVENTORY OF CONTRACTED SERVICES (ICS) SYSTEM.

This section would direct the Secretary of Defense to develop a services contracting reporting and analysis system as a replacement for the existing inventory of contracted services requirements under section 2330a, title 10, United States Code. The Secretary of Defense is further directed to propose any necessary statutory changes to implement the new system as well as a funding requirements estimate, and policy implementation language for the new system. The new system shall be specifically designed to support and integrate with the Department of Defense's total workforce management system and acquisition requirements development processes. The new system would be, in part, intended to resolve the problem of the current inventory of contracted services having developed into a legal compliance requirement rather than a tool for strategic decision-making or transparent oversight.

The committee notes that the current statute requires the collection of several specific data elements which may limit the Department of Defense's flexibility to engage in business process reengineering aimed at improving the inventory of contracted services data collection process. The committee, therefore, expects that the Department's proposed statutory language would address data collection needs while avoiding inadvertent barriers to technical innovation or business process reform.

The committee is aware that there is a need for the Department to collect information on contract employees for the purposes of proper oversight and efficient total force management. However, the committee notes that the large datasets produced under the current inventory of contracted services are of relatively little use for oversight or transparency purposes.

The committee recognizes that the current process for collecting inventory of contracted services data imposes additional administrative costs on contractors, adds to the Department's staff workload, and requires the ongoing maintenance of complicated, customized information management systems. The committee expects that, when formulating the new services contracting reporting and analysis system, the Department would minimize these administrative and maintenance costs to the maximum extent practicable.

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SEC. ___. IMPROVED SYSTEM FOR DATA COLLECTION ON SERVICE CONTRACTING TO REPLACE CURRENT INVENTORY OF CONTRACTED SERVICES (ICS) SYSTEM.

(a) SENSE OF CONGRESS.—It is the sense of Congress that the current system of the Department of Defense for data collection relating to contracted services, known as the Inventory of Contracted Services (ICS), established pursuant to section 2330a of title 10, United States Code, should be replaced by more effective system of data collection relating to such services in order to enable senior leaders of the Department—

(1) to better understand workforce composition to allow for more informed decisions on workforce staffing and funding decisions;

(2) to improve services acquisition strategy; and

(3) to improve oversight of service contracting.

(b) REPLACEMENT DATA COLLECTION AND REPORTING SYSTEM.—

(1) The Secretary of Defense shall develop a Services Contracting Reporting and Analysis System, consistent with the objectives stated in subsection (a), to be proposed as a replacement for the Inventory of Contracted Services requirements in effect under section 2330a of title 10, United States Code. The software and data standards developed for such system shall apply uniformly across the military departments and Defense Agencies.

(2) In developing the proposed Services Contracting Reporting and Analysis System pursuant to paragraph (1), the Secretary shall also develop—

(A) a draft for any statutory changes the Secretary determines to be needed in order to replace the Inventory of Contracted Services system with the proposed system;

(B) an estimate of funding requirements for the proposed system; and

(C) proposed revisions to Department of Defense directives and other administrative issuances that would be required for implementation of the proposed system, including any requirements under the proposed system for reporting by contractors.

(c) IMPLEMENTATION REPORT.—

(1) The Secretary of Defense shall submit to the congressional defense committees a report on the proposed Services Contracting Reporting and Analysis System developed pursuant to subsection (b) as a replacement for the Inventory of Contracted Services requirements in effect under section 2330a of title 10, United States Code.

(2) The report shall include the following:

(A) A descriptive overview, in nontechnical language, of the proposed system and the ways in which it differs from the Inventory of Contracted Services system.

(B) A list of data elements proposed to be made available through the proposed system.

(C) The matters specified in subsection (b)(2).

Recommendations 71, 72, and 73

RECOMMENDED REPORT LANGUAGE

SEC. ___. CONTRACT AUDIT PRACTICE.

This section would amend Section 893 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383; 10 U.S.C. 2302 note) by replacing "significant deficiency" with the term "material weakness." The committee notes that the proposed revised definition will better align review and approval of contractor business systems with generally accepted commercial and government auditing standards.

This section also would mandate the adoption of the Professional Practice Guide prepared by acquisition advisory panel, established under section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92). This section would require the Department of Defense to phase-in use of such practice guide within six-months after date of enactment and that the audit workforce would be properly trained regarding use of the Guide. This section would further establish a collaborative working group of subject matter experts, within and outside the government, in order to keep the Guide current with evolving audit practices.

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SEC. __. CONTRACT AUDIT PRACTICE.

(a) REVISION TO STANDARDS FOR CONTRACTOR BUSINESS SYSTEMS.—Section 893 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383; 10 U.S.C. 2302 note) is amended—

(1) by striking "significant deficiency" in subsections (b)(4), (b)(5), and (h)(3) and inserting "material weakness"; and

(2) by striking paragraph (4) of subsection (h) and inserting the following:

"(4)(A) The term 'material weakness' means a deficiency, or combination of deficiencies, in internal control over risks related to Government contract compliances or other shortcomings in the system, such that there is a reasonable possibility that a material noncompliance will not be prevented, or detected and corrected, on a timely basis.

"(B) For purposes of subparagraph (A), a reasonable possibility of an event shall be considered to exist when the likelihood of the event occurring is—

"(i) reasonably possible (meaning that the chance of the event occurring is more than remote but less than likely); or

"(ii) probable.".

(b) IMPLEMENTATION OF PROFESSIONAL PRACTICE GUIDE PREPARED BY SECTION 809 PANEL.—

(1) IN GENERAL.—The Secretary of Defense shall adopt the audit practice guide described in paragraph (2) for use as guidance in support of the contract audit practice of the Department of Defense and of the practice of any independent private auditor that the

Department may use in support of its contract audit needs. The guide is supplemental to, and does not supersede, regulations and auditing standards applicable to contract audits.

(2) PROFESSIONAL PRACTICE GUIDE.—The guide referred to in paragraph (1) is the Professional Practice Guide set forth in Attachment [X] of Volume III of the Report of the Section 809 Panel, dated January 15, 2019.

(3) DEADLINE.—Adoption and phase-in of the Professional Practice Guide in accordance with paragraph (1) shall be carried out not later than the end of the six-month period beginning on the date of the enactment of this Act. In adopting the guide, the Secretary shall ensure that the audit workforce is properly informed and trained as to the intent and expected use of the guide.

(c) WORKING GROUP FOR FUTURE CHANGES.—

(1) FINDING.—Congress finds that future changes to the Professional Practice Guide adopted pursuant to subsection (b) should be made through a collaborative process involving subject matter experts from a variety of relevant backgrounds who have expertise in the field of auditing, accounting, or both, similar to the process by which the guide was developed by the Section 809 Panel.

(2) WORKING GROUP.—The Secretary of Defense shall establish a working group composed of representatives of the Defense Contract Audit Agency and the Defense Contract Management Agency and representatives of other organizations from within the Government and outside the Government with expertise in auditing, accounting, or both.

(3) FUNCTION.—The working group shall ensure that the professional practice guide for contract audit practice adopted pursuant to subsection (a) stays current with changes in audit practice. The working group may adopt such changes to the guide as the

working group determines are appropriate for the purpose stated in the preceding sentence or as otherwise determined appropriate by the working group, and any changes adopted by the working group shall be made a part of the guide.

(4) ACTIVITIES TO BE COLLABORATIVE.—The activities of the working group shall be conducted so that proposed changes to the guide are considered collaboratively. As part of the collaborative process, the working group shall seek information from other public and private sector stakeholders as needed to facilitate any proposed changes.

(5) PUBLICATION.—Any revision to the guide that is adopted by the working group and the proceedings of the working group shall be posted on the website of the Defense Contract Audit Agency.

(6) FEDERAL ADVISORY COMMITTEE ACT EXEMPTION.—The working group shall be exempt from the Federal Advisory Committee Act.

(d) SECTION 809 PANEL.—In this section, the term "Section 809 Panel" means the panel established by the Secretary of Defense pursuant to section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), as amended by section 863(d) of the National Defense Authorization Act for Fiscal Year 2017 (P. L. 114-328) and sections 803(c) and 883 of the National Defense Authorization Act for Fiscal Year 2018 (P. L. 115-91).

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RECOMMENDED REGULATORY REVISIONS

252.242-7005 Contractor Business Systems.

As prescribed in 242.7001, use the following clause:

CONTRACTOR BUSINESS SYSTEMS (FEB 2012)

(a) This clause only applies to covered contracts that are subject to the Cost Accounting Standards under 41 U.S.C. chapter 15, as implemented in regulations found at 48 CFR 9903.201-1 (see the FAR Appendix).

(b) *Definitions*. As used in this clause deficiencies may be either of the following—

Material Weakness: A deficiency, or combination of deficiencies, in internal control over risks related to Government contract compliances or other shortcomings in the system, such that there is a reasonable possibility that a material noncompliance will not be prevented, or detected and corrected, on a timely basis. A reasonable possibility exists when the likelihood of an event occurring is either reasonably possible, meaning the chance of the future event occurring is more than remote but less than likely, or is probable

Significant Deficiency: A deficiency, or combination of deficiencies, in internal control over Government contract risks or other shortcomings in the system that is less severe than a material weakness yet important enough to merit the attention of those charged with governance.

Other Deficiency: A deficiency, or combination of deficiencies, in internal control over Government contract risks or other shortcomings in the system that have a clearly trivial, or inconsequential, effect on the ability of the business system to detect and correct errors on a timely basis.

Acceptable contractor business system: means contractor business systems that comply with the criteria of the applicable business system clauses and does not contain a material weakness that would affect the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes.

"Contractor business systems" means—

Accounting system, if this contract includes the clause at 252.242-7006, Accounting System Administration;

Earned value management system, if this contract includes the clause at 252.234-7002, Earned Value Management System;

Estimating system, if this contract includes the clause at 252.215-7002, Cost Estimating System Requirements;

Material management and accounting system, if this contract includes the clause at 252.242-7004, Material Management and Accounting System;

Property management system, if this contract includes the clause at 252.245-7003, Contractor Property Management System Administration; and

Purchasing system, if this contract includes the clause at 252.244-7001, Contractor Purchasing System Administration.

~~"Significant deficiency," in the case of a contractor business system, means a shortcoming in the system that materially affects the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes.~~

(c) *General*. The Contractor shall establish and maintain acceptable business systems in accordance with the terms and conditions of this contract.

(d) ~~*Significant deficiencies*~~ *Deficiencies*. (1) The Contractor shall respond, in writing, within 30 days to an initial determination that there are one or more deficiencies in one or more of the Contractor's business systems.

(2) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the final determination as to whether the Contractor's business system contains ~~significant deficiencies~~ material weaknesses. If the Contracting Officer determines that the Contractor's business system contains ~~significant deficiencies~~ material weaknesses such that the system would be disapproved, the final determination will include a notice to withhold payments.

(e) *Withholding payments*. (1) If the Contracting Officer issues the final determination with a notice to withhold payments for ~~significant deficiencies~~ material weaknesses in a contractor business system required under this contract, the Contracting Officer will withhold five percent of amounts due from progress payments and performance-based payments, and direct the Contractor, in writing, to withhold five percent from its billings on interim cost vouchers on cost-reimbursement, labor-hour, and time-and-materials contracts until the Contracting Officer has determined that the Contractor has corrected all significant deficiencies as directed by the Contracting Officer's final determination. The Contractor shall, within 45 days of receipt of the notice, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(2) If the Contractor submits an acceptable corrective action plan within 45 days of receipt of a notice of the Contracting Officer's intent to withhold payments, and the Contracting Officer, in

consultation with the auditor or functional specialist, determines that the Contractor is effectively implementing such plan, the Contracting Officer will reduce withholding directly related to the ~~significant deficiencies~~ material weaknesses covered under the corrective action plan, to two percent from progress payments and performance-based payments, and direct the Contractor, in writing, to reduce the percentage withheld on interim cost vouchers to two percent until the Contracting Officer determines the Contractor has corrected all ~~significant deficiencies~~ material weaknesses as directed by the Contracting Officer's final determination. However, if at any time, the Contracting Officer determines that the Contractor has failed to follow the accepted corrective action plan, the Contracting Officer will increase withholding from progress payments and performance-based payments, and direct the Contractor, in writing, to increase the percentage withheld on interim cost vouchers to the percentage initially withheld, until the Contracting Officer determines that the Contractor has corrected all ~~significant deficiencies~~ material weaknesses as directed by the Contracting Officer's final determination.

(3) *Payment withhold percentage limits*.

The total percentage of payments withheld on amounts due under each progress payment, performance-based payment, or interim cost voucher, on this contract shall not exceed--

Five percent for one or more ~~significant deficiencies~~ material weaknesses in any single contractor business system; and

Ten percent for ~~significant deficiencies~~ material weaknesses in multiple contractor business systems.

If this contract contains pre-existing withholds, and the application of any subsequent payment withholds will cause withholding under this clause to exceed the payment withhold percentage limits in paragraph (e)(3)(i) of this clause, the Contracting Officer will reduce the payment withhold percentage in the final determination to an amount that will not exceed the payment withhold percentage limits.

(4) For the purpose of this clause, payment means any of the following payments authorized under this contract:

Interim payments under—

Cost-reimbursement contracts;

Incentive type contracts;

Time-and-materials contracts;

Labor-hour contracts.

Progress payments.

Performance-based payments.

(5) Payment withholding shall not apply to payments on fixed-price line items where performance is complete and the items were accepted by the Government.

The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights or remedies the Government has under this contract.

Notwithstanding the provisions of any clause in this contract providing for interim, partial, or other payment withholding on any basis, the Contracting Officer may withhold payment in accordance with the provisions of this clause.

The payment withholding authorized in this clause is not subject to the interest-penalty provisions of the Prompt Payment Act.

(f) *Correction of deficiencies*. (1) The Contractor shall notify the Contracting Officer, in writing, when the Contractor has corrected the business system's deficiencies.

(2) Once the Contractor has notified the Contracting Officer that all deficiencies have been corrected, the Contracting Officer will take one of the following actions:

If the Contracting Officer determines that the Contractor has corrected all ~~significant deficiencies~~ material weaknesses as directed by the Contracting Officer's final determination, the Contracting Officer will, as appropriate, discontinue the withholding of progress payments and performance-based payments, and direct the Contractor, in writing, to discontinue the payment withholding from billings on interim cost vouchers under this contract associated with the Contracting Officer's final determination, and authorize the Contractor to bill for any monies previously withheld that are not also being withheld due to other significant deficiencies. Any payment withholding under this contract due to other ~~significant deficiencies~~ material weaknesses, will remain in effect until the Contracting Officer determines that those significant deficiencies are corrected.

If the Contracting Officer determines that the Contractor still has ~~significant deficiencies~~ material weaknesses the Contracting Officer will continue the withholding of progress payments and performance-based payments, and the Contractor shall continue withholding amounts from its billings on interim cost vouchers in accordance with paragraph (e) of this clause, and not bill for any monies previously withheld.

If the Contracting Officer determines, based on the evidence submitted by the Contractor, that there is a reasonable expectation that the corrective actions have been implemented and are expected to correct the ~~significant deficiencies~~ material weaknesses, the Contracting Officer will discontinue withholding payments, and release any payments previously withheld directly related to the ~~significant deficiencies~~ material weaknesses identified in the Contractor notification, and direct the Contractor, in writing, to discontinue the payment withholding from billings on interim cost vouchers associated with the Contracting Officer's final determination, and authorize the Contractor to bill for any monies previously withheld.

If, within 90 days of receipt of the Contractor notification that the Contractor has corrected the ~~significant deficiencies~~ material weaknesses, the Contracting Officer has not made a determination in accordance with paragraphs (f)(2)(i), (ii), or (iii) of this clause, the Contracting Officer will reduce withholding directly related to the ~~significant deficiencies~~ material weaknesses identified in the Contractor notification by at least 50 percent of the amount being withheld from progress payments and performance-based payments, and direct the Contractor, in writing, to reduce the payment withholding from billings on interim cost vouchers directly related to the ~~significant deficiencies~~ material weaknesses identified in the Contractor notification by a specified percentage that is at least 50 percent, but not authorize the Contractor to bill for any monies previously withheld until the Contracting Officer makes a determination in accordance with paragraphs (f)(2)(i), (ii), or (iii) of this clause.

At any time after the Contracting Officer reduces or discontinues the

withholding of progress payments and performance-based payments, or directs the

Contractor to reduce or discontinue the payment withholding from billings on interim cost vouchers under this contract, if the Contracting Officer determines that the Contractor has failed to correct the ~~significant deficiencies~~ material weaknesses identified in the Contractor's notification, the Contracting Officer will reinstate or increase withholding from progress payments and performance-based payments, and direct the Contractor, in writing, to reinstate or increase the percentage withheld on interim cost vouchers to the percentage initially withheld, until the Contracting Officer determines that the Contractor has corrected all ~~significant deficiencies~~ material weaknesses as directed by the Contracting Officer’s final determination.

252.242-7006 Accounting System Administration.
As prescribed in 242.7503, use the following clause:

ACCOUNTING SYSTEM ADMINISTRATION (FEB 2012)

a) *Definitions*. As used in this clause—

(1) "Acceptable accounting system" means a system that complies with the ~~system has an effective internal control structure complies with the system criteria in paragraph (c) of this clause to provide reasonable assurance that— (i) Applicable laws and regulations are complied with;~~

~~(ii) The accounting system and cost data are reliable;~~

~~(iii) Risk of misallocations and mischarges are minimized; and~~

~~(iv) Contract allocations and charges are consistent with billing procedures.~~
criteria of the applicable business system clauses and does not contain a material weakness that would affect the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes.

(2) "Accounting system" means the Contractor's system or systems for accounting methods, procedures, and controls established to gather, record, classify, analyze, summarize, interpret, and present accurate and timely financial data for reporting in compliance with applicable laws, regulations, and management decisions, and may include subsystems for specific areas such as indirect and other direct costs, compensation, billing, labor, and general information technology.

(3) "Material Weakness" means a deficiency, or combination of deficiencies, in internal control over risks related to Government contract compliances or other shortcomings in the system, such that there is a reasonable possibility that a material noncompliance will not be prevented, or detected and corrected, on a timely basis. A reasonable possibility exists when the likelihood of an event occurring is either reasonably possible, meaning the chance of the future event occurring is more than remote but less than likely, or is probable.

(4) "Significant Deficiency" ~~means a material weakness, or a combination of material weaknesses, in internal control over government reporting objectives, such that there is a reasonable possibility that a material mischarge will not be prevented or detected on a timely basis. A shortcoming in the system that materially affects the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes~~ a deficiency, or combination of deficiencies, in internal control over Government contract risks or other

shortcomings in the system that is less severe than a material weakness yet important enough to merit the attention of those charged with governance.

(5) "Other Deficiency" means a deficiency, or combination of deficiencies, in internal control over Government contract risks or other shortcomings in the system that have a clearly trivial, or inconsequential, effect on the ability of the business system to detect and correct errors on a timely basis.

(6) "Material Noncompliance" means a misstatement in the information provided to the Government (e.g. billings, incurred cost submissions, pricing proposals, etc.) that will materially influence, and may adversely impact the economic or management decisions of the users of the information.

(7) "Misstatement" means that contract costs that are billed, proposed, or reported, to the United States Government do not comply with contract terms and federal regulations such as contract terms, Federal Acquisition Regulations (FAR) and Cost Accounting Standards (CAS).

(8) Acceptable contractor business system means contractor business systems that comply with the criteria of the applicable business system clauses and does not contain a material weakness that would affect the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes.

(b) *General*. The Contractor shall establish and maintain an acceptable accounting system. Failure to maintain an acceptable accounting system, as defined in this clause, shall result in the withholding of payments if the contract includes the clause at 252.242-7005, Contractor Business Systems, and also may result in disapproval of the system.

(c) *System criteria*. The Contractor's accounting system shall be evaluated by an internal control audit that provides reasonable assurance that government reporting objectives are met. The auditor will evaluate whether key internal controls are in place and operating in order to – ~~provide for —~~provide reasonable assurance that:

- Direct costs and indirect costs are classified in accordance with contract terms, FAR, CAS and other regulations, as applicable.
- Direct costs are identified and accumulated by contract in accordance with contract terms, FAR, CAS and other regulations, as applicable.
- Methods are established to accumulate and allocate indirect costs to contracts in accordance with contract terms, FAR, CAS and other regulations, as applicable.
- General ledger control accounts accurately reflect all transactions recorded in subsidiary ledgers and/or other information systems that either integrate or interface with the general

ledger including, but not limited to, timekeeping, labor cost distribution, fixed assets, accounts payable, project costs, and inventory.
- Adjustments to the general ledger, subsidiary ledgers, or other information systems bearing upon the determination of contract costs (e.g. adjusting journal entries, reclassification journal entries, cost transfers, etc.) are done for reasons that do not violate contract terms, FAR, CAS, and other regulations, as applicable.
- Identification and treatment of unallowable costs are accomplished in accordance with contract terms, FAR, CAS and other regulations, as applicable.
- Billings are prepared in accordance with contract terms, FAR, CAS and other regulations, as applicable.

(d) ~~*Significant Deficiencies*~~ *Material Weaknesses*. (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, of any ~~significant deficiencies~~ material weaknesses. The initial determination will describe the ~~deficiency~~ weakness in sufficient detail to allow the Contractor to understand the deficiency.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies ~~significant deficiencies~~ material weaknesses in the Contractor's accounting system. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing.

(3) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining ~~significant deficiencies~~ material weaknesses;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval, if the Contracting Officer determines that one or more ~~significant deficiencies~~ material weaknesses remain.

(e) If the Contractor receives the Contracting Officer's final determination of ~~significant deficiencies~~ material weaknesses that may result in a system disapproval, the Contractor shall, within 45 days of receipt of the final determination, either correct the ~~significant deficiencies~~ material weaknesses or submit an acceptable corrective action plan showing milestones and actions to eliminate the ~~significant deficiencies~~ material weaknesses .

(f) *Withholding payments*. If the Contracting Officer makes a final determination to disapprove the Contractor's accounting system, and the contract includes the clause at 252.242-7005, Contractor Business Systems, the Contracting Officer will withhold payments in accordance with that clause. (End of clause)

SUBPART 242.70-- CONTRACTOR BUSINESS SYSTEMS

(Revised February 24, 2012)

242.7000 Contractor business system deficiencies.

(a) *Definitions.* As used in this subpart——

*"*Acceptable contractor business systems" and "contractor business systems" are defined in the clause at 252.242-7005, Contractor Business Systems.

"Covered contract" means a contract that is subject to the Cost Accounting Standards under 41 U.S.C. chapter 15, as implemented in regulations found at 48 CFR 9903.201-1

(see the FAR Appendix) (10 U.S.C. 2302 note, as amended by section 816 of Public Law 112-81).

~~Significant deficiency is~~*"*Deficiencies" are defined in the clause at 252.242-7005, Contractor Business Systems.

(b) *Determination to withhold payments*. If the contracting officer makes a final determination to disapprove a contractor's business system in accordance with the clause at 252.242-7005, Contractor Business Systems, the contracting officer shall—

(1) In accordance with agency procedures, identify one or more covered contracts containing the clause at 252.242-7005, Contractor Business Systems, from which payments will be withheld. When identifying the covered contracts from which to withhold payments, the contracting officer shall ensure that the total amount of payment withholding under 252.242-7005 does not exceed 10 percent of progress payments, performance-based payments, and interim payments under cost-reimbursement, labor-hour, and time-and-materials contracts billed under each of the identified covered contracts. Similarly, the contracting officer shall ensure that the total amount of payment withholding under the clause at 252.242-7005, Contractor Business Systems, for each business system does not exceed five percent of progress payments, performance-based payments, and interim payments under cost-reimbursement, labor-hour, and time-and-materials contracts billed under each of the identified covered contracts. The contracting officer has the sole discretion to identify the covered contracts from which to withhold payments.

(2) Promptly notify the contractor, in writing, of the contracting officer's determination to implement payment withholding in accordance with the clause at 252.242-7005, Contractor Business Systems. The notice of payment withholding shall be included in the contracting officer's written final determination for the contractor business system and shall inform the contractor that—

(i) Payments shall be withheld from the contract or contracts identified in the written determination in accordance with the clause at 252.242-7005, Contractor Business Systems, until

the contracting officer determines that there are no remaining ~~significant deficiencies material weaknesses~~; and

(ii) The contracting officer reserves the right to take other actions within the terms and conditions of the contract.

(3) Provide all contracting officers administering the selected contracts from which payments will be withheld, a copy of the determination. The contracting officer shall also provide a copy of the determination to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

(c) *Monitoring contractor's corrective action*. The contracting officer, in consultation with the auditor or functional specialist, shall monitor the contractor's progress in correcting the deficiencies. The contracting officer shall notify the contractor of any decision to decrease or increase the amount of payment withholding in accordance with the clause at 252.242-7005, Contractor Business Systems.

(d) *Correction of* ~~significant deficiencies~~ ~~*material weaknessess*~~. (1) If the contractor notifies the contracting officer that the contractor has corrected the ~~significant deficiencies~~ material weaknessess, the contracting officer shall request the auditor or functional specialist to review the correction to verify that the deficiencies have been corrected. If, after receipt of verification, the contracting officer determines that the contractor has corrected all ~~significant deficiencies~~ material weaknesses as directed by the contracting officer's final determination, the contracting officer shall discontinue the withholding of payments, release any payments previously withheld, and approve the system, unless other ~~significant deficiencies~~ material weaknesses remain.

(2) Prior to the receipt of verification, the contracting officer may discontinue withholding payments pending receipt of verification, and release any payments previously withheld, if the contractor submits evidence that the significant deficiencies have been corrected, and the contracting officer, in consultation with the auditor or functional specialist, determines that there is a reasonable expectation that the

corrective actions have been implemented and are expected to correct the ~~significant deficiencies~~ material weaknesses.

(3) Within 90 days of receipt of the contractor notification that the contractor has corrected the ~~significant deficiencies~~ material weaknesses, the contracting officer shall--

(i) Make a determination that—

(A) The contractor has corrected all ~~significant deficiencies~~ material weaknesses as directed by the contracting officer's final determination in accordance with paragraph (d)(1) of this section;

(B) There is a reasonable expectation that the corrective actions have been implemented in accordance with paragraph (d)(2) of this section; or

(C) The contractor has not corrected all ~~significant deficiencies~~ material weaknesses as directed by the contracting officer's final determination in accordance with paragraph (d)(1) of this section, or there is not a reasonable expectation that the corrective actions have been implemented in accordance with paragraph (d)(2) of this section; or

(ii) Reduce withholding directly related to the significant deficiencies covered under the corrective action plan by at least 50 percent of the amount being withheld from progress payments and performance-based payments, and direct the contractor, in writing, to reduce the percentage withheld on interim cost vouchers by at least 50 percent, until the contracting officer makes a determination in accordance with paragraph (d)(3)(i) of this section.

(4) If, at any time, the contracting officer determines that the contractor has failed to correct the ~~significant deficiencies~~ material weaknesses identified in the contractor's notification, the contracting officer will continue, reinstate, or increase withholding from progress payments and performance-based payments, and direct the contractor, in writing, to continue, reinstate, or increase the percentage withheld on interim cost vouchers to the percentage initially withheld, until the contracting officer determines that the contractor has corrected all ~~significant deficiencies~~ material weaknesses as directed by the contracting officer's final determination.

(e) For sample formats for written notifications of contracting officer determinations to initiate payment withholding, reduce payment withholding, and discontinue payment withholding in accordance with the clause at DFARS 252.242-7005, Contractor Business Systems, see PGI 242.7000.

242.7001 Contract clause.

Use the clause at 252.242-7005, Contractor Business Systems, in solicitations and contracts (other than in contracts with educational institutions, Federally Funded Research and Development Centers (FFRDCs), or University Associated Research Centers (UARCs) operated by educational institutions) when—

(a) The resulting contract will be a covered contract as defined in 242.7000(a); and

(b) The solicitation or contract includes any of the following clauses:

(1) 252.215-7002, Cost Estimating System Requirements.

(2) 252.234-7002, Earned Value Management System.

(3) 252.242-7004, Material Management and Accounting System.

(4) 252.242-7006, Accounting System Administration.

(5) 252.244-7001, Contractor Purchasing System Administration.

(6) 252.245-7003, Contractor Property Management System Administration.

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Section 7
Simplifying Procurement and Contracting

DoD should continue pre- and postaward procurement process improvement designed to encourage agility, value time and improve contracting best practices.

RECOMMENDATIONS

Rec. 74: Eliminate redundant documentation requirements or superfluous approvals when appropriate consideration is given and documented as part of acquisition planning.

Rec. 75: Revise regulations, instructions, or directives to eliminate non-value-added documentation or approvals.

Rec. 76: Revise the fair opportunity procedures and require their use in task and delivery order competitions.

Recommendations continued on following page.

RECOMMENDATIONS

Rec. 77: Require role-based planning to prevent unnecessary application of security clearance and investigation requirements to contracts.

Rec. 78: Include the supply of basic energy as an exemption under FAR 5.202.

Rec. 79: Enable enhanced use of advanced payments, at time of contract award, to small businesses.

Rec. 80: Preserve the preference for procuring commercial products and services when considering small business set-asides.

Rec. 81: Clarify and expand the authority to use Other Transaction agreements for production.

Rec. 82: Provide Armed Services Board of Contract Appeals authority to require filing of contract appeals through an electronic case management system.

Rec. 83: Raise the monetary threshold to provide agency boards of contract appeals accelerated, small business, and small claims (expedited) procedures to $250,000 and $150,000 respectively.

INTRODUCTION

The primary duty assigned to the Section 809 Panel by the FY 2016 NDAA was to review defense acquisition regulations "with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process."[1] During the course of this review of regulations, the Section 809 Panel was then tasked to make any recommendations to amend or repeal such regulations to:

> *(A) establish and administer appropriate buyer and seller relationships in the procurement system;*
>
> *(B) improve the functioning of the acquisition system;*
>
> *(C) ensure the continuing financial and ethical integrity of defense procurement programs;*
>
> *(D) protect the best interests of the Department of Defense;*
>
> *(E) improve the efficiency of the contract auditing process, including through the development of risk-based materiality standards; and*
>
> *(F) eliminate any regulations that are unnecessary for the purposes described in subparagraphs (A) through (E).*[2]

The following section addresses these primary duties in a direct and practical way. Although the topics of this section vary across the range of defense acquisition practices, they all are aimed at streamlining defense acquisition regulations. These recommendations undertake streamlining in one of four ways: decluttering excess documentation requirements or procedures; utilizing existing authorities in a more efficient way; removing rigidity; or clarifying definitions. These elements of streamlining seek to return time and flexibility to the acquisition workforce. Regulatory decluttering is a constant challenge for DoD; these recommendations take aim at improving some particularly timely and important acquisition issues.

It is difficult to overstate the effect of implementing the recommendations in this section. While many of the recommendations alter a few words or lines in existing regulations, these small changes echo across the defense acquisition workforce with wide effects *in the field*. In this way, the recommendations put forth by the Section 809 Panel in this section act as a fulcrum. Small movements beget major relief in DoD's day-to-day activities.

The remainder of this section is organized as follows. Recommendations 74 and 75 eliminate or revise eight duplicative or non-value-added documentation requirements in the package required in the execution of a contract. This decluttering will reduce paperwork and execution schedules, allowing contracting officers (COs) to focus on analysis over administration.

[1] FY 2016 NDAA, Pub. L. 114-94, Stat. 1356.
[2] Ibid.

Recommendations 76 and 77 differ in subject but encompass the same call to action: use existing authorities and processes to greatly reduce burden in the field. Recommendation 76 stresses using the allowed and streamlined fair opportunity procedures when competing orders under multiple-award indefinite delivery/indefinite quantity (MA IDIQ) contracts, rather than using the lengthier FAR Part 15 source selection procedures often used. Recommendation 77 requires that existing role-based planning be used for service contracts rather than requiring blanket security clearances and investigations. In terms of widespread impact, implementing Recommendation 77 would help reduce the security clearance investigation backlog of nearly 700,000 and allowing investigations to be conducted for those military and contractor employees with a true need for access.

Recommendations 78, 79, 82, and 83 remove the rigidity of the regulatory system in specific circumstances. Allowing for more flexibility in these areas provides relief to both the defense acquisition workforce and private sector companies. Recommendation 78 adds the purchasing of basic energy to the exemption list for announcing contract awards. This exemption allows energy to be purchased more closely to commercial standards, removing some barriers to entry for the energy industry and offering DoD price savings. Recommendation 79 allows advance payment on contract awards to provide small businesses needed capital, which is an identified challenge for small businesses and currently not recognized or encouraged to any significant extent. Recommendations 82 and 83 modernize the Armed Services Board of Contract Appeals (ASBCA) by allowing it to require filing in the board's electronic case management system (ECMS) and increasing the monetary threshold to allow for the use of expedited case resolution procedures. In both cases, implementing these recommendations would allow ASBCA to process, hear, and resolve more claims with less administrative burden.

Recommendations 80 and 81 offer clarifications to current regulations that have created confusion and misuse in the field. Recommendation 80 clarifies the preference for procuring commercial items when considering small business set-asides. Statute and regulations appear to provide contradictory guidance in this area; this recommendation provides a clear order of precedence. Recommendation 81 clarifies and expands the authorities for follow-on production under the Other Transactions Authority (OTA) regime. Clear, established authorities for follow-on production provide a valuable, streamlined path for moving from prototyping to production for these projects. Again, small regulatory adjustments have the potential to reverberate across DoD and to deliver great efficiencies to the acquisition workforce. This is perhaps the most important duty of the Section 809 Panel.

RECOMMENDATIONS 74 AND 75 SHARE THE COMMON THEME: ELIMINATE OR REVISE DOCUMENTATION REQUIREMENTS

The acquisition workforce (AWF) faces an ever-expanding series of federal regulations, embodied by the Federal Acquisition Regulation (FAR). In 1947, its first iteration, the Armed Services Procurement Regulation (ASPR), had just 125 pages. When the FAR was published in 1983, the collection of regulations had grown to 1,953 pages.[3] By January 2018, the FAR had 2,320 pages and the DoD Defense Federal Acquisition Regulation Supplement (DFARS) was 1,702 pages.[4]

This body of regulations provides guidance to federal contracting officers. In practice, the regulations often provoke frustration and confusion for professionals empowered to act as agents of the federal government in negotiating and crafting contracts with companies in the commercial marketplace. Federal contracting officers spend years in formal training, dedicating a minimum of 791 hours to complete 23 courses.[5] This training is followed up by an exam testing would-be contracting officers' knowledge of the copious regulations prior to being issued a warrant to sign contracts. When contracting officers receive warrants to buy on behalf of the U.S. government, it is an institutional acknowledgement that upon warranting, they are highly informed, able to make complex decisions, and are knowledgeable about the laws and regulations guiding those decisions.

In addition to the federal regulations governing the actions of contracting officers, DoD often layers on additional requirements for documentation and reviews. These processes are designed to harness the collective expertise of DoD's acquisition professionals and ensure compliance with numerous regulatory, statutory, and policy requirements and coordination with DoD's complex mission. The current acquisition process consumes contracting officers' time with tedious paperwork and processes demonstrating compliance with a puzzle of regulations, many of which are outdated and duplicative. Consequently, contracting professionals are discouraged from innovating, DoD fails to adopt best practices from the commercial marketplace, and AWF members spend years perfecting process skills, and preparing and reviewing often duplicative document requirements for each procurement.

Numerous assessments indicate that acquisitions are taking too long to complete. In April 2018 the Defense Pricing/Defense Procurement & Acquisition Policy office (now the Defense Pricing and Contracting office) indicated its top priority for FY 2018 was to reduce procurement administrative lead time (PALT). PALT is the time to complete a procurement from its first step, often the solicitation but sometimes including requirements generation processes, to its last, when the contracted good or service is received. Other similar metrics track the procurement from solicitation to award, focusing exclusively on internal administrative processes. Consensus within DoD and the broader federal

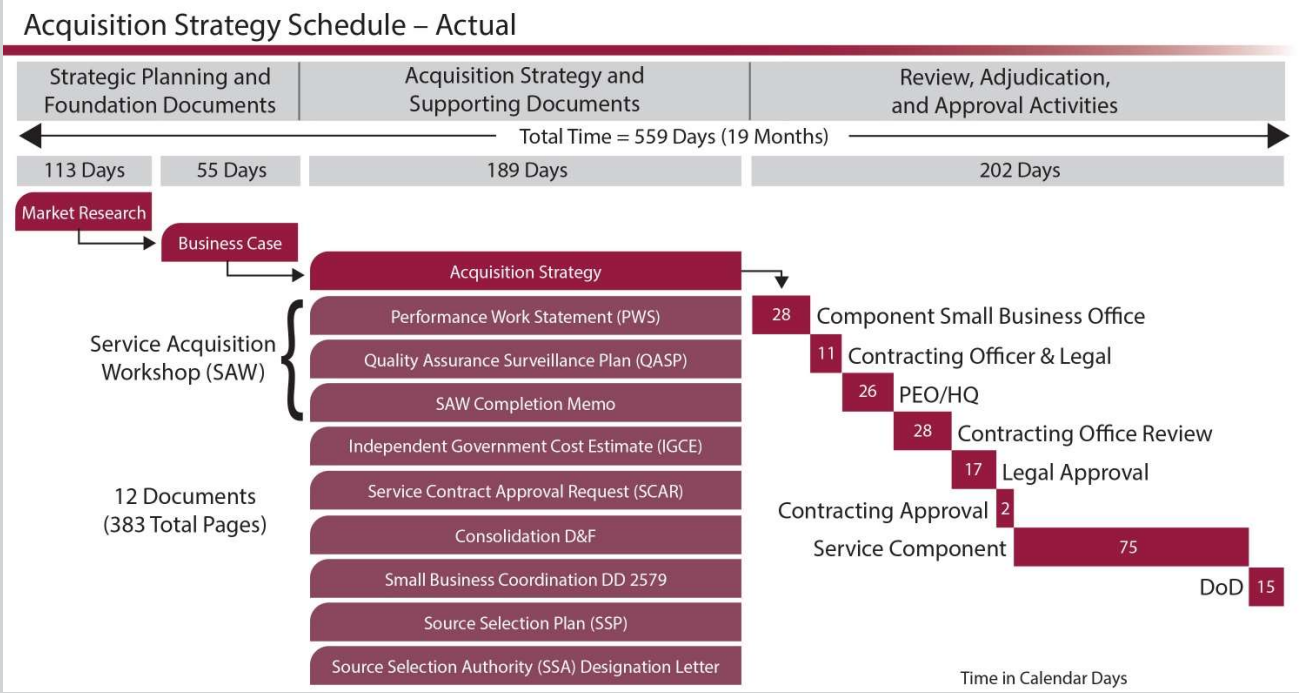
[3] Allen Friar, *Swamped by Regulations: Perils of an Ever-Increasing Burden,* Defense Acquisition University, February 2015, 34, accessed November 8, 2018, http://www.dtic.mil/dtic/tr/fulltext/u2/a621269.pdf.
[4] Page count information obtained from product details section of Amazon.com listings: https://www.amazon.com/Federal-Acquisition-Regulation-January-2018/dp/1454895519 and https://www.amazon.com/Department-Defense-Supplement-DFARS-January/dp/1454895500.
[5] Calculated using Continuous Learning Points for required Acquisition and Functional training for Levels I-III certification in Contracting with minimal electives, Defense Acquisition University, accessed August 24, 2018, http://icatalog.dau.mil/onlinecatalog/CareerLvl.aspx.

acquisition community is that the administrative time to either award the contract or receive the good or service is much too long.

Case Study:
Documentation Required from Program Manager (PM) and Contracting Officer

One recent procurement for sustainment services for Army Information Technology took 559 days (19 months) to prepare documentation and secure approval on a $3.1 billion acquisition strategy at the DoD level. In total 11 documents in addition to the acquisition strategy, totaling 383 pages, were required to be jointly produced by the program and contracting office (see Figure 7-1). This 559 days is neither the time taken to receive services nor even award a contract for services. This time is strictly that which is needed to garner approval of a strategy to acquire services—a strategy which needs to then be implemented through the solicitation, award, and performance phases. A recent study conducted by GAO found comparable, protracted procurement timelines to award contracts across DoD, including some with lengthier schedules. Three of the nine programs analyzed, all which were under $50 million, took more than 2 years from the release of the solicitation to award of the contract.[6] This time is additive to the 19 months to garner approval of an acquisition strategy described earlier, a phase which comes before the solicitation phase.

Figure 7-1. Acquisition Strategy Schedule – Actual



Source: U.S. Army PEO EIS/PM AESIP, "Acquisition Strategy Schedule Analysis and Lessons Learned," Army-produced PowerPoint presentation, August 2014.

In 2017, Acting Secretary of the Army Ryan McCarthy called for reforms to streamline the contracting process and reduce procurement timelines. In his words, "Our contracting policies and documents must be well-understood, delayered, and the overall process much faster."[7] To illustrate the problem

[6] GAO, *DoD Should Develop a Strategy for Assessing Contract Award Time Frames*, *GAO-18-467,* July 2018, accessed July 17, 2018, https://www.gao.gov/assets/700/693123.pdf.
[7] DoD, *Army Directive 2017-32 (Acquisition Reform Initiative #6: Streamlining the Contracting Process),* November 15, 2017, accessed November 8, 2018, https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN6464_AD2017-32_Web_Final.pdf.

and establish an average baseline of current procurement timelines, Army Contracting Command analyzed PALT for new starts where the requirements were competed. Table 7-1 provides these findings.

Table 7-1. Army Competitive Procurement Timelines

Dollar Value	Procurement Lead Time
$1M - $10M	150
$10M - $50M	190
$50M - $100M	400
$100M - $250M	425
$250M - $1B	575
>$1B	700

These timeframes reflect average procurement lead time from January to September 2017. The Army's strategy for reforming this time-consuming process has the following three main goals:[8]

- Centralize policy under the Deputy Assistant Secretary of the Army (Procurement) to standardize contracting policy across the Army and remove unnecessary or outdated policies that delay the contracting process.
- Complete a review of the 350 potential required contract file documents to identify and reduce contract documentation requirements and identify streamlining opportunities. The goal is to reduce contract file documents by at least 10 percent.
- Review and standardize peer review policies and procedures to reduce redundant or advisory-only peer reviews. Incorporate changes into the Army Federal Acquisition Regulation Supplement (AFARS) to support efficient execution of reviews and baseline best practices.

This need to reduce documentation and save time is not unique to the Army. The Defense Acquisition University website estimates procurement action lead time for an action $10,000 to $10 million is 208 days, 58 days longer than the Army's published time. In December 2017, Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) Ellen Lord devised a plan to reduce PALT by 50 percent.[9] Across the government, all agencies measure PALT and have initiatives to reduce their numbers and shorten time to awarding a contract. The Environment Protection Agency, for instance,

[8] Ibid.
[9] "Here's how Ellen Lord will reduce acquisition time by 50 percent," Aaron Mehta, Defense News, December 8, 2017, accessed November 8, 2018, https://www.defensenews.com/pentagon/2017/12/08/heres-how-ellen-lord-will-reduce-acquisition-time-by-50-percent/.

reported in 2018 that only 75 percent of its competitive proposals were meeting the agency's target PALT of 210 days.[10]

The Navy has recently made strides to reduce its PALT. In 2007, the Navy published an *Acquisition Plan Guide* that was 63 pages long, with Appendix A, a sample acquisition plan illustrating format and content, being 38 pages.[11] One official who was working with the Navy at that time, indicated it was common to see acquisition plans as long as 120 pages.[12] In recognition of the burden of increasing paperwork and the time it adds to acquisition, the Navy implemented a streamlining initiative in November 2016, with the introduction of the streamlined acquisition plan (STRAP).[13] STRAP reduced the content for Navy acquisition plans to that which is statutorily required plus a few other salient acquisition items. STRAP was implemented in the Navy Marine Corps Acquisition Regulation Supplement (NMCARS) through four separate annexes for various types of procurements. A separate document, called the Management and Oversight Process for the Acquisition of Services, is used for service acquisitions less than $50 million. These five separate documents were used to replace one acquisition planning document and helped the Navy reduce the contents of the acquisition plan to approximately 30 pages.[14] Still, one Navy contracting office reported similar procurement timelines for FY 2019 to those the Army realized in 2017. Procurements exceeding $50 million were projected to have an average lead time between 330–600 days and those between $7 million and $50 million were lower, at 280 days.[15]

Similarly the Air Force has implemented streamlining initiatives and allows for a Streamlined Acquisition Strategy Summary (SASS) for acquisitions less than $10 million. SASS requires less information, is fewer pages, and is organized as a fillable worksheet. SASS also acts as a combined acquisition strategy and acquisition plan. The Air Force uniquely has self-imposed a requirement to prepare an acquisition plan for all actions more than $10 million, even those less than $50 million, which would not ordinarily be required by regulation.[16] This requirement to have an acquisition plan does not alleviate acquisition planners from preparing an acquisition strategy for major system acquisitions or service contracts. The Air Force also has initiatives to reduce the acquisition timeline and has seen an average reduction from 16.1 months to 12 months from FY 2014 to FY 2017 for sole source, negotiated acquisitions.[17] The Air Force recently started tracking procurement timelines for

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[10] Environmental Protection Agency, *Data Quality Record for Strategic Measures,* January 16, 2018, accessed October 19, 2018, https://www.epa.gov/sites/production/files/2018-05/documents/dqr-3-5-palt.pdf.
[11] Department of the Navy, *Acquisition Plan Guide,* March 2007, accessed November 8, 2018, http://www.secnav.navy.mil/rda/Policy/Department of the Navy/donapg0227074.doc.
[12] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, October 2018.
[13] "NMCARS, Archives" ASN RDA, accessed October 12, 2018, http://www.secnav.navy.mil/rda/Pages/NMCARS.aspx.
NMCARS Change 13-11 issued Annex 17 and 18, which were promulgated via Deputy Assistant Secretary of the Navy (Acquisition and Procurement) memorandum. NMCARS Change 13-16 issued Annexes 19-21.
[14] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, October 2018.
[15] Ibid.
[16] DFARS 207.103(d)(i) requires Agency Heads to, "Prepare written acquisition plans for (A) Acquisitions for development, as defined in FAR 35.001, when the total cost of all contracts for the acquisition program is estimated at $10 million or more; (B) Acquisitions for production or services when the total cost of all contracts for the acquisition program is estimated at $50 million or more for all years or $25 million or more for any fiscal year; and (C) Any other acquisition considered appropriate by the department or agency." However, the Acquisition Plan approval authorities listed in AFFARS 5307.104-93 indicates an Acquisition Plan is required at $10M.
[17] U.S. Air Force, *Contract Award Timelines FY17 Annual Results,* PowerPoint presentation, October 2018.

competitive acquisitions in FY 2018 and through third quarter averaged 10.9 months from the time of solicitation issuance to the time of contract award.[18]

The DoD acquisition system is encumbered with processes, reviews, and approvals that are redundant, non-value-added, inflexible, and/or unduly restrictive. From a contracting officer or PM perspective, these restrictive processes limit the authority of contracting officers entrusted to legally and contractually bind the government and result in delayed capability to the warfighter. Innovative contracting practices are stifled when the most knowledgeable acquisition professionals spend substantial time on check-block tasks they know to have limited or no value. As tasks that are driven by regulations, they are unavoidable, and they grow exponentially every year. Such limitations prevent DoD agility and ultimately undermine one of the foundational standards set forth in the FAR to "Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service."[19]

RECOMMENDATIONS

Recommendation 74: Eliminate redundant documentation requirements or superfluous approvals when appropriate consideration is given and documented as part of acquisition planning.

Problem

Several documents or iterative approvals are required by multiple regulations despite the fact that they are already included in the Acquisition Plan. These requirements create unnecessary work for contracting officers, PMs, and approving officials, and they add little value to the end product or service.

Subrecommendation 74a: Eliminate duplicative documentation when rationale is approved as part of an acquisition strategy or acquisition plan. Delegate authority to approve statutory or regulatory determinations documented within the acquisition strategy or acquisition plan to the approving authority of the strategy or plan.

Background

Acquisition planning is required by statute (10 U.S.C. § 2305 (a)(1)(A)(ii)) and implemented through FAR 7.102 and DFARS 207.1 to promote and provide for acquisition of commercial items and full and open competition, to the maximum extent practicable, and for the selection of appropriate contract types. Acquisition planning should begin as soon as the agency identifies a need and culminate in a written acquisition plan designed to make sure the acquisition can meet its objectives.[20] The acquisition plan is a detailed document with prescribed contents detailed in the FAR, including all the technical, business, and management aspects of the acquisition, as well as any other influences. According to the *Defense Acquisition Guidebook* (DAG),

> *An Acquisition Plan is prepared by the Contracting Officer and formally documents the specific actions necessary to execute the approach delineated in the approved Acquisition Strategy. The Acquisition Plan*

[18] Data collection interview, conducted by Section 809 Panel Team 6: IT Acquisition, October 2018.
[19] Performance Standards, FAR 1.102-2(a).
[20] General Procedures, FAR 7.104. Contents of Written Acquisition Plans, FAR 7.105.

> *serves as the basis for contractual implementation as referenced in Federal Acquisition Regulation (FAR) Subpart 7.1 and Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 207.1.*[21]

Discussion

PMs and contracting officers create many planning documents twice—once for the acquisition plan and once for the contract file—then wait for them to be approved, often through separate review chains. This duplication is driven by redundant FAR or DFARS sections. Table 7-2 illustrates this redundancy with some examples of planning required for the acquisition plan (as detailed in FAR Part 7) as well as in other FAR or DFARS subparts.

Table 7-2. Examples of Redundancy in FAR-Directed Acquisition Planning

	Acquisition Planning Requirements	Other FAR-directed and Unnecessary Requirements
Warranty	FAR 7.105(b)(14)(ii)	DFARS 246.704(2)
Options	FAR 7.105(a)(5)	FAR 17.205
Past Performance Evaluation	FAR 7.105(b)(4)	FAR 15.304(c)(3)(ii)
Electronic and Information Technology Accessibility Standards	FAR 7.103(q)	FAR 39.203
Ozone Depleting Products	FAR 7.103(p)(2)	FAR 11 and FAR 23.8
Consolidation	FAR 7.105(b)(1)(iv)	FAR 7.107-2(b)

In addition to creating more work for contracting officers and PMs, each of these duplications wastes the time of everyone involved in reviewing the various packages. The FAR allows the acquisition plan to be approved at one level above the contracting officer, but the military services typically assign this responsibility to a higher authority, such as the program executive officer, who oversees the PM, or many levels above the contracting officer in the contracting chain.

If a contracting officer has generated documentation demonstrating planning or compliance required by the acquisition plan, it is unnecessary and wasteful to repeat the same process for a different FAR subpart. A single document should suffice for the contract file. While not exhaustive, the six sections below briefly discuss examples of this duplication identified in Table 7-2.

Warranty

Warranties must be justified for both the acquisition plan and agency procedures related to quality assurance. A warranty is "a promise or affirmation given by a contractor to the government regarding

[21] DAU, *Defense Acquisition Guidebook,* September 16, 2013, accessed June 25, 2018, https://at.dod.mil/sites/default/files/documents/DefenseAcquisitionGuidebook.pdf.

the nature, usefulness, or condition of the supplies or performance of services furnished under the contract."[22]

FAR 46.702 indicates,

> *(a) The principal purposes of a warranty in a Government contract are—*
> *(1) To delineate the rights and obligations of the contractor and the Government for defective items and services; and*
> *(2) To foster quality performance.*
> *(b) Generally, a warranty should provide --*
> *(1) A contractual right for the correction of defects notwithstanding any other requirement of the contract pertaining to acceptance of the supplies or services by the Government; and*
> *(2) A stated period of time or use, or the occurrence of a specified event, after acceptance by the Government to assert a contractual right for the correction of defects.*
> *(c) The benefits to be derived from a warranty must be commensurate with the cost of the warranty to the Government*

This subpart goes on to say that warranties must be approved in accordance with agency procedures; however, the requirement for such documentation already exists in the acquisition plan. [23]

Options

Options must be justified for both the acquisition plan and procedures related to special contracting methods. FAR 7.105(a)(5) requires the acquisition plan to describe "the basis for establishing delivery or performance-period requirements." Additionally, FAR 7.105(b)(5)(i) requires use of options to be discussed as part of *acquisition considerations* in the acquisition plan. FAR 17.205 requires contracting officers to justify in writing the quantities or the term under option, the notification period for exercising the option, and any limitation on option price. If included in the acquisition plan under FAR 7, the additional contract file documentation required by FAR 17 is unnecessary.

Past Performance Evaluation

Past performance evaluation is also required for both the acquisition plan and procedures related to source selection. FAR 15.304(c)(3)(ii) requires past performance to be considered in negotiated, competitive source selections unless the contracting officer documents the reasons it is not an appropriate evaluation factor. Because FAR 7.105(b)(4) requires the acquisition plan to "discuss source-selection procedures for the acquisition, including the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the acquisition objectives" the documentation required in FAR 15 is unnecessarily duplicative.

[22] Definitions, FAR 2.101.
[23] DFARS 246.704(2) states, "The chief of the contracting office shall approve the use of a warranty only when the benefits are expected to outweigh the cost." FAR 7.105(b)(14)(ii) states, "The reliability, maintainability, and quality assurance requirements, including any planned use of warranties."

Electronic and Information Technology Accessibility Standards

Agencies acquiring electronic information technology must ensure that federal employees and members of the public with disabilities have comparable access and use of information to those without disabilities. This requirement is mandated by the Rehabilitation Act of 1973 and the Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards and implemented by FAR 39.2.[24]

Conflicting regulatory guidance on the timing of exceptions to these requirements creates confusion and unnecessary work in drafting the acquisition plan. FAR 39.203 requires acquisitions comply with accessibility standards at 36 CFR Part 1194 unless a determination of an exception is made prior to contract award. FAR 7.103(q) requires agency heads to ensure acquisition planning addresses EIT accessibility standards in requirements planning—long before the contract award. If an exception applies, it should be addressed during the acquisition planning phase, included as part of the acquisition plan, and omitted as a separate, later determination.

Ozone-Depleting Products

DoD is prohibited by law from contracting for an ozone-depleting substance unless deemed necessary by the senior acquisition official for the procurement.[25] The FAR implements this law in several sections, including requiring compliance as part of acquisition planning, describing the agency need, and again under FAR 23.8, Ozone-Depleting Substances and Greenhouse Gases.[26] Including multiple references to this requirement throughout the FAR is confusing and an inefficient means to achieve an end. When addressed during acquisition planning, the determination should be partof the acquisition plan.

Consolidation

Multiple determinations are required for contract consolidation. Contract consolidation is,

> *use of a solicitation to obtain offers for a single contract or a multiple award contract: (A) to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited; or (B) to satisfy requirements of the Federal agency for construction projects to be performed at 2 or more discrete sites.*[27]

By statute, contracts may not be consolidated without the senior procurement executive or chief acquisition officer for the agency making a determination that consolidation is necessary and justified.

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[24] Electronic and Information Technology, 29 U.S.C. 794d. Information and Communication Technology Standards and Guidelines, 36 CFR part 1194.
[25] Definitions, 10 U.S.C. 2302 note.
[26] FAR 7.103(p) indicates the Head of the Agency is responsible for "ensuring that agency planners...comply with the policy in 11.002(d) regarding procurement of…and non-ozone-depleting products, and products and services that minimize or eliminate, when feasible, the use, release, or emission of high global warming potential hydrofluorocarbons, such as by using reclaimed instead of virgin hydrofluoro-carbons." FAR 11.002(d), indicates, "When agencies acquire products and services, various statutes and executive orders (identified in part 23) require consideration of sustainable acquisition (see subpart 23.1) including…(vi) Non-ozone depleting substances, and products and services that minimize or eliminate, when feasible, the use, release, or emission of high global warming potential hydrofluorocarbons, such as by using reclaimed instead of virgin hydrofluorocarbons (subpart 23.8)."
[27] Consolidation of Contract Requirements, 15 U.S.C. 657q.

There are many reasons why an agency may conclude that consolidation is necessary and justified, including cost, improved quality, or shortened acquisition cycle. Rationale for determining whether consolidation is necessary and justified is addressed as part of acquisition planning and must be documented as part of the written acquisition plan in accordance with FAR 7.105(b)(1)(iv). Once documented as part of the written acquisition plan, there is no relief given to the separate determination required by FAR 7.107. This additional determination delays acquisitions by requiring more preparation and staff time. When consolidation is addressed during acquisition planning, the determination should be part of the acquisition plan, and a separate determination should not be required.

Conclusions

One of the main issues with government acquisition is the copious amount of documentation and approvals required. The FAR and other regulations often create duplicative and conflicting requirements to demonstrate compliance with a single statutory mandate. This redundancy creates unnecessary paperwork and wastes time. Much of this duplication comes from overlap between the acquisition strategy and acquisition plan, or between one of these foundational documents and additional regulatory procedures. Eliminating duplicative documentation and obsolete requirements would reduce this redundancy. Further, when rationale must be documented or approved by a higher authority, it should be consolidated into one place with a singular approval authority. The elimination of superfluous documentation and time required to garner approval will reduce procurement lead time.

Subrecommendation 74b: Revise statutory and regulatory requirements for contract type determination when already approved as part of a written acquisition plan or acquisition strategy, and when a written acquisition plan or acquisition strategy is not required, streamline contract type determinations to a single approval authority no higher than the Chief of the Contracting Office.

Background

Selection of contract type can be one of the most important decisions made by the PM and contracting officer. Many factors need to be considered when selecting the contract type, including acquisition history, complexity and type of the requirement, and period of performance. The contract type signifies not only the risk the government is willing to accept but also the certainty of the defined requirement and anticipated performance outcomes. In instances when more complex contract types are selected, such as incentive fee or award fee, the contract type can act as a tool to motivate the contractor to increase speed of delivery, reduce cost, or enhance performance.

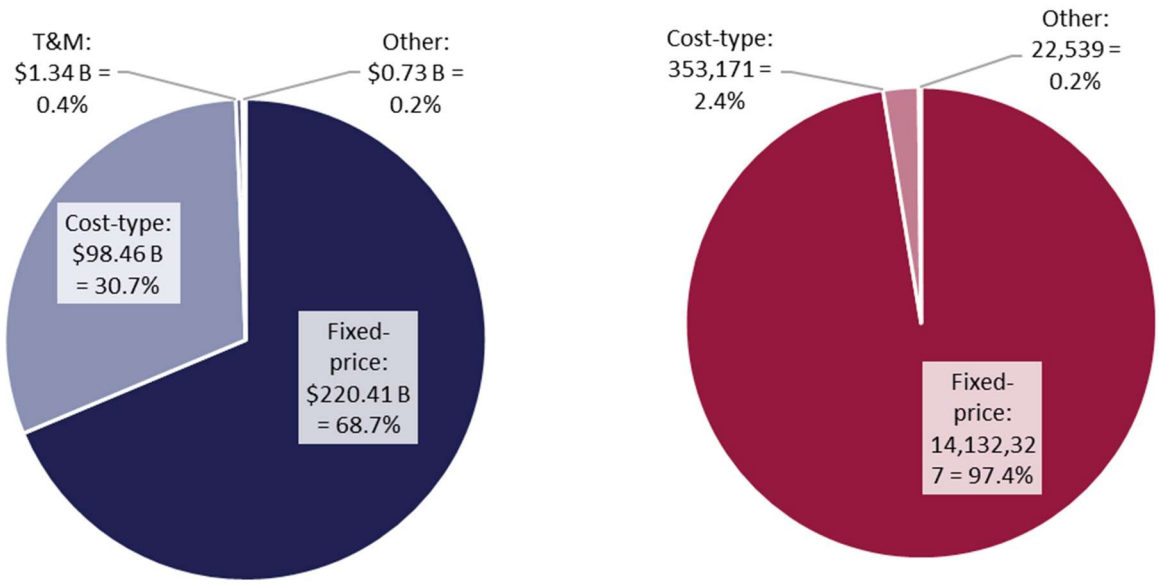
FAR 16 outlines various contract types and the circumstances when each may be deemed appropriate given the nature of the acquisition. The major categories of contract types are fixed-price and cost reimbursement with variations covering circumstances such as contractor incentives or market fluctuation, and, to a lesser degree, time, and material.[28] Depending on the type of contract selected, the

[28] FAR 16.202-1 describes a firm-fixed-price contract as one that "provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties." FAR 16.301-1 describes a cost reimbursement

authority to approve certain contract types can be many levels above the contracting officer. This requirement for top-level approval can cause delays in early acquisition phases or even act as a deterrent to suitable contract type selection.

Fixed-price contracts are the preferred and most used contract type, whether measured as dollar obligations or contract actions. Figure 7-2 illustrates the extent of DoD's use of these contract types during fiscal year 2017.[29]

Figure 7-2. Comparison of DoD Contract Dollar Obligations and DoD Contract Actions, FY 2017[30]



Despite the preponderance of fixed-price DoD contract actions and obligations, recent law has further encouraged this contract type. The FY 2017 NDAA explicitly establishes a preference for fixed-price contracts and requires a contracting officer to gain approval from the Service acquisition executive or equivalent when entering into cost reimbursement contracts exceeding $50 million, with the threshold lowering to $25 million after fiscal year 2019.[31]

contract as one which provides "for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer." FAR 16.601(b) describes a time and materials contract as one that "provides for acquiring supplies or services on the basis of— (1) Direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) Actual cost for materials."

[29] Fixed-price includes firm-fixed-price as well as variations, including: fixed-price award fee, fixed-price incentive fee, fixed-price level of effort, fixed-price redetermination, and fixed-price with economic price adjustment. Cost type includes cost only as well as variations, including: cost-plus award fee, cost-plus fixed fee, cost-plus incentive fee, and cost sharing.

[30] Data from FPDS, extracted September 19, 2018.

[31] Section 829 of FY 2017 NDAA, Pub. L. No. 114-328 (2016).

Discussion

Similar to previous examples, multiple instances exist for which the FAR requires duplicative contract type determinations beyond the content of the written acquisition plan. FAR 7.105(b)(3) requires the acquisition plan to address the following:

> *Discuss the rationale for the selection of contract type. For other than firm-fixed-price contracts, see 16.103(d) for additional documentation guidance. Acquisition personnel shall document the acquisition plan with findings that detail the particular facts and circumstances (e.g., complexity of the requirements, uncertain duration of the work, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection. The Contracting Officer shall ensure that requirements and technical personnel provide the necessary documentation to support the contract type selection.*

This requirement is further emphasized with the requirement for the contract file to include rationale for the contract type selection in the acquisition plan, when an acquisition plan is required.[32] FAR 16.203-3 requires additional documentation for fixed-price contracts with economic price adjustment, which should be supported in the rationale contained in the acquisition plan. FAR 16.401(d) requires the head of the contracting activity to sign a determination and finding for incentive and award-fee contracts. Justifying their use is in the best interest of the government. Additionally, FAR 16.601(d) requires the head of the contracting activity approve a determination and finding for time-and-material contracts exceeding 3 years.

The rationale for contract selection already must be thoroughly documented in the acquisition plan. This documentation is a non-value-added, time-consuming processes when duplicated outside the acquisition plan. The additional determination and finding requires more time preparing and staffing a duplicative document to support a solicitation and contract, when often the secondary approval authority would have already reviewed or been in the staffing chain of the acquisition plan.

Conclusion

Multiple instances of redundant, time-consuming contract type approvals exist within the FAR, e.g., economic price adjustment, time and materials greater than 3 years, and incentive or award fee. Further, the FAR identifies the acquisition plan as the appropriate place for documenting the selected contract type. Additional documentation and approvals at levels other than the contracting officer categorically undermine contracting officers' authority, knowledge, and experience with the acquisition. The redundancies hinder the contracting officer's ability to exercise business acumen and delay the procurement process; therefore, they should be revised. Further, inconsistent approval authorities for various contract types, in particular approval authorities many levels above the contracting officers or outside contracting officers' immediate chain of command, cause confusion and further delays in the precontract award phase. When an approved acquisition plan is not required, the contract type determinations should have a single approval path no higher than the chief of the contracting office.

[32] Negotiating Contract Type, FAR 16.103(d)(1).

Subrecommendation 74c: Revise 10 U.S.C. 2304a(d) and 41 U.S.C. 4103(d) to eliminate requirement for approval from the head of the agency for single-source task-order or delivery-order contracts.

Background

Section 843 of the FY 2008 NDAA included, among other requirements, prohibition of awarding single-source task order or delivery order contracts. This statutory requirement at 10 U.S.C. § 2304a(d) is implemented under FAR 16.504(c)(1). A task-order or deliver-order contract is used when the government has a specified requirement with an indefinite quantity, within stated limits, of supplies or services during a fixed period, also referred to as an indefinite-quantity contract. The government subsequently places orders for individual requirements as needed. Quantity limits may be stated as number of units or as dollar amounts. The FAR indicates a preference for multiple awards when executing an indefinite-quantity contract, meaning contracting officers award to a pool of qualified contractors who will receive future orders for specific quantities once the quantity is known.[33] This practice ensures continuous competition when orders are placed after the initial indefinite-quantity contract is awarded.

Discussion

The contracting officer is responsible for determining the number of awardees as part of acquisition planning. Further, "The Contracting Officer must document the decision whether or not to use multiple awards in the acquisition plan or contract file."[34] The FAR then contradicts itself by requiring the head of the agency to make a written determination that,

> *(i) The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;*
> *(ii) The contract provides only for firm fixed price (see 16.202) task or delivery orders for—*
> *(A) Products for which unit prices are established in the contract; or*
> *(B) Services for which prices are established in the contract for the specific tasks to be performed;*
> *(iii) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or*
> *(iv) It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.*

The FAR contradicts itself by giving the contracting officer authority to make this determination and then later takes it away, reserving the determination for a higher authority. This authority requires concurrence and eventual approval five levels above the contracting officer.

Acquisition plan content requirements, outlined at FAR 7.105, address indefinite-quantity contract preferences in multiple sections. First, FAR 7.105(b)(2) addresses competition and "how competition will be sought, promoted, and sustained throughout the course of the acquisition." Under FAR 7.105(b)(3), the acquisition plan must address "the rationale for the selection of contract type." If an indefinite-quantity contract is selected, whether for single- or multiple-award preference, the

[33] Indefinite-Quantity Contracts, FAR 16.504(a)&(c).
[34] Indefinite-Quantity Contracts, FAR 16.504(c)(1)(ii)(A)&(C).

acquisition plan is required to address the rationale for the selection in conjunction with the acquisition risks, industry support, competition maximization objectives, and other concerns. The acquisition plan does so more comprehensively than the determination required by FAR 16. The requirement to seek a head of the agency determination for single-source task order or delivery order contracts is both duplicative and unduly burdensome.

Conclusion

FAR 16.504(c)(1) is contradictory, first delegating responsibility for determining the number of awardees to the contracting officer, then reserving the determination for a higher authority. Additionally, the written acquisition plan already requires the planning team to address the salient components of FAR 16. The statutory requirement to obtain head of the agency approval for single-source task-order or delivery-order contracts exceeding $112 million should be revised and FAR 16.504(c)(1) should be repealed.

Subrecommendation 74d: Direct DoD to justify, consolidate, or eliminate requirements in the FAR and DFARS relative to acquisition plans and acquisition strategies.

Problem

FAR Part 7 establishes requirements for acquisition planning and contents of an acquisition plan, but this regulation has become overly complex and overlaps with other subparts of the FAR and DoD Instructions (DoDIs), especially DoDI 5000.02, 5000.74, and 5000.75, relative to acquisition strategies.

Background

DoD must report to Congress annually on major defense acquisition programs and does so using data collated in program acquisition strategies. According to the DAG,

> *The Acquisition Strategy is a top-level description, in sufficient detail to allow senior leadership and the Milestone Decision Authority (MDA) to assess whether the strategy makes good business sense, effectively implements laws and policies, and reflects management's priorities.* [35]

DoD implements acquisition strategy requirements through FAR 34.004 and DoDI 5000.02 for Major System Acquisitions and through FAR 37 and DoDI 5000.74 for services contracts. Yet another DoDI, 5000.75, governs acquisition strategy requirements for defense business systems. The FAR also requires the acquisition strategy for major systems be prepared in accordance with Subpart 7.1, the same subpart that governs acquisition plans and indicates that the strategy "shall qualify as the acquisition plan for the major system acquisition."[36] According to the DAG, "in practice, DoD Components often prefer to provide a more general acquisition strategy to the milestone decision authority (MDA) for approval and choose to prepare a separate, more detailed [acquisition plan]."[37] Further, DoD implements acquisition strategy requirements for service contracts through FAR 37 and DoDI 5000.74.

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[35] DAU, *Defense Acquisition Guidebook,* September 16, 2013, accessed June 25, 2018, https://at.dod.mil/sites/default/files/documents/DefenseAcquisitionGuidebook.pdf.
[36] Acquisition Strategy, FAR 34.004.
[37] DAU, *Defense Acquisition Guidebook,* September 16, 2013, accessed June 25, 2018, https://at.dod.mil/sites/default/files/documents/DefenseAcquisitionGuidebook.pdf.

Both the acquisition strategy and the acquisition plan include statutory and regulatory components, but their purposes differ. The acquisition strategy is a higher level document that delineates programmatic goals for full lifecycle performance. The acquisition plan is more detailed and focuses on the business arrangement structured in the contemplated contract. Table 7-3 compares the two documents.

Table 7-3. Summary of Distinctions between the Acquisition Strategy and Acquisition Plan[38]

	Acquisition Strategy	Acquisition Plan
Required by	DoDI 5000.02, Enclosure 2, paragraphs 5(c) and 6(a)	FAR 7.1
Required for	All acquisition categories	Contracting or procuring for development activities when the total cost of all contracts for the acquisition program is estimated at$10 million or more; procuring products or services when the total cost of all contracts is estimated at$50 million or more for all years or $25 million or more for any one fiscal year; and other procurements considered appropriate by the agency.
Approval Authority	MDA	Component Acquisition Executive or designee in accordance with Agency FAR supplements.
Purpose	Describes overall strategy for managing the acquisition program. The acquisition strategy describes the PM's plan to achieve programmatic goals and summarizes the program planning and resulting program structure.	Comprehensive plan for implementing the contracting strategy.
Use	Required at program initiation. The acquisition strategy should be updated for all subsequent milestones, at the full-rate production decision review, and whenever the approved strategy changes.	Integrates the efforts of all personnel responsible for significant aspects of the contractual agreement. The purpose is to ensure that the government meets its needs in the most effective, economical, and timely manner.
Level of Detail	Strategy level. Needed by MDA for decision-making. Also planning level for some discrete information requirements.	Execution level. Provides the detail necessary to execute the approach established in the approved acquisition strategy and to guide contractual implementation and conduct acquisitions.
Content	Prescribed by DoDI 5000.02 ; additional guidance in the DAG	Prescribed by FAR 7.1; DFARS 207
Individual Responsible for Preparing the Document	PM	Person designated as responsible.

[38] Ibid.

Discussion

Acquisition planning is a multifunctional team effort. The results of planning efforts are detailed in the acquisition plan and include "the technical, business, management, and other significant considerations that will control the acquisition."[39] The FAR is itself a comprehensive and detailed set of rules in which various subparts often create overlapping requirements. Notably, the acquisition strategy and the acquisition plan overlap to such an extent that is unclear why all this documentation is necessary, especially when it bogs down the acquisition process.

Statute requires agencies to document aspects of both an acquisition plan and acquisition strategy, but there is no prohibition to doing so in one document. In the case of major system acquisitions, the acquisition strategy actually qualifies as the acquisition plan.[40] Table 7-4 identifies the required content of both documents. Some similarities within the documents present clear opportunities for streamlining. Duplicative requirements include contract type determination (including a discussion on multiyear procurement and business strategies), risk management, market research (including available sources), and background and objectives such as cost and procurement history.

Table 7-4. Acquisition Plan and Acquisition Strategy Requirements and Commonalities

Acquisition Plan Contents[41]	Statutory Requirements for an Acquisition Strategy[42]
▪ Acquisition background and objectives: – Statement of need – Applicable conditions – Cost – Capability or performance – Delivery or performance-period requirements – Trade-offs – Risks – Acquisition streamlining ▪ Plan of action: – Sources – Competition – Contract type selection – Source-selection procedures – Acquisition considerations – Budgeting and funding – Product or service descriptions – Priorities, allocations, and allotments – Contractor versus government performance – Inherently governmental functions – Management information requirements – Make or buy – Test and evaluation	▪ Acquisition approach ▪ Benefit analysis and determination ▪ Business strategy ▪ Contracting strategy – Contract type determination – Termination liability estimate ▪ Cooperative opportunities ▪ General equipment valuation ▪ Industrial base capabilities considerations ▪ Intellectual property strategy ▪ Market research ▪ Modular open systems approach ▪ Multiyear procurement ▪ Risk management ▪ Small Business Innovation Research/Small Business Technology Transfer Program technologies

[39] Contents of Written Acquisition Plans, FAR 7.105.
[40] Acquisition Strategy, FAR 34.004.
[41] Adapted from FAR 7.105.
[42] Extracted from DoDI 5000.02, Enclosure 1, Table 2 (2017).

Acquisition Plan Contents[41]	Statutory Requirements for an Acquisition Strategy[42]
– Logistics considerations – Government-furnished property – Government-furnished information – Environmental and energy conservation objectives – Security considerations – Contract administration – Other considerations – Milestones for the acquisition cycle – Identification of participants in acquisition plan preparation	

Naval Sea Systems Command published an *Acquisition Strategy Guide* in April 2010, which calls out a single acquisition management plan (SAMP) combining the acquisition plan and acquisition strategy requirements into one document.[43] According to the guide, "Use of a SAMP is at the PEO's discretion for [Acquisition Category (ACAT)] I and II programs where the [Milestone Decision Authority] is Navy, but is highly recommended when there is a common approval authority for both [acquisition strategy] and [acquisition plan] such as ACAT III, IV, and [Abbreviated Acquisition Program] programs."[44] One former Navy official interviewed indicated that during his time as a procurement analyst, out of the more than 100 acquisition plans he reviewed, only one used the SAMP format.[45] For the Defense Information Systems Agency, the agency acquisition regulation supplement requires use of a combined, standard, or streamlined plan; however, as noted earlier, in the DAG, DoD acquisition planners often prefer to prepare separate documents.[46]

Conclusions

It is best for DoD and the individual Military Services to review the acquisition planning documentation requirements and reduce them to basics. DoD should focus documentation requirements on those required by statute or truly critical to "satisfying the mission need in the most effective, economical, and timely manner."[47] The growing demand for documentation should be reduced by eliminating requirements that are obsolete or not value added. DoD should compare these requirements with those in DoDI 5000.02, 5000.74, and 5000.75, then revise—and right size—these acquisition instructions to eliminate redundancy with FAR requirements or other unnecessary requirements.

[43] Naval Sea Systems Command, *Acquisition Strategy Guide v1.0,* April 2010, accessed October 10, 2018, http://www.dtic.mil/dtic/tr/fulltext/u2/a550109.pdf.
[44] Ibid, 18.
[45] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, October 2018.
[46] DISA Acquisition Regulation Supplement (DARS), Subpart 7.103 indicates, "A written plan (combined AS/AP, standard, or streamlined) shall also be prepared for… (1) Acquisitions with a total value, including options, of $50M and above."
[47] Acquisition Strategy, FAR 34.004.

Implementation

Legislative Branch

- Revise Section 829 of the FY 2017 NDAA (Pub. L. No. 114–328; 10 U.S.C. § 2306 note), which requires senior acquisition executive approval for cost type contracts.
- Revise 10 U.S.C. § 2304a(d), which requires head of the agency approval for single source task order or delivery order contracts.
- Revise 41 U.S.C. § 4103(d) which requires head of the agency approval for single source task order or delivery order contracts.

Executive Branch

- Revise FAR and DFARS to explicitly eliminate separate determinations, when rationale documented in an approved acquisition plan or acquisition strategy. Delegate authority to approve determinations documented within the acquisition plan or acquisition strategy to the plan or strategy approving authority.
- Revise FAR and DFARS to eliminate contract type determinations when already approved as part of a written acquisition plan or acquisition strategy. When a written acquisition plan or acquisition strategy is not required, revise FAR and DFARS to delegate contract type determinations to a single approval authority no higher than the Chief of the Contracting Office.
- Direct DoD to consolidate or eliminate requirements in the FAR and DFARS relative to acquisition plans and Acquisition Strategies. DoD should compare these requirements with those in DoDI 5000.02, 5000.74, and 5000.75, then revise—and right size—these acquisition instructions to eliminate redundancy with FAR requirements or other unnecessary requirements. This study should begin no later than 180 days after passage of the Act, and conclude within 1 year.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

- The recommended changes to the statutes and the FAR would apply to DoD and civilian agencies that use the FAR. Both DoD and civilian agencies will benefit from these recommendations.

Recommendation 75: Revise regulations, instructions, or directives to eliminate non-value-added documentation or approvals.

Problem

Within the DoD acquisition system, solicitation and precontract award processes are cumbersome and non-value-added, leading to substantial acquisition delays.

Subrecommendation 75a: Repeal the requirement at DFARS 215.371-2 to resolicit for an additional 30 days when only one offer is received in response to a solicitation.

Background

The 1984 Competition in Contracting Act (CICA) was intended to achieve competitive prices by increasing competition. The law requires the government to compete acquisitions with few exceptions and includes advanced notification timeframes for imminent solicitations as well as minimum response times for contractors responding to solicitations. Nevertheless, in the 30 years since CICA enactment, there is growing concern that competition processes have not always met the desired goals for effective competition. Beginning in 2010, then Under Secretary of Defense for Acquisition, Technology, and Logistics (USD[AT&L]) Ashton Carter included promotion of competition in his Better Buying Power (BBP) initiatives.[48] Among other things, the BBP series of guidance documents issued from 2010 through 2015 included direction to DoD policy makers to streamline the competition process, but also identified that for services, where a single offer was received in response to a solicitation open for less than 30 days, the agency was to resolicit for an additional 30 days.

This direction led to a broader regulatory proposal to limit the ability of contracting officials to avail themselves of the standard for competition at FAR 15.403-1(c) to justify a fair and reasonable price that prohibits obtaining cost or pricing data where there was an expectation of competition from 2 or more offerors. That broader shift in policy did not require an additional 30-day resolicitation period, but in June 2012, DoD issued a final rule to the DFARS addressing competitive procedures when only one offer is received in response to a solicitation that requires resolicitation and revised requirements as needed. That rule was not limited to the acquisition of services. To date, overall increases in effective competition, which have ranged from 50 to 60 percent since 2010 and been the historic range for many years for DoD competition, have not been documented by DoD since the implementation of that policy, nor is data available to support its continuance.[49] The BBP memos do identify that more engagement with industry and other structural changes to the business relationships between the private sector and DoD, such as issuing better demand signals and enhancing knowledge about the value of Intellectual Property, are more important than minor process changes that delay the procurement cycle, but have negligible effect on the competitive process.

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[48] OSD Memorandum, *Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending,* September 14, 2010, accessed November 7, 2018, https://www.acq.osd.mil/fo/docs/USD_ATL_Guidance_Memo_September_14_2010_FINAL.PDF.
[49] "Contract Policy: Competition," Defense Pricing and Contracting, accessed November 29, 2018, https://www.acq.osd.mil/dpap/cpic/cp/competition.html.

Discussion

DFARS 215.371-1 states, "It is DoD policy, if only one offer is received in response to a competitive solicitation … To take the required actions to promote competition." The contracting officer is required to conduct market research and engage in a variety of requirements outreach activities prior to developing the strategy and solicitation and is required to identify a list of potential offerors interested in the acquisition as well as scan the marketplace for new or unfamiliar sources.[50] Contracting officers have a good indication long before a solicitation closes, and throughout the presolicitation procurement cycles, even before developing the strategy or solicitation, if the acquisition circumstances will promote effective competition. This foresight includes knowing whether or not two or more offerors are likely to emerge, allowing for strategies to draw new offerors to the federal market, and acknowledging that contracting officers are required to solicit potential offerors and anyone else that expresses interest in a procurement (such a request itself is an indicator of interest in competition). If contracting officers believe competition is unlikely or a modification to the strategy is necessary to promote competition, the time to strategize about increased competition is when drafting the strategy, not after offers have been received. Thus, all the predicate steps to achieving effective competition are taken from the outset of any procurement and are subject to internal and external process outcome reviews by agency managers and several oversight organizations to assure that contracting officials have taken steps to maximize competition.

Interested parties also have multiple opportunities prior to the solicitation phase to be notified of the government's requirement and intent to solicit. FAR 5.203 requires a proposed contract action be publicized 15 days prior to issuance of the solicitation. DFARS 215.371-2 (a)(2) requires contracting officers to "Resolicit, allowing an additional period of at least 30 days for receipt of proposals" in instances where solicitations were open for less than 30 days and only one offer was received. Resoliciting does not resolve a potentially flawed acquisition strategy that does not fully promote competition. Nor does it obviate the need for offerors to monitor acquisitions and respond to solicitations in a timely manner. The requirement at DFARS 215.371-2 to resolicit for an additional 30 days has proven itself unlikely to result in additional interest in an acquisition or increased competition and only delays acquisitions. That said, when only one offer is received, the contracting officer is required to "consult with the requiring activity as to whether the requirements document should be revised in order to promote more competition" and, further, seek post-award feedback from potential offerors. This feedback is to be documented and used in future acquisitions to promote competition.[51] The requirement to adopt lessons learned in any given procurement and to adapt the procurement strategy for the future, which force contracting officers and requiring activities to analyze their requirements and methods of fulfilling them, are more likely to promote competition than relying on resoliciting, which will likely only delay the acquisition.

Conclusions

Interested parties have multiple opportunities prior to the solicitation closing to be notified of the government's requirement and intent to solicit, e.g. market research, synopsis and to engage in the competitive process. The policy to resolicit adds time to the procurement process, has no direct nexus to any documented increase in competition in DoD and does not align with other internal and external

[50] Procedures, Guidance and Information, DFARS 210.002.
[51] Source Selection: Promote Competition, DFARS 215.371-2 and DFARS PGI 215.371-2.

outreach activities conducted by contracting officials as a predicate to soliciting competitive offerors. The requirement at DFARS 215.371-2 for contracting officers to resolicit for an additional 30 days when only one offer is received in response to a solicitation should be repealed.

Subrecommendation 75b: Eliminate the documentation approval process for DoD programs to use OMB-designated best-in class contract vehicles for direct acquisitions.

Background

OMB designates more than a dozen interagency contracts as best-in-class (BICs). Several of these contracts provide DoD and other agencies with access to IT services and solutions. The General Services Administration (GSA) publishes a regularly updated list of approved BICs via the agency's Acquisition Gateway web tool.[52] When DoD conducts acquisitions using non-DoD BIC contract vehicles, there are lengthy documentation approval processes. These approval processes can take several months and incentivizes contracting personnel to use or create agency-unique contract vehicles. Avoidance of already-established contract vehicles increases the amount of duplicative administrative work in DoD contracting offices and potentially decreases the government's negotiating power.[53]

Discussion

Interagency contracting is an important part of DoD's acquisition system, particularly in IT and other areas that may require specialized technical or market knowledge on the part of contracting professionals. Interagency contracting can also be important when buying commoditized products. If the government, as a whole, purchases large amounts of something, a large, preexisting, nondefense contract may provide a faster and higher-quality solution than if contracting officers were to develop a brand-new contract. Statutory requirements on interagency contracts exist under 10 U.S.C. § 2304 and 31 U.S.C. § 1535 (commonly referred to as the Economy Act). The acquisition community implements these laws via FAR Part 17 and DFARS Part 217.[54]

10 U.S.C. § 2304(f) establishes restrictions on making a contract award using "other than competitive procedures," including the streamlined process of using a non-DoD BIC contract vehicle. The section creates thresholds above which senior officials must approve a written justification for the acquisition in question. For contracts valued at $75 million or more, an agency-level senior procurement executive must provide approval.[55] DFARS 217.7 expands these requirements, adding special procedures for interagency contract acquisitions that exceed the simplified acquisition threshold. The subpart requires

[52] Table lists all BICs identified as providing access to IT solutions in GSA Acquisition Gateway, "Best in Class (BIC) Consolidated List," accessed April 30, 2018, https://hallways.cap.gsa.gov/app/#/gateway/best-class-bic/6243/best-in-class-bic-consolidated-list.
[53] In order to use agency-unique solutions, a contracting office must in many cases spend time and resources putting a new contract vehicle in place (complete with a competition to establish an indefinite delivery, indefinite quantity vehicle as required under FAR Part 15). These same solutions might be obtained by competing a task order on an existing contract vehicle using the more streamlined FAR 16.5 procedures.
[54] Agency Agreements, 31 U.S.C. § 1535(a), states, "The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if (1) amounts are available; (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government; (3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise."
[55] Under Chief Acquisition Officers and Senior Procurement Executives, 41 U.S.C. § 1702(c), *senior procurement executive* refers to the person "responsible for management direction of the procurement system of the executive agency."

DoD components to conduct best-interest evaluations, scope determinations, funding reviews, and data collection and reporting.[56]

DoD interagency procurements are categorized as either direct or assisted. A direct acquisition is one for which a requiring agency places an order directly against another agency's existing contract vehicle—essentially placing a simple purchase order. An assisted acquisition is one for which the requiring agency sends requirements to the contracting agency, which then engages in acquisition processes on behalf of the requiring agency.[57]

Greater use of interagency OMB-designated BICs in DoD contracting should be encouraged. Using BICs may provide several benefits:

- Allowing for the development of common requirements.
- Reducing duplicate contracts (freeing up more of the contracting workforce for other priorities).
- Applying demand management practices; and
- Improving the government's negotiating power with vendors.[58]

Despite the clear benefits to using OMB-designated BICs for contracting, DoD creates mechanisms that discourage their use. Through an overabundance of unnecessary approval documents and signature-accumulation exercises, DoD incentivizes acquisition personnel to create new, duplicative, and overly expensive contract vehicles rather than rely on preexisting ones.

Conclusion

Statutory requirements on interagency contracts exist under the Economy Act and additional documentation required of DoD when using best in class contract vehicles for direct acquisitions discourages use of these vehicles. The results are inefficient contracting strategies and loss of volume discounts and purchasing power. The documentation approval process for DoD programs to use best-in-class contract vehicles for direct acquisitions should be eliminated. The approval process for assisted acquisitions should remain unchanged to ensure greater visibility of offloading and control of contract terms and conditions.

Subrecommendation 75c: Repeal regulatory requirement for preaward Equal Employment Opportunity (EEO) clearance, FAR 22.805(a).

Background

The 1965 Executive Order (EO) 11246, Equal Employment Opportunity, prohibits the discrimination of government or government contractor employees or applicants for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. Section 211 of the EO indicates,

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[56] Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense, DFARS 217.7.
[57] See Procedures, FAR 17.502-1(a). Definitions adapted in part from presentation by Steve Sizemore, *Interagency Acquisition,* GSA Federal Acquisition Service, April 25-26, 2017, 3, accessed May 11, 2018, https://interact.gsa.gov/sites/default/files/Interagency%20Acquisition_2017_CLP.pdf.
[58] Adapted in part from presentation by Geri Haworth, *Best in Class Contracts,* GSA Professional Services & Human Capital Symposium, June 6-8, 2017, accessed April 23, 2018, https://interact.gsa.gov/sites/default/files/PSHC%20Symp%20-%20Best%20in%20Class%20Contracts%20Final.pdf.

> *If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor.*

Although the EO does not describe a lengthy precontract award process to demonstrate compliance, the FAR's implementation of the EO does.

Discussion

FAR 22.805(a) requires clearance from the Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (OFCCP) that contracts and subcontracts over $10 million are compliant with one or more of the requirements of EO 11246. This requirement is duplicative with FAR 52.222-26 and leads to unnecessary delays.

This process can take up to 35 consecutive days prior to award of a contract for all contracts and subcontract awards over $10 million. Contracting officers are required to submit a preaward clearance request 30 days before the proposed award date, once the awardee is known. On submitting the request to the OFCCP, contracting officers must wait up to 15 days for a response. The response may come in the form of granted clearance for award or a notification of intent to conduct a compliance evaluation, which can take an additional 20 days. In FY 2017, according to data retrieved from FPDS, there were 3,200 contracts awarded meeting this threshold.[59] These 3,200 contracts do not include subcontract awards or modifications to contracts that would constitute a contract award, both of which may also be subjected to this clearance process. In a worst-case scenario the potential result is a cumulative delay, in just one fiscal year, of up to 113,000 days waiting for this clearance, the equivalent of more than 300 years.[60]

Case Study:
Mission Vulnerability Caused by EEO Pre-Award Clearance

One contracting officer interviewed described an emergent requirement performed by a nontraditional contractor not previously cleared by the OFCCP for EEO compliance. The contracting officer submitted a request for preaward clearance to the OFCCP, waited the requisite 15 days and never received a response from the office. After considering this tacit approval of the contractor's compliance with the requirements of EO 11246, the contracting officer proceeded with award. The lack of response caused a 15 day vulnerability to a critical Army mission. The contracting officer indicated that even in instances of urgency, the regulations do not provide enough latitude for timely execution, as claims of urgency require coordination between the head of the contracting activity and OFCCP, which is an even more burdensome and lengthier process than coordinating with the OFCCP directly and waiting for a response.[61]

[59] Based on Section 809 Panel staff analysis of FPDS query results for FY 2017 base and all options value of DoD modification-zero contract actions above $10 million. Blanket purchase agreement, blanket order agreement, and indefinite delivery contract actions omitted from query. FPDS data extracted July 13, 2018 produced 3,221 results.
[60] Number of days based on calculation of number of contracts (about 3,200) multiplied by 35 days. Number of years based on number of days (about 113,000) divided by 365 days per year.
[61] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, August 2018.

With few exceptions, all contracts over $10 million must include FAR clause 52.222-26, Equal Opportunity, which requires the contractor to comply with EO 11246 and the rules, regulations, and orders of the Secretary of Labor.[62] The clause at 52.222-26 is required for use in all solicitations and contracts estimated over $10,000 unless it fits one of the aforementioned exceptions for national security or under exceptional circumstances. The clause describes the contractual authority of the OFCCP to cancel, terminate or suspend the contract after issuance if the contractor is found not to be in compliance with the clause or any rule enforced by DOL relative to EO 11246. Among other things, the clause has substantive obligations for a contractor not to discriminate for employment purposes on the basis of a variety of factors, to take affirmative action to prevent discrimination in employment, to publicize and disseminate the remedies and protections for workers for any non-compliance, and to allow OFCCP to have access and enforce prescribed remedies for non-compliance. It is also required as a clause for use in the simplified acquisitions of commercial items. As such, the clause is one that is included in virtually all federal forms used to both solicit offers from industry and to award final contracts, and is typically included in the final form contracts in Section I as part of the general reference provisions, which then become part of the performance requirements of every contract, subject to remedies for breach, False Claims Act liability and specific OFCCP enforcement actions.

Prior to even being solicited, as a predicate to becoming eligible to receive a federal contract, offerors are also required to register their company in the System for Award Management (SAM), incorporated by reference in contracts at clause 52.204-7, which encompasses the data base for online representations and certifications (formerly ORCA). ORCA contains two related EEO compliance clauses at 52.222-22, Previous Contracts and Compliance Reports, and 52.222-25, Affirmative Action Compliance. Both clauses require an affirmative representation by any recognized federal contract offeror to their prior compliance with the Equal Opportunity clause at 52.222-26 and that they have an Affirmative Action program in place whose compliance is monitored by the OFCCP under EO 11246. Insofar as the pre-award process includes multiple ongoing representations as to EO compliance prior to receiving a solicitation, and any contract awarded contains the operative clause at 52.222-26 that provides for various remedies for non-compliance, including breach of contract, it is reasonable to conclude that when an offeror to a federal contract self-certifies their agreement to, and previous compliance with, the requirements of EO 11246 by signing their proposal/offer to the federal government, the government has ample protection from potential contractor noncompliance prior to the time of award. Thus, under contract formation principles and law, the contractor has both certified to their previous and ongoing compliance with EO 11246 and then promised their future compliance, subject to breach, on the specific contract.

The Pre-award Compliance Review Clearance form required under FAR 22.805 thus duplicates a series of electronic and paper oversight mechanisms that are already embedded in the procurement process in the FAR solicitation and contract clauses, SAM and ORCA representations and certification already and is unnecessary at the award stage to ensure that contractors are in compliance with EO 11246 or Equal Opportunity law generally. While we understand that DOL may object to eliminating the pre-award compliance clearance form, it is not true that eliminating it will create additional compliance or

[62] Exceptions include national security contracts and those explicitly excluded by the Deputy Assistant Secretary for Federal Contract Compliance, U.S. Department of Labor.

performance risk or that oversight of the EO will be any less strictly construed under contract law provided the offeror has completed their mandatory SAM registration and signed their offer, but its elimination will allow for greater speed to award and one less duplicative procurement file document."

Precedent exists in acquisition regulations for contractors to self-certify compliance in streamlined processes that avoid the delay of government validation. EO 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, for instance, simply requires the contractor to certify, prior to award, it has implemented a compliance plan to prevent prohibited activities. The same process should apply to EO 11246. Contractor certification prior to award should be sufficient, with ongoing compliance checks by OFCCP. Authority to take action against noncompliance would come from the EO authority. This reform would greatly reduce the procurement acquisition lead time and allow for speedier contract awards.

Conclusion

Requirements for preaward EEO clearance are inconsistent with comparable labor laws and EOs, which rely on contractor certification and post-award enforcement using the terms of the contract and the EO. The preaward clearance process leads to substantial delays in contract awards and should be repealed.

Subrecommendation 75d: Revise FAR 19.815 to allow for tacit release for non-8(a) competition by the Small Business Administration (SBA) if concurrence or rejection has not been received by the Small Business Administration after 15 working days.

Background

In the Small Business Act of July 30, 1953, Congress created the Small Business Administration (SBA), for which the function was to "aid, counsel, assist and protect, insofar as is possible, the interests of small business concerns." The charter also stipulated that SBA would ensure small businesses a "fair proportion" of government contracts and sales of surplus property.[63] Section 8 of the act allows the SBA to enter into contract with the government and subsequently "arrange for the performance of such procumbent contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns."[64] This program is commonly referred to as the 8(a) program, deriving its name from the section of the act itself. The 8(a) program allows or, in some cases, requires the limitation of competition for certain contracts to businesses that participate in the 8(a) Business Development Program. The program helps the government achieve its socioeconomic goal to award at least 5 percent of federal contracting dollars to small disadvantaged businesses each year.[65]

Discussion

The FAR implements section 8(a) of the Small Business Act in subpart 19.8. The FAR offers detail on the process of contracting with SBA, including how to select acquisitions and determine eligibility as a

[63] "About the SBA: History," U.S. Small Business Administration, accessed November 8, 2018, https://www.sba.gov/about-sba/what-we-do/history.
[64] Small Business Act § 8(a)(1)(B).
[65] "8(a) Business Development Program," U.S. Small Business Administration, accessed November 8, 2018, https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program.

small business, the agency offering and SBA acceptance, and contract execution and administration processes. Unique to the 8(a) program and its requirements is the presumption of perpetual inclusion.

The FAR indicates that "once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements shall remain in the 8(a) program unless there is a mandatory source… or SBA agrees to release the requirement from the 8(a) program."[66] The FAR briefly describes the process to release a procurement from the 8(a) program. Unlike the detailed process for determining whether to accept a requirement for the 8(a) program, which allows the SBA 10 working days to accept offers over the simplified acquisition threshold and 2 working days for those under the threshold, there is no prescribed timeframe when a request is made to release a requirement from the 8(a) program. This prevents contracting officers from soliciting performance outside the 8(a) program and causes unnecessary delays while waiting for the SBA's response. One source indicated on several occasions his office requested release of a requirement, or portion of a requirement, and waited between 3 and 90 days while the SBA processed the request for release. He said, "The lack of predictability of the SBA in the release process is very detrimental to acquisition planning and our ability to adhere to schedule constraints for critical programs within the DoD."[67]

Conclusions

SBA should be allowed 15 working days after receipt of the contracting officer's written request, described at FAR 19.815(b), to respond with a determination whether to release a requirement from the 8(a) program. If SBA does not provide the requesting contracting officer with a determination within that period, release from the 8(a) program should be presumed and the contracting officer should be authorized to proceed with award outside the 8(a) program.

Implementation

Legislative Branch

- Revise 10 U.S.C. 2304(f) to clarify and streamline the process of awarding DoD task orders under OMB-designated BIC contract vehicles. For assisted acquisitions, the current process may remain in place with higher-level approvals needed. For direct acquisitions, DoD contracting officers should execute the acquisition without explicit approval.

Executive Branch

- Repeal requirement at DFARS 215.371-2 to resolicit for an additional 30 days when only one offer was received in response to a solicitation.
- Eliminate the documentation approval process required at DFARS 217.770 for DoD programs to use OMB-designated BIC contract vehicles for direct acquisitions.
- Repeal requirement for pre-award EEO clearance, FAR 22.805(a).

[66] Release for Non-8(a) Procurement, FAR 19.815(a).
[67] Email to Section 809 Panel, September 2018.

- Revise FAR 19.815 to allow for tacit release for non-8(a) competition by the SBA if no response has been received by the SBA after 15 working days.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

- The recommended changes to the statutes and the FAR would apply to DoD and civilian agencies that use the FAR. Both DoD and civilian agencies will benefit from these recommendations.

RECOMMENDATIONS 76 THROUGH 81 ARE STAND-ALONE RECOMMENDATIONS ABOUT VARIOUS TOPICS RELATED TO SIMPLIFYING PROCUREMENT AND CONTRACTING

Recommendation 76: Revise the fair opportunity procedures and require their use in task and delivery order competitions.

Problem

When competing orders under MA IDIQ contracts, contracting personnel frequently choose complex source selection procedures derived from FAR 15.3 instead of the streamlined fair opportunity procedures in FAR 16.505(b) intended for these types of procurements.[68] Voluntary use of source selection procedures results in additional, unnecessary steps in the solicitation, proposal, and evaluation processes that create additional workload for both government and industry. Forgoing the opportunity to use the more streamlined fair opportunity procedures also extends the timeline to award.[69]

Background

The concept of fair opportunity first appeared in the Federal Acquisition Streamlining Act of 1994 (FASA). It was considered a necessary and common sense process to accompany the proliferation of MA IDIQ contracts. The logic was that contractors that already participated in a full FAR 15.3 competition to get onto the vehicle should not be subjected to the same process to compete for orders. Streamlined ordering procedures would shorten award timeframes, benefitting both government and its MA IDIQ contract holders. The Office of Federal Procurement Policy (OFPP) explained in 1997 "Congress recognized that without streamlined order placement, the quality benefits and cost savings made possible by continuous competition might be outweighed by excessive expenditures of time and administrative resources."[70]

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[68] DoD, *Source Selection Procedures*: *Defense Federal Acquisition Regulation Supplement, Procedures, Guidance and Information, Subpart 215.3--Source Selection*, March 31, 2016, accessed October 23, 2018, https://www.acq.osd.mil/dpap/policy/policyvault/USA004370-14-DPAP.pdf.

[69] ASI Government Advisory, *Streamlining Task and Delivery Order Solicitations under MA/IDIQ Contracts,* May 2016, accessed October 23, 2018, https://interact.gsa.gov/sites/default/files/ASI%20Advisory%20on%20Streamlining%20Final%206.9.2016.pdf.

[70] "Best Practices for Multiple Award Task and Delivery Order Contracting," Office of Management and Budget, July 1997, Chapter 4—Ordering Procedures, accessed October 23, 2018, https://www.gsa.gov/cdnstatic/BestPracticesMultipleAward.pdf.

As incorporated into the FAR, the language in Subpart 16.505(b)(1)(ii) describes the latitude provided to contracting officers:

> *The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. …The competition requirements in Part 6 and the policies in Subpart 15.3 do not apply to the ordering process.*

To assist with adoption of these streamlined procedures, OFPP issued best practices guidance in 1999.[71] Specific examples of streamlining available when using FAR 16.5 procedures include the following:

- No formal source selection plan or evaluation team structure is required. As stated in the FAR, "Formal evaluation plans or scoring of quotes or offers are not required." For orders exceeding $5.5 million made on a best value basis, however, contracting officers are required to provide "a written statement documenting the basis for award and the relative importance of quality and price or cost factors."

- The only mandatory evaluation factor is cost/price. There are no required rating tables or definitions, which provided the contracting officer with flexibility to use simplified evaluation schemes.

- No requirement exists to establish a competitive range or enter into *discussions* with all offerors. The contracting officer may decide to initiate *exchanges* (the fair opportunity equivalent of *discussions*) with any number of offerors or with only one.

- Immediate comparison of proposals is permitted with no need to independently evaluate prior to comparative analysis.

- Use of oral presentations and/or demonstrations is allowed. Also available in FAR 15.3 procedures, these types of activities can play a prominent role as the main or even sole technical evaluation technique in FAR 16.5 competitions.

- No requirement exists to quantify tradeoffs that lead to the selection decision. However, "The contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision."

Streamlined ordering procedures for Federal Supply Schedules (FSS) are available in FAR 8.405. GSA publishes various guidance documents encouraging proper use of these streamlined procedures, including one titled *Think Simplified (Not FAR Part 15)*.[72] When DoD competes orders on FSS contracts, however, it sometimes uses FAR 15.3 procedures.

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[71] Ibid.
[72] GSA, *Handout F: Think Simplified (Not FAR Part 15), 22,* November 12, 2013, accessed October 23, 2018, https://interact.gsa.gov/sites/default/files/handouts%20a%20through%20h%2011.29.14.pdf.

Despite all the advantages of FAR 16.5 procedures and the substantial number of years they have been available, DoD has shown a general reluctance toward their adoption and use.

Discussion

The *broad discretion* afforded to contracting officers in FAR 16.5 goes hand-in-hand with FAR 1.102 which states "absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment," and yet use of the streamlined procedures described in FAR 16.5 has been inconsistent at best, leading many in the acquisition community to comment on the matter. An article in the Nash & Cibinic Report titled *Simplified Acquisition Procedures: Why Can't We Keep Them Simple?* states the following:[73]

> *One of the most remarkable and disappointing phenomena of Government contracting is the unwillingness or inability of many contracting officers to take advantage of the streamlining and labor-saving contract formation procedures that became available during the acquisition reform era of the 1990's. COs needlessly resort to Federal Acquisition Regulation Part 15 solicitation, offer, and award procedures when making simplified acquisitions, when competing task orders under multiple award service contracts, and even when placing orders under General Services Administration schedules.*

Numerous presentations at the National Contract Management Association (NCMA) World Congress from 2014 to 2018 expressed a similar sentiment, including one titled *Fair Opportunity—Why Are We Making This So Hard?*[74]

Some DoD organizations have developed guides to encourage and assist contracting professionals in the use of fair opportunity procedures. For example, in August 2017 the Air Force Materiel Command published *Guiding Principles for Fair Opportunity Selection Under Federal Acquisition Regulation (FAR) 16.505(b)(1)*. The introduction to the guide summarizes the issue as follows:

> *Many acquisition teams do not capitalize on the flexibility and potential time savings associated with the less formal FAR 16.505 competition strategies because the FAR and its supplements do not contain more specific guidance or information on how COs can utilize their "broad discretion." As a result, the advantages available through competing an action under a MAC IDIQ are underutilized as many teams spend valuable time, money and resources using formal FAR 15.3 source selection procedures because there is so much regulation, training and sample documentation available. Simply put, the current acquisition community is extremely conversant with FAR 15.3 source selection procedures, so teams revert to using formal FAR 15.3 competition procedures rather than exploring and utilizing the streamlining opportunities afforded by FAR 16.505.*

The Coalition for Government Procurement found "it takes a contracting officer 145 days less to place an order under an MA IDIQ, than to establish a new contract. That faster ordering time saves the

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[73] Vernon J. Edwards and Ralph C. Nash, *THE FAR: Does It Have Contractual Force And Effect?,* 31 Nash & Cibinic Rep. NL ¶ 10, February 2017, accessed October 23, 2018, http://www.wifcon.com/analy/thefardoesithave.pdf.
[74] Nick Tsiopanas and Jessica Dobbeleare, *Fair Opportunity – Why Are We Making this So Hard?*, presentation to the NCMA World Congress 2014, July 29, 2014, accessed October 23, 2018, https://www.ncmahq.org/docs/default-source/default-document-library/pdfs/f02---fair-opportunity---why-are-we-making-this-so-hard.pdf?sfvrsn=5932202b_2.

government an estimated $37,000 per contracting officer per order. This estimate does not account for the savings that result from customers receiving their products and services more quickly."[75] Frequent use of full source selection procedures when fair opportunity procedures could—or should—be used, raises a number of questions: *How much time and money is being wasted in this manner across the department on an annual basis? To what degree is the department needlessly delaying capabilities to warfighters and other end users, and what are the second-order effects of these inefficiencies?*

An ASI Government advisory from 2016 found the following:[76]

> *Awarding a new standalone contract took between 405 and 495 hours, while awarding a task order took between 119 and 168 hours. A comparison of acquisition strategies revealed that issuing a standalone contract versus awarding an order under a GWAC for a transaction exceeding $12.5 million:*
>
> *Increased the total amount of work by 121 percent*
>
> *Increased the amount of work done by experts from 14 percent to 80 percent*
>
> *Reduced the amount of work done by journeymen and entry levels from 86 percent to 20 percent*
>
> *Required a GS-14/15 supervisor as expert for approximately .92 staff years versus .07 staff years, or a non-supervisory expert for .36 staff years versus .03 staff years.*

The implications of these analyses are clear: Widespread and more consistent use of FAR 16.5 procedures would benefit DoD by reducing cycle times for task order awards and by freeing senior and expert personnel to focus on more strategic and difficult procurements.

Some have observed the tendency to use FAR 15.3 is due to the workforce's comfort with rules and procedures that are spelled out in detail. By contrast, the FAR does not provide a formal definition of what constitutes providing MA IDIQ awardees *fair opportunity* for order competitions. The flexibility of the FAR 16.5 process—viewed by some as a strength—can actually be a weakness because it requires the contracting team to develop details. That is, it requires some creativity and possibly innovation as opposed to just following predetermined steps. FAR 16.5 specifically tells contracting officers they have broad discretion in this process; yet it appears that discretion is unsettling in a culture that values compliance and checklists.

Current DoD source selection procedures state the FAR 15.3 procedures should be considered for use on MA IDIQ orders of more than $10 million. In DoD contracting's compliance oriented culture, the word *considered* is often interpreted as *should* or even *shall*. Presumably, the rationale for recommending consideration of source selection procedures at $10 million was based on the then-current GAO protest threshold. That threshold has since been increased to $25 million, but dollar value alone does not

[75] "Multiple Award IDIQ Contracts: Essential Tools in the Acquisition Toolbox," The Coalition for Government Procurement, September 28, 2017, accessed October 23, 2018, http://thecgp.org/multiple-award-idiq-contracts-essential-tools-in-the-acquisition-toolbox.html.
[76] ASI Government Advisory, *Streamlining Task and Delivery Order Solicitations under MA/IDIQ Contracts,* May 2016, accessed October 23, 2018, https://interact.gsa.gov/sites/default/files/ASI%20Advisory%20on%20Streamlining%20Final%206.9.2016.pdf.

accurately indicate risk, and when properly planned and executed, FAR 16.5 procedures do not increase risk of protest.

Contracting officers' apprehension could stem in part from GAO's consistently held view that if a FAR 16.5 competition uses FAR 15.3 terminology and/or partial procedures, then GAO will apply the standards of a FAR 15.3 negotiated procurement to bid protests.[77] The same is true for orders against FSS. A protest by Finlen Complex, Inc. of an Army award for procurement of meals, lodging, and transportation was sustained by GAO because the "agency's use of a negotiated procurement approach, rather than a simple Federal Supply Schedule purchase, triggered [the] requirement to provide for a fair and equitable competition." GAO went on to say "Despite the 'simplified' label, this procurement is very similar to any other negotiated acquisition conducted under the rules set forth in FAR part 15."[78] In this and many similar bid protest cases, GAO has repeatedly invoked the stance that it looks to the substance of an agency's actions, rather than the form.[79] Simply stating a solicitation uses FAR 16.5 procedures is not sufficient. The entire solicitation and associated process must follow those procedures and carefully avoid using FAR 15.3 terminology. Table 7-5 provides a comparison of FAR 15.3 and FAR 16.5 terminology. These different lexicons are a critical component to establishing which procedures are being used.

Table 7-5. FAR 15.3 and 16.5 Terminology Comparison

FAR 15.3 Terms	FAR 16.5 Terms
Offeror	Contractor
Request for Proposals (RFP)	Request for Task Order Proposals (RFTOP) Fair Opportunity Proposals Request (FOPR)
Source Selection	Task Order Evaluation Evaluation and Selection
Source Selection Plan	Proposal Evaluation Plan Fair Opportunity Selection Plan
Source Selection Authority	Task Order Determining Official Fair Opportunity Decision Authority
Discussions	Interchanges Exchanges
Proposal	Proposal Quote Response

Other nuances can come into play when using FAR 16.5 procedures. One such nuance is whether oral presentations constitute *discussions*. In a bid protest by Sapient Government Services, Inc., the company argued that the Department of Homeland Security (DHS) had initiated discussions by conducting a dialogue about Sapient's proposed solution during a task order competition oral presentation. GAO

[77] GAO, *Decision, Matter of: Abacus Technology Corporation; SMS Data Products Group, Inc., B-413421,* October 28, 2016, accessed October 23, 2018, https://www.gao.gov/assets/690/680987.pdf.
[78] "Finlen Complex, Inc., B-288280," GAO, October 10, 2001, accessed October 23, 2018, https://www.gao.gov/products/407353.
[79] GAO, *Decision, Matter of: CourtSmart Digital Systems, Inc., B-292995.2,* February 13, 2004, accessed October 23, 2018, https://www.gao.gov/assets/380/371312.pdf.

denied the protest, stating DHS properly followed FAR 16.5 procedures because the exchanges that occurred during the oral presentation pertained only to the oral presentation and not to Sapient's earlier submitted written proposal.[80] It is understandable how nuances like these could give contracting officers pause when deciding which set of procedures to use. With appropriate planning and understanding, the streamlined procedures can be used with confidence while saving valuable time in the process. The default procedures for MA IDIQ order competitions should be based on the streamlining available in FAR 16.5; however, interviews, publications, and conference presentations indicate FAR 15.3 procedures are frequently used instead. Many DoD contracting offices do not have guidance or procedures for fair opportunity, so their personnel continue to use what they know and have been trained on—full FAR 15.3 source selection procedures.

Conclusions

When properly designed and followed, FAR 16.5 procedures save time and money for DoD and industry partners, as well as get needed capabilities to users faster. These procedures also encourage innovation in the contracting process by providing substantial flexibility to contracting officers and explicitly authorizing broad discretion in the process.

DoD must increase use of FAR 16.5 procedures by providing practitioners with policy, guidance, and best practices to give them the knowledge, support, and confidence needed to benefit from this important acquisition tool.

Implementation

Legislative Branch

- Revise 10 U.S.C. § 2304c(d)(1–5) to more clearly specify what constitutes streamlined ordering procedures (e.g., subfactors are not required), and to increase the threshold for use of these procedures from $5.5 million to $7 million, consistent with the streamlined procedures for acquiring commercial products and services addressed in the Section 809 Panel *Volume 2 Report*, Recommendation 28.

Executive Branch

- Revise FAR 16.505(b)(1)(iv) to more clearly specify what constitutes streamlined ordering procedures (e.g., subfactors are not required), and to increase the threshold for use of these procedures from $5.5 million to $7 million, consistent with the streamlined procedures for acquiring commercial products and services addressed in the Section 809 Panel *Volume 2 Report*, Recommendation 28.

- Revise FAR 16.505(b)(1)(ii) to require contracting officers to use streamlined procedures when placing orders under multiple-award contracts. Require contracting officers to obtain approval

[80] GAO, *Decision, Matter of: Sapient Government Services, Inc., B-412163.2,* January 4, 2016, 6-7, accessed October 23, 2018, https://www.gao.gov/assets/680/674778.pdf.

to use the complex source selection policies and procedures in FAR Part 15.3 when placing orders under multiple-award contracts.

- Remove from FAR 16.505(b)(1)(ii) the statement "Include the procedures in the solicitation and the contract." Different orders under the same contract may benefit from different procedures. Establishing a single set of procedures up-front and years before specific order requirements are known could conflict with the intent to provide broad discretion in developing fair opportunity procedures.

- Develop a Fair Opportunity desk guide to assist contracting professionals in confidently using proven streamlined procedures, and encourage development and use of innovative techniques to increase the quality of the evaluation and selection process while further reducing cycle time. This desk guide would not be prescriptive and instead would include examples of successful procedures, case studies, and best practices.

- Remove the following statement from the DoD Source Selection Procedures: "Agencies shall consider the use of these procedures for orders under multiple award (Fair Opportunity) greater than $10 million."[81]

Note: Explanatory report language and draft legislative and regulatory text can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

- Although there are no explicit cross-agency implications for this recommendation, other agencies could benefit from using the fair opportunity procedures developed by DoD.

Recommendation 77: Require role-based planning to prevent unnecessary application of security clearance and investigation requirements to contracts.

Problem

DoD sometimes incorrectly applies security clearance and investigation requirements to unclassified contracts, reducing the talent pool from which contractor companies can recruit and exacerbating the substantial investigation backlog. The National Background Investigations Bureau (NBIB) backlog currently exceeds 657,000 personnel investigations and requires on average more than 200 days to complete a background investigation.[82] In many cases, these contract requirements violate the need-to-know principle that guides the National Industrial Security Program (NISP). In addition to reducing the talent pool from which contractor personnel can be recruited, unnecessary clearance requirements

[81] DoD, *Source Selection Procedures*: *Defense Federal Acquisition Regulation Supplement, Procedures, Guidance and Information, Subpart 215.3--Source Selection*, March 31, 2016, accessed October 23, 2018, https://www.acq.osd.mil/dpap/policy/policyvault/USA004370-14-DPAP.pdf.
[82] Derek B. Johnson, *Security Clearance Backlog Drops 9 Percent,* FCW, September 25, 2018, accessed September 27, 2018, https://fcw.com/articles/2018/09/25/clearance-backlog-drops.aspx?m=1/.

increase the investigation backlog and add administrative burden to both DoD and contractor companies.

Background

Unnecessary requirements for cleared personnel place a substantial burden on contractor companies and disincentivize hiring new, innovative employees. DoD has stated repeatedly its desire to attract talent from the commercial marketplace where the vast majority of innovation and technology development now takes place. The personnel who work in this marketplace generally do not have security clearances and many are not willing to subject themselves to either the inconvenience associated with the process or the protracted delay waiting for the results of an investigation and adjudication. It stands to reason that an individual with in-demand skills would prefer a more streamlined hiring process without such dependencies.

The NBIB backlog is a governmentwide problem, but 75 percent of government clearances are for DoD jobs. In 2005, GAO added the personnel security clearance process to its High Risk List—a list that "calls attention to the agencies and program areas that are high risk due to their vulnerabilities to fraud, waste, abuse, and mismanagement or are most in need of broad reform."[83] After demonstrating progress in 2011, the security clearance process was removed from the list, only to reappear in 2018. This recurrence was attributed to large growth in the clearance backlog, a previous security breach of the background investigation IT system, lack of a discernable plan to address the backlog, investigator capacity, or reform effort delays.[84] Although the report listed numerous factors, GAO did not evaluate whether DoD's 3.6 million clearance holders met the need-to-know requirement for having access to classified data. Defense Security Service (DSS) personnel estimate as many as 10 to 30 percent of contractor secret clearances are unnecessary.[85]

The government communicates contract clearance requirements through the DD Form 254, Department of Defense Contract Security Classification Specification, "for the protection of information in the possession of cleared contractors associated with a classified contract."[86] To access material requiring confidential, secret, and top secret clearances, contractors must obtain a Facility Security Clearance (FCL) from DSS based on DD Form 254 requirements. The FCL is particularly important when common contract language contains requirements such as "[A]ll Contractor personnel performing on this TO shall possess or be eligible to obtain a SECRET security clearance" even on an unclassified system.[87] Unnecessary security requirements such as these make maintaining an FCL a necessity to compete on contracts. DSS conducts annual security reviews of cleared contractors to ensure safeguards are employed and National Industrial Security Program Operating Manual procedures are followed. These reviews include verifying a valid need to know exists, and DSS can rescind an FCL based on failure to demonstrate a need to know, regardless of the contract's DD Form 254. As a result, unnecessary classification leaves contractors vulnerable to termination of its FCL through no fault of their own.

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[83] GAO, *Overview: High Risk List, GAO-17-317,* January 2018 edition, accessed October 31, 2018, https://www.gao.gov/highrisk/overview.
[84] GAO, *High Risk List, GAO-17-317,* January 2018 edition, accessed June 25, 2018, https://www.gao.gov/highrisk/govwide_security_clearance_process/why_did_study#t=1
[85] Defense Security Service, interview with Section 809 Panel Staff, June 13, 2018.
[86] Defense Security Service, Public Affairs Office, *What is a DD Form 254?,* DSS Access Magazine, Volume 3, Issue 1, Spring 2014, 10, accessed June 20, 2018, http://www.dss.mil/documents/about/DSS_ACCESS_v3i1_Web.pdf.
[87] Excerpt from an Army Performance Work Statement (PWS) Small Business Task Order.

According to some at DSS who monitor and process contractor personnel security eligibility and access, contractors face "a losing battle in most circumstances…[they] do not want to fight their GCA/COR [Government Contracting Agency/Contracting Officer Representative] due to possible backlash."[88]

Once an FCL is approved and a classified contract awarded, the contractor uses the same systems as the government to manage cleared personnel. Considering the large clearance backlog and nearly 9-month average timeline for new investigations, contractors are incentivized to take the path of least resistance and settle for individuals with a current clearance, even if they are less qualified. The most qualified personnel languish waiting on clearances and ultimately move on to other opportunities. The real-world effect of the backlog on the industry talent pool was captured in a Senate intelligence hearing in March 2018:[89]

> *New careers are put on hold, top talent is lost to nondefense industries, and programs that will provide critical warfighter capabilities are delayed. And these impacts come with a real-world price tag, resulting in otherwise unnecessary increases in program costs and inefficient use of taxpayer dollars.*

The process levies unnecessary requirements on contractors and makes DoD unattractive to top talent.

Discussion

Most government contractors work on unclassified programs and do not require national security clearances.[90] This workforce consists of support contractors, such as acquisition support or cost analysis support, who will never access classified information and only require credentialing and access to an unclassified email system. There are already governmentwide and DoD-specific processes in place to complete this credentialing, in addition to the security clearance process. The 2008 Homeland Security Presidential Directive (HSPD) 12 established minimum standards for issuance of Personal Identity Verification (PIV) cards and Title 32 CFR established the IT security clearance standards. A PIV card and a Tier 1 investigation, formerly the National Agency Check with Inquiries (NACI), is the minimum standard for an individual to access federal facilities and unclassified systems such as DoD email.

HSPD-12 charged the Office of Personnel Management (OPM) to "ensure the effective, efficient and timely completion of investigations and adjudications relating to eligibility for logical and physical

[88] Defense Security Service, interview with Section 809 Panel Staff, June 13, 2018.
[89] U.S. Senate Select Committee on Intelligence, Hearing Video, Mar. 7, 2018, accessed June 25, 2018, https://www.intelligence.senate.gov/hearings/open-hearing-security-clearance-reform.
[90] According to a 2014 report on security clearance determinations from the Director of National Intelligence, 483,185 contractor personnel were eligible for a Confidential or Secret clearance, whereas in 2015 a Volcker Alliance issue paper reported the total number of government contractor personnel ("contract employees") was 3,702,000. Office of the Director of National Intelligence, *2014 Security Clearance Determinations Report*, 4, accessed October 31, 2018, https://www.dni.gov/files/documents/2015-4-21%20Annual%20Report%20on%20Security%20Clearance%20Determinations.pdf. Paul C. Light, *The True Size of Government,* Issue Paper, The Volker Alliance, October 5, 2017, accessed October 31, 2018, https://www.volckeralliance.org/publications/true-size-government.

access." The PIV card is the first step to establish eligibility. Some of the criteria needed to grant a PIV card to individuals include the following:[91]

- The individual is not known to be or reasonably suspected of being a terrorist.
- The employer is able to verify the individual's claimed identity.
- There is no reasonable basis to believe the individual has submitted fraudulent information concerning his or her identity.
- There is no reasonable basis to believe the individual will attempt to gain unauthorized access to classified documents, information protected by the Privacy Act, information that is proprietary in nature, or other sensitive or protected information.
- There is no reasonable basis to believe the individual will use an identity credential outside the workplace unlawfully or inappropriately.
- There is no reasonable basis to believe the individual will use Federally-controlled information systems unlawfully, make unauthorized modifications to such systems, corrupt or destroy such systems.

HSPD-12 also standardized the NACI, now known as the Tier 1 investigation, for issuing an identity credential. It includes an NAC with "written inquiries to past employers, schools, references, and local law enforcement agencies covering the past five years and if applicable, of the appropriate agency for any identified arrests."[92] Tier 1 provides confidence an individual will not misuse information or seek to gain unauthorized access to classified data.

In addition to governmentwide credentialing, DoD also requires contractors with a valid need to know for accessing defense IT systems be categorized by the positions they fill. A 1978 change to Title 32 CFR introduced the three Automated Data Processing (ADP) position categories based on potential threats to IT systems. These criteria are used today via the DD Form 2875, System Authorization Access Request, for every DoD government employee, contractor, and Military Service member to document their level of access in DoD IT systems. They also establish employees' responsibility and involvement in IT systems and the commensurate security clearance needed.[93]

- ADP–I positions: Critical-Sensitive Positions requiring a Tier 5 background investigation
  - Those positions in which the incumbent is responsible for the planning, direction, and implementation of a computer security program; major responsibility for the direction, planning and design of a computer system, including the hardware and software; or, can

[91] OPM Memorandum, *Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD-12,* July 31, 2008, accessed June 26, 2018, https://www.opm.gov/suitability/suitability-executive-agent/policy/final-credentialing-standards.pdf.
[92] "Security Clearance Investigations Process Updated," William Henderson, ClearanceJobs, October 9, 2011, accessed July 12, 2018, https://news.clearancejobs.com/2011/10/09/security-clearance-investigations-process-updated/.
[93] Defense Industrial Personnel Security Clearance Program, 32 C.F.R. 155.

access a system during the operation or maintenance in such a way, and with a relatively high risk for causing grave damage, or realize a significant personal gain.

- ADP–II positions: Noncritical-Sensitive Positions requiring a Tier 3 background investigation
  - Those positions in which the incumbent is responsible for the direction, planning, design, operation, or maintenance of a computer system, and whose work is technically reviewed by a higher authority of the ADP–I category to insure the integrity of the system.
- ADP–III positions: Nonsensitive positions requiring a Tier 1 background investigation
  - All other positions involved in computer activities.

The HSPD-12 requirements for credentialing and the CFR IT ADP criteria ensure personnel are adequately screened and given the proper level of access to IT systems. Used in concert, these programs allow the government to confidently plan by individual role and limit overclassifying contracts.

Conclusions

Although NBIB plans a new National Background Investigation System to "address security concerns and provide a continuous vetting process to reduce errors and provide efficiencies," it will not change the process or reduce the number of unnecessary clearances.[94] For unclassified DoD contracts, the apparent fallback position of requiring all cleared personnel is a costly burden to the government and the contractor. Doing so incentivizes contractors to provide cleared but less qualified personnel due to the large increase in new clearance requests and reinvestigations. DoD loses the opportunity to hire quality personnel by settling for an expedient solution, and highly qualified applicants move to nondefense opportunities. Section 925 of the FY 2018 NDAA Conference Report states "The background investigation process is broken" and the current security clearance process causes a "degradation in workforce quality, as high-performing personnel with the best alternatives are unlikely to wait for many months to begin work for the U.S. Government."[95] One way to reduce the clearance burden on contractors is to scrutinize each clearance/investigation requested based on the role from the DD Form 2875.

There are few clearances required for unclassified systems aside from those needed for elevated permissions that could compromise the system. The DD Form 254 should be the authoritative source for clearance requirements based on consolidated and detailed information from the OPM Position Designation Tool and employee DD Form 2875, which provides the job title, justification, clearance held, and ADP level designation for each role in the organization. Section 13 of the DD Form 254, Security Guidance, is the ideal consolidation point to communicate every role that requires a security clearance or a Tier 3 or Tier 5 investigation. Documents can be attached within Section 13 to clearly specify the contract security requirements. If properly planned and aligned with the DD Form 254, this

[94] "DISA Modernizing Clearance Process with Continuous Monitoring," Lauren C. Williams, Defense Systems, June 22, 2018, accessed June 25, 2018, https://defensesystems.com/articles/2018/06/22/disa-clearance-nbis-tech.aspx?s=ds_250618,.
[95] FY 2018 NDAA, Conference Report to Accompany H.R. 2810, Report 115-404, November 9, 2017, 905, accessed October 16, 2018, https://www.congress.gov/115/crpt/hrpt404/CRPT-115hrpt404.pdf#page=943.

role-based requirement could drastically reduce the number of clearance requests thereby providing improved access to uncleared talent.

Implementation

Legislative Branch

- There are no statutory changes required for this recommendation.

Executive Branch

- Develop policy to ensure clearance requirements in contracts are based only on valid security requirements that do not violate the NISP need-to-know principle.
- Issue guidance requiring role-based planning using the OPM Position Designation Tool to inform the DD Form 254, Department of Defense Contract Security Classification Specification.
- Expand use of the DD Form 254 to include use in unclassified contracts where Tier 3 and Tier 5 investigations are required based on ADP positions.
- Require use of DD Form 2875, System Authorization Access Request, to inform the DD Form 254 of required Tier 3 and Tier 5 investigations where no access to classified exists.
- Include personnel clearance planning in programs of instruction for DoD acquisition professionals and personnel generating contract investigation and clearance requirements.

Note: Draft regulatory text can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

- Although there are no explicit cross-agency implications for this recommendation, other agencies could benefit from using role-based planning for security clearances.

Recommendation 78: Include the supply of basic energy as an exemption under FAR 5.202.

Problem

The price of natural gas and electricity (i.e., basic energy) moves on a *spot market*, which means the price fluctuates so much that it is traded in 1-minute intervals.[96] The majority of basic energy bought in government as a commodity is awarded within 3 hours of receiving price proposals, otherwise offerors have the right to withdraw their price.[97] These practices are customary in the marketplace due to the by-the-minute-interval at which basic energy is traded. FAR 5.303 does not offer an exception

[96] "What is Price Volatility," U.S. Energy Information Administration, accessed October 14, 2018, https://www.eia.gov/naturalgas/weekly/archivenew_ngwu/2003/10_23/Volatility%2010-22-03.htm. U.S. Energy Information Administration cites the term *basic energy* as a supply of natural gas, electricity, heating oil.
[97] DLA Energy, briefing to Section 809 Panel, October 2018.

precluding this fluctuating commodity *from announcement of contract awards* (also known as *public announcement*), as it does for other commodities with price instability (i.e., FAR 5.202, Exceptions Perishable Subsistence Supplies), for which a delay in award is unreasonable. The requirement at FAR 5.303, Announcement of Contract Awards, triggers an unnecessary contract award delay from the time the government has received offers, to the time it is authorized to notify the potential awardee, thus resulting in either: (a) overinflated prices to cover an unnecessary risk factor of price volatility; or (b) during exchanges with industry, offerors reported that any delay award notification for basic energy is so far out of customary commercial practices, it dissuades the firm from doing business with the government.

Background

At least 15 government agencies that procure basic energy are affected by the FAR requirement according to a Federal Business Opportunities (FBO) search for the purchase of electricity or natural gas as a commodity.[98] There is a distinct difference in the FAR from buying power (i.e., electricity, utilities) as a service, as opposed to a *supply* or *commodity* (these two terms are interchangeable). Many of the requests for proposal advertised on FBO used the classification code *S –Utility and housekeeping services*, because there is no commodity classification code available for basic energy as a supply.[99] A *classification* disconnect exists between government agencies procuring basic energy as a *supply*, and those procuring power as a *service*. This distinction becomes important because the FAR provides an exception at 5.202 (b)(5) which precludes an agency from the announcement requirements (including those required at FAR 5.303) if the proposed contract action is for utility services and only one source is available. According to FAR Part 41, Utility Services, "the acquisition of natural or manufactured gas when purchased as a commodity does not apply." Therefore, agencies procuring basic energy as a supply are not exempt.

> *The term 'price volatility' is used to describe price fluctuations of a commodity; it is measured by the day-to-day percentage difference in the price of the commodity. The degree of variation, not the level of prices, defines a volatile market. Since price is a function of supply and demand, it follows that volatility is a result of the underlying supply and demand characteristics of the market. Therefore, high levels of volatility reflect extraordinary characteristics of supply and/or demand. Volatility provides a measure of price uncertainty in markets. When volatility rises, firms may delay investment and other decisions or increase their risk management activities. The costs associated with such activities tend to increase the costs of supplying and consuming gas.*[100]

Basic energy today is a commodity. As a wholesale commodity, this product is bought and sold on the New York Mercantile Exchange (NYMEX) where pricing is calculated in 5-minute increments with over 400 thousand contracts traded daily.[101] "Currently, electricity products can be traded at more than

[98] "Agencies," FedBizOpps.Gov, Federal Business Opportunities, accessed October 14, 2018. https://www.fbo.gov/index?s=agency&mode=list&tab=list.
[99] "Home," FedBizOpps.Gov, Federal Business Opportunities, accessed October 14, 2018. https://www.fbo.gov/index?s=main&mode=list&tab=list.
[100] "What is Price Volatility," U.S. Energy Information Administration, accessed October 14, 2018, https://www.eia.gov/naturalgas/weekly/archivenew_ngwu/2003/10_23/Volatility%2010-22-03.htm.
[101] "New York Mercantile Exchange—NYMEX," Investopedia, accessed October 14, 2018. https://www.investopedia.com/terms/n/nymex.asp.

two dozen hubs and delivery points in North America, and natural gas products can be traded at more than 120 hubs."[102] Trades occur every minute and prices fluctuate with each trade because power-plants must maintain or change their output to meet demand at least every 5 minutes. [103] This spot market operation is indicative of real-time price transactions so as to not have a generation shortfall on the overall system.[104]

Only the requirements at FAR 5.303, Announcement of Contract Awards, are problematic because they cause an unnecessary delay in award notification for a commodity with major price fluctuations. The requirements in FAR 5.2, Synopsis of Proposed Contract Actions, do not inhibit commercial practices, nor do these requirements prevent timely award. Adding an exemption category under FAR 5.202, Exceptions, which specifically exempts the agency from the requirements in FAR 5.303 if the contracting officer determines the proposed contract action for the supply of basic energy (i.e., natural gas, electricity, heating oil, or similar basic energy commodities subject to price volatility) would address the problem.

Discussion

"Prices of basic energy are generally more volatile than prices of other commodities."[105] When purchasing basic energy as commodities, the current contract award announcement process adversely affects the government's ability to engage the dynamic marketplace in a manner consistent with commercial practice. The requirement under FAR 5.303, Announcement of Contract Awards, requires the contracting officer to make award information available (if more than $4 million) in "sufficient time for the agency concerned to announce it by 5 p.m. Washington D.C. time. Agencies shall not release information on awards before the public release time of 5 p.m. Washington D.C. time." There are two major problems with the latter FAR requirement regarding the award of basic energy:

- If the local agency had the capacity to notify the public through its media directorate after 5 p.m. Eastern time on the day of award, then the award notification for basic energy would still disrupt the commercial practices of an instantaneous price evaluation and award notification within 3 hours of receiving firm price offers.

- Agency supplements (e.g., DFARS, AFARS) all require either 2 or 3 business days. For example, Army contracting officers must submit the information for contract award no later than noon 3 business days' notice prior to the date of proposed award.[106] If the Army were to receive final price offers for the supply of basic energy on a Thursday at 2 p.m., it could not notify offerors of the award until the following Tuesday. This practice is unreasonable in the basic energy market

[102] "Wholesale Electricity and Natural Gas Market Data," U.S. Energy Information Administration, accessed October 14, 2018, https://www.eia.gov/electricity/wholesale/.
[103] Ibid. Richard J. Campbell, *Electricity Markets – Recent Issues in Market Structure and Energy Trading*, *R43093*, Congressional Research Service, 37, accessed October 11, 2018. https://fas.org/sgp/crs/misc/R43093.pdf.
[104] Ibid.
[105] "What is Price Volatility," U.S. Energy Information Administration, accessed October 14, 2018, https://www.eia.gov/naturalgas/weekly/archivenew_ngwu/2003/10_23/Volatility%2010-22-03.htm.
[106] "A quick reference of the AFARS," Department of the Army, accessed October 14, 2018, http://farsite.hill.af.mil/vmafara.htm.

and dissuades vendors from doing business with the government, particularly small businesses.[107]

The scale at which the government buys basic energy is huge, consistently resulting in awards more than $4 million dollars. "The Federal government consumed roughly 57.4 million megawatt-hours of electricity to operate all of its U.S. facilities in fiscal year 2007 (the latest information available), making it the single largest U.S. electricity consumer."[108] "Electricity prices vary by region across the United States based on supply and demand factors which are largely influenced by the cost of fuels (i.e., natural gas), power generation technologies and infrastructure, and trends in weather."[109] The price of electricity is codependent on the price of natural gas because electricity is most often generated using either coal or natural gas.[110]

If not otherwise mitigated, any award notification delay when purchasing basic energy as a commodity exposes the supplier to significant price risk, resulting in higher offered prices to the government.

Conclusions

Basic energy in the commercial market place is dependent on the trading practices of the NYMEX, where pricing is done on a 1-minute increment basis and contracts are leveraged based on supply-and-demand variations on a 5-minute basis. The immediacy to secure contract pricing is paramount to the government receiving the best priced offer. Equally important, the government should closely adhere to commercial practices to maintain a healthy pool of vendors willing to do business with the government.

The proposed FAR change to add an exemption under FAR 5.202 excludes the announcement of a contract award in accordance with FAR 5.303 for basic energy. This proposed change would mitigate price inflation and reinforce commercial business practices. It would allow the government to take full advantage of the dynamic marketplace and align with the commercial practice by awarding basic energy contracts almost immediately after receipt of a price offer. This exception is anticipated to increase the number of participating offerors, enhance competition, and facilitate participation of small businesses.

Implementation

Legislative Branch

- There are no statutory changes required for this recommendation.

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[107] DLA Energy, briefing to Section 809 Panel, October 2018.
[108] Anthony Andrews, *Federal Agency Authority to Contract for Electric Power and Renewable Energy Supply, R41960,* Congressional Research Service, accessed October 14, 2018, http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R41960.pdf.
[109] Richard J. Campbell, *Electricity Markets – Recent Issues in Market Structure and Energy Trading*, *R43093*, Congressional Research Service, 37, accessed October 11, 2018. https://fas.org/sgp/crs/misc/R43093.pdf.
[110] "Wholesale Electricity and Natural Gas Market Data," U.S. Energy Information Administration, accessed October 14, 2018, https://www.eia.gov/electricity/wholesale/.

Executive Branch

- Modify FAR 5.202, Exceptions, to create and insert paragraph (b) and reorder the remaining sequential paragraph (c).

Note: Draft regulatory text can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

Recommendation 79: Enable enhanced use of advanced payments, at time of contract award, to small businesses.

Problem

Small businesses have limited cash flow, and DoD is very slow to pay invoices.[111] The costs incurred by small companies to borrow money to continue operations can be substantial. Without an initial upfront payment on contract awards, small businesses may not bid on government contracts because they cannot afford to buy the material, produce the product, and then wait to get paid by the government.[112] Additionally, the government pays after the invoice is officially *received* by the government, whereas industry pays at the invoice *creation* date.[113] This delay discourages small businesses from DoD contracts, creates a barrier to entry and decreases competition, potentially depriving warfighters of new and innovative solutions to their technology and innovation requirements. One solution is advance payments as covered in law and regulation under contract financing.[114]

Background

Small businesses are incubators of innovation; they account for an average of 13 more patents per employee than large firms. The Small Business Act codifies the government's interest in obtaining innovation and solutions from small businesses. Large-scale DoD policy initiatives like Better Buying Power Initiative have made attracting small business entry into DoD contracting a major goal. Numerous laws and regulations exist to promote small business participation in government contracting:

- **Small Business Act (15 U.S.C. §§ 631-657):** Establishes mandatory small business contracting goals and small business programs applicable to all Federal agencies, including the DoD.

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[111] GAO, *DOD Payments to Small Businesses: Implementation and Effective Utilization of Electronic Invoicing Could Further Reduce Late Payments, GAO-06-358,* May 2006, accessed November 5, 2018, https://www.gao.gov/assets/260/250143.pdf.
[112] The Small Business Administration's size standards for small businesses are based on average annual revenues and number of employees. A business must make between or below $750,000 and $35.5 million and have between or below 100 and 1,500 employees depending on the industry.
[113] "Collecting from the Federal Government," The Credit Research Foundation, accessed November 5, 2018, https://www.crfonline.org/orc/cro/cro-6.html.
[114] FAR Part 32,001, Definitions: Contract financing payment means an authorized Government disbursement of monies to a contractor prior to acceptance of supplies or services by the Government. ... Delivery payments are invoice payments for prompt payment purposes.

- **DoDI 5134.04 (Director of Small Business Programs):** Establishes the Director of SBP as the principal advisor to the USD(AT&L) and the Secretary of Defense on small business matters and provides small businesses the maximum practicable opportunity for contracts in accordance with the Small Business Act.

- **DoDI 4205.01 (DoD Small Business Programs):** Establishes DoD small business programs under the authority of the Director of SBP. DoD small business programs include small business; veteran-owned small business; service-disabled, veteran-owned small business; historically underutilized business zone small business; small, disadvantaged business; women-owned small business, DoD Mentor-Protégé Program; Indian Incentive Program; Small Business Innovation Research (SBIR); Small Business Technology Transfer; and all other small business programs in DoD.

- **The Small Business Innovation Development Act (SBIR) (15 U.S.C. § 638):** This section of the Small Business Act establishes the SBIR program as well as the rules governing the program.

- **10 U.S.C. § 2307, Contract Financing Section D, Security for Advance Payments:** Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination *by the head of the agency* that to do so would be in the public interest.

- **FAR Part 52.232-40 – Providing Accelerated Payments to Small Business Subcontractors:** As prescribed in 32.009-2, states that "upon receipt of accelerated payments from the Government, the Contractor shall make accelerated payments to its small business subcontractors under this contract, to the maximum extent practicable and prior to when such payment is otherwise required under the applicable contract or subcontract, after receipt of a proper invoice and all other required documentation from the small business subcontractor."

- **FAR Part 32.402(b):** "Advance payments may be provided on any type of contract; however, the agency shall authorize advance payments sparingly. Except for the contracts described in 32.403(a) and (b), advance payment is the least preferred method of contract financing and generally they should not be authorized if other types of financing are reasonably available to the contractor in adequate amounts."

- **FAR Part 32.402(c)(1)(iii):** The agency head or designee determines, based on written findings, that the advance payment—

  (A) Is in the public interest (under 32.401(a) or (b)); or

  (B) Facilitates the national defense (under 32.401(c)).

- **Section 852 of the FY 2019 NDAA:** Reinforces acceleration of payments to small business subcontractors.

Despite these laws, regulations, and policies, studies indicate small business participation in DoD is still not as robust as it could be, leaving DoD unable to tap potential innovation and solutions.[115]

Discussion

Small businesses report the time required to receive payments impedes their ability to do business with DoD.[116] Unlike large companies, small businesses do not have cash flow available at contract execution to cover expenses that arise before they can submit their first invoice. Small businesses need incentives to risk bidding on DoD contracts that advance contract payments can offer.[117]

DoD encounters obstacles when using the existing federal and departmental regulations that allow advance payments. Current regulations designate the head of an agency as the decision authority for advance payment use. Requiring this level of authority makes it impractical to get necessary approvals. Reaching the head of an agency requires, in most cases, eight to 12 independent reviews and approvals for a single document. In some cases, more layers of review may be required, depending on the size of the contracting activity. Because of the time and manpower required, acquisition personnel rarely consider routing a document up the chain of command seeking approval for advanced payments. Most of these types of actions involve contracts valued at less than the Simplified Acquisition Threshold (SAT) and are often small business set-asides. Many of these types of contract actions occur at the end of the fiscal year, which further constrains the amount of time personnel have to obtain this level of review and approval.

Conclusions

Regardless of company size, emerging technologies and research and development move at a rapid pace, often much faster than federal procurement and payment timelines. Emerging small technology businesses often require capital in advance of performance to stay in the forefront of technological advances and cannot borrow operational capital for months at a time while awaiting contract payments from the government without jeopardizing their future viability as a business. A more flexible advanced payment policy that authorizes approval at lower levels than the head of the agency will encourage greater use of advanced payments to finance small businesses and provide the capital needed to develop innovative ideas and solutions.

The statute allows for advance payments up to the total price of the contract, but currently limits advance payments for commercial items to 15 percent of the contract price. Raising the advance payment threshold to 20 percent for small businesses offering commercial items in addition to the general authority up to 100 percent of the contract price will add even more flexibility in cases where innovation is dependent on the modification or integration of commercial products or services into a new product. Modifying existing regulations and guidance on advanced payments will also make it easier to identify and approve eligible small businesses and create more of a marketplace for small businesses to engage in DoD innovation.

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[115] Ronnie Schilling, Thomas A. Mazzuchi, and Shahram Sarkani, "Survey of Small Business Barriers to Department of Defense Contracts, *Defense Acquisition Research Journal,* Vol. 24, No. 1 (2017): 2-29, http://dx.doi.org/10.22594/dau.16-752.24.01, accessed November 5, 2018, https://www.dau.mil//library/arj/Lists/PageContent/Attachments/2/ARJ80-Article01_Schilling.pdf.
[116] Ibid.
[117] Information gathered during Section 809 Panel Enablers/Incentives Workshop, March 14, 2018.

Implementation

Legislative Branch

- Modify 10 U.S.C. § 2307, Contract Financing, to (a) allow advanced payments when a cognizant approval authority or its delegate below the head of the agency determines that doing so would be in the public interest and to (b) provide an exception for small businesses supplying commercial items that would allow them to receive advanced payments of up to 20 percent of the contract price.

Executive Branch

- Conduct training for relevant personnel on the ability to maximize use of FAR Part 32.403(g).

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

Recommendation 80: Preserve the preference for procuring commercial products and services when considering small business set-asides.

Problem

When the government's needs may be met by products or services available in the commercial marketplace and contracting officers are considering a small business set-aside, they may face a dilemma if the small-business solution does not satisfy the definition of *commercial product* or *commercial service*. Neither statute nor regulation provides an order of precedence between the statute's preference for acquiring commercial products or services and the requirement to procure certain products or services from small businesses.

Background

Preference for Commercial Products and Services

One of the most pivotal parts of FASA was the establishment of a preference for the government to procure commercial products and commercial services rather than government-unique products and services. This preference is codified in 41 U.S.C. § 3307, Preference for Commercial Items:

> *(b) PREFERENCE. — The head of each executive agency shall ensure that, to the maximum extent practicable—*
>
> *(1) requirements of the executive agency with respect to a procurement of supplies or services are stated in terms of—*
>
> *(A) functions to be performed;*
>
> *(B) performance required; or*

> *(C) essential physical characteristics;*
>
> *(2) those requirements are defined so that commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items may be procured to fulfill those requirements; and*
>
> *(3) offerors of commercial items and nondevelopmental items other than commercial items are provided an opportunity to compete in any procurement to fill those requirements.*

The preference is also codified in 10 U.S.C. § 2377, Preference for Acquisition of Commercial Items:

> *(a) PREFERENCE .— The head of an agency shall ensure that, to the maximum extent practicable—*
>
> *(1) requirements of the agency with respect to a procurement of supplies or services are stated in terms of—*
>
> *(A) functions to be performed;*
>
> *(B) performance required; or*
>
> *(C) essential physical characteristics;*
>
> *(2) such requirements are defined so that commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items, may be procured to fulfill such requirements; and*
>
> *(3) offerors of commercial items and nondevelopmental items other than commercial items are provided an opportunity to compete in any procurement to fill such requirements.*

This preference is implemented in FAR Part 10, Market Research, Subpart 10.002, Procedures and Part 12, Acquisition of Commercial Items, Subpart 12.101, Policy:

> *(d) (1) If market research establishes that the Government's need may be met by a type of item or service customarily available in the commercial marketplace that would meet the definition of a commercial item at Subpart 2.1, the contracting officer shall solicit and award any resultant contract using the policies and procedures in Part 12.*

> *Agencies shall --*
>
> *(a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements;*
>
> *(b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and*
>
> *(c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.*

Small Business Set-Aside

The government's overarching small business policy is contained in 15 U.S.C. § 644(a), Commerce and Trade, Awards and Contracts:

> *(a) Determination*
> *To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns*

In particular, Paragraph (a)(4) is permissive and leaves to the contracting officer's judgment the extent to which small business "shall receive any award or contract…as to which it is determined…(4) to be in the interests of assuring that a fair proportion…be made to small business concerns."

In 15 U.S.C. § 644 (j), the statute specifically reserves procurements greater than the micro-purchase threshold (MPT) (currently $10,000) and less than the SAT (currently $250,000):

> *(j) Small business reservation*
> *(1) Each contract for the purchase of goods and services that has an anticipated value greater than the micro-purchase threshold, but not greater than the simplified acquisition threshold shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.*

15 U.S.C. § 644 (j) is implemented in regulation in FAR Part 19, Small Business Programs, Subpart 19.502-2, Total Small Business Set-Asides:

> *(a) Before setting aside an acquisition under this paragraph, refer to 19.203(b). Each acquisition of supplies or services that has an anticipated dollar value exceeding $3,500 ($20,000 for acquisitions as described in 13.201(g)(1)), but not over $150,000, ($750,000 for acquisitions described in paragraph (1)(i) of the Simplified Acquisition Threshold definition at 2.101), is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.*

Setting aside the procurement is subject to there being "two or more responsible small business concerns that are competitive in terms of market prices, quality and delivery,"[118] typically referred to as the *Rule of Two*.

For procurements greater that the SAT, the statute is silent, but FAR 19.203 (c) asks contracting officers to *consider* using a small business program for such a procurement:

> *(c) Above the simplified acquisition threshold. For acquisitions of supplies or services that have an anticipated dollar value exceeding the simplified acquisition threshold definition at 2.101, the contracting officer shall first consider an acquisition for the small business socioeconomic contracting programs*

Discussion

Both statute and regulation establish a preference for acquiring commercial products and commercial services, when available, to satisfy the government's need. This clear preference is strongly supported by language at FAR 10.001(a)(3), which states if the government cannot find a commercial product or commercial service to meet its need, it must consider modifying commercial products and commercial services to meet its need, and if that is not sufficient, consider modifying the government's requirement itself before considering procuring a noncommercial product or service.

Statute is silent on any conflict between the preference for commercial products and services and small business set-asides. The statute does not specifically establish a preference for awards to small business, but it establishes the overarching policy of *assuring a fair proportion* of awards are made to small business. For awards between the MPT and the SAT, the statue reserves awards for small business subject to satisfying the Rule of Two. For awards greater than the SAT, reserving a procurement is left to the judgment of the contracting officer, again subject to the Rule of Two.

An important consideration is the logical order in which the commercial determination and Rule of Two determination take place in the acquisition process. It is logical to conclude that the contracting officer, using market research, would first determine *what* will be procured (including commercial and noncommercial) to satisfy the government's need. Once *what* is to be procured is established, it is logical to then address the question of *how* (interagency procurement, existing multiple-award contract, solicitation) and from *whom* (competitive, sole source, small business, large business). Although, the plain language of the FAR can reasonably be read to require contracting officers to determine if a commercial product or service could satisfy the government's requirements before deciding whether the procurement at issue should be set aside for small businesses, nothing in the FAR expressly states that commerciality determinations must come before any set-aside determinations.

When this issue was recently considered in Analytical Graphics, Inc. v. United States, the Court of Federal Claims (COFC) found that "there is not a clear order of precedence in the statutes or

[118] Total Small Business Set-Asides, FAR 19.502-2(a).

implementing regulations for how to approach a procurement which potentially involves both a small business set-aside analysis and a commercial availability analysis."[119]

At a minimum, the current ambiguity in the law will lead to inconsistencies across agencies, and, indeed, between individual contracting officers within agencies in terms of how acquisitions are planned. In a worst-case scenario, the Court's holding in Analytical Graphics, Inc. creates a roadmap for agencies to circumvent the statutory preference for commercial products and services. Specifically, following Analytical Graphics, Inc., contracting officers have no obligation to determine whether the government's requirements can be satisfied by commercial products or services before deciding whether to set-aside the procurement for small businesses.

Practically speaking, if the government has a requirement that can be satisfied by a commercial product or service, and the commercial product or service that could satisfy the government's requirement is only available from large businesses, but two or more small businesses are available that could meet the government's requirement with a noncommercial product or service, then the government would be permitted to set-aside the procurement for small businesses and conduct the acquisition on a FAR Part 15 basis, thereby purchasing a developmental product when a commercial product or service already exists that meets the government's needs.

Clearly, this outcome is inconsistent with Congress's goals in FASA. Equally troubling however, absent language clarifying the priority of the commercial products and services preference over the Rule of Two, the government could avoid purchasing commercial products and services whenever it wants simply by identifying two or more small business offerors that can meet the government's requirements with a developmental solution.

Because the Rule of Two presupposes agencies have already developed their requirements, and because agencies are required by FASA and the FAR to consider the availability of commercial products and services at the requirements development stage, it follows that agencies must decide whether or not a procurement can be conducted on a FAR Part 12 basis before deciding whether the procurement can be set aside for small businesses. Implicit in the language of FAR 19.502-2 is that prospective small business offerors will be submitting an offer in response to *a defined requirement*. Without this assumption, the language "offers will be obtained" has no meaning. Agencies should be considering the commerciality of their requirement at the outset of the acquisition. Only after such requirements are defined can the agency rationally consider a set-aside determination based on whether there is a reasonable expectation that "offers will be obtained" from small businesses in response to that requirement.

Conclusions

Clarification is needed regarding existing law following the COFC's determination in Analytical Graphics, Inc. *v.* United States that "there is not a clear order of precedence" between the commercial item preference and the Rule of Two. The Court highlighted the need for legislators and regulators to address this issue, stating,

[119] *Analytical Graphics, Inc.* v. *United States*, 135 F. Cl. 378, 412 (2017).

> *[g]iven the ambiguity in the two competing statutory goals and absent regulatory guidance regarding the choice as to which has precedence, the choice made by agency generally deserves deference … The court should not be the entity to make that choice, and should intervene only when there is an obvious foul. Absent compelling statutory or regulatory guidance, which is missing here, the court generally defers to the agency's choice in a procurement in which the market research was carefully conducted. As the statutes and regulations do not point to a clear order for an agency to proceed between the small business set-aside determination and a commercial availability decision, the court does not read a requirement into the statutes and regulations that requires the agency or this court to first examine either.*[120]

Implementation

Legislative Branch

- Modify 41 U.S.C. § 3307, Preference for Commercial Products and Services, to establish acquisition of commercial products, commercial services, and nondevelopmental items as having precedence over small-business set-asides.

- Modify 10 U.S.C. § 2377, Preference for Acquisition of Commercial Products and Commercial Services, to establish acquisition of commercial products, commercial services, and nondevelopmental items as having precedence over small-business set-asides.[121]

Executive Branch

- Modify FAR 6.203, Set-Asides for Small Business Concerns, to establish acquisition of commercial products, commercial services, and nondevelopmental items as having precedence over small-business set-asides.

- Modify FAR 12.102, Applicability, to refer to commercial items as commercial products and services and to establish acquisition of commercial products, commercial services, and nondevelopmental items as having precedence over small-business set-asides.

Note: Explanatory report language and draft legislative and regulatory text can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

- The recommended statutory and FAR revisions will benefit all federal agencies subject to the FAR by clarifying the precedence for the preference for acquisitions of commercial products and services when considering a small business set-aside.

[120] *Analytical Graphics, Inc. v. United States*, 135 F. Cl. 378, 412 (2017).
[121] Note that similar language was proposed in Section 854 of the base version of the Senate FY 2018 NDAA.

Recommendation 81: Clarify and expand the authority to use Other Transaction agreements for production.

Problem

The current statutory authorities do not adequately allow use of Other Transaction agreements (OTs) for follow-on production and use of OTs for rapid fielding existing technologies when necessary.

Background

Congress has provided DoD with broad authority to use OTs to carry out prototype projects under 10 U.S.C. § 2371b, but the path to using OTs for follow-on related production is limited to when competitive procedures were used, the prototype was successfully completed, and a participant in the prototype project is involved in the production OT. Creating additional opportunities to use OTs for production will facilitate DoD's ability to address emergent challenges that senior DoD officials determine to have national security implications.

OTs are widely recognized as important tools to address the current threat environment and allow DoD to make purchases in a manner more consistent with private-sector practices. Congress provided permanent authority in the FY 2016 NDAA for follow-on production in an effort to accelerate fielding technologies that could offset technological advantages of potential adversaries, specifically in directed energy, high-speed munitions, autonomous systems, undersea warfare, cyber technology, and intelligence data analytics.[122] Despite changes in technology development, DoD's acquisition process has not adequately kept pace, as Under Secretary of Defense (Acquisition and Sustainment) Ellen Lord, informed Congress: "Inarguably . . . the current pace at which we develop advanced capability is being eclipsed by those nations that pose the greatest threat to security, seriously eroding our measure of overmatch."[123]

The primary purpose of using OTs is to leverage the flexibility they provide to do the following:

- Attract innovative ideas and solutions from industry sectors that would not typically participate in the traditional invasive, cumbersome, and costly government contracting process.
- Allow for leveraging private-sector research and development investments that have military utility, thereby lowering required DoD investment and reducing development lead time and the cost of fielding capabilities.
- Encourage traditional DoD contractors to invest in and pursue innovation, especially in those areas that may have broader application (e.g., commercial market).

[122] Section 815 of FY 2016 NDAA, Pub. L. No. 114–92, 129 Stat. 784 (2015).
[123] Ellen Lord, *Testimony Statement Before the Committee on Armed Services, United States Senate, First Session, 115th Congress,* December 7, 2017, accessed October 30, 2018https://www.armed-services.senate.gov/imo/media/doc/Lord_12-07-17.pdf.

- Allow for highly flexible, creative contract arrangements that more directly capture the *best deal* between the parties (e.g., unique funding and financial contribution schemes, intellectual property rights, outcome-based performance milestones).[124]

For a number of years, DoD's ability to use these agreements was tightly controlled. When DoD was first granted authority in 1989, only the Defense Advanced Research Project Agency (DARPA) could grant authorization to enter into an OT, for basic, applied, or advanced research projects.[125] In 1993, DARPA's authority was expanded to include prototyping under Section 845 of the NDAA, and in 1996, the rest of the DoD was authorized to use OT.[126] In 2001, Congress amended Section 845 to include a provision to allow for limited follow-on production to participants in the original prototype project, provided the production did not exceed the specific number of units at specific target prices set in the original transaction.[127]

In 2015, Congress rescinded the temporary prototype authority and codified it under a new section, 10 U.S.C. § 2371b, Authority of the Department of Defense to Carry Out Certain Prototype Projects. The FY 2016 NDAA removed many of restrictions in place for follow-on production, and allowed the award for production to be in the form of a contract, pursuant to the FAR, or transaction under its Other Transaction authority (OTA).[128] Congress intended the new authority to be used to attract "firms and organizations that do not usually participate in government contracting due to the typical overhead burden and 'one size fits all' rules."[129] Expanded use of OTs in DoD, Congress reasoned, was to support efforts to access new sources of technical innovation, including Silicon Valley startup companies and small commercial firms.[130]

Congress provided for follow-on production of successful prototype projects in 10 U.S.C. § 2371b(f).[131] Subsection (f) provides for the award of a follow-on production contract or transaction, pursuant to the following:

> *(f) Follow-on Production Contracts or Transactions.*
>
> *(1) A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction. A transaction includes all individual prototype subprojects awarded under the transaction to a consortium of United States industry and academic institutions.*
>
> *(2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of section 2304 of this title, if—*

[124] Gary Kyle, email to the Section 809 Panel, September 20, 2018.
[125] Section 251 of FY 1990-1991 NDAA, Pub. L. No. 101-189, 103 Stat. 1403 (1989). Research Projects: Transaction Other Than Contracts and Grants, 10 U.S.C. § 2371.
[126] Section 845 of FY 1994 NDAA, Pub. L. No. 103-160 (1993). Section 804 of FY 1997 NDAA, Pub. L. No. 104-201, 110 Stat. 2605 (1996).
[127] Section 822 of FY 2002 NDAA, Pub. L. No. 107–107, 115 Stat 1182 (2001).
[128] Section 815 of FY 2016 NDAA, Pub. L. No. 114–92, 129 Stat. 893 (2015).
[129] FY 2016 NDAA, Senate Rep. No 1356, Pub. L. No. 114-92, at 700, May 2015.
[130] Ibid.
[131] Ibid.

> *(A) competitive procedures were used for the selection of parties for participation in the transaction; and*
>
> *(B) the participants in the transaction successfully completed the prototype project provided for in the transaction.*
>
> *(3) Contracts and transactions entered into pursuant to this subsection may be awarded using the authority in subsection (a), under the authority of chapter 137 of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.*[132]

Within the context of Subsection (f), Congress clarified *competitive procedures* refers to a competition for award of an OT to a consortium or to a competition for a particular project, known as a standalone OT.[133] A consortium is an association of two or more individuals, companies, organizations, governments, or combination of the above designed to facilitate mutually beneficial collaborative research and development activities among the government, industry, and/or academia, resulting in an agreement for consortium members to build a prototype that demonstrates solutions to problems. A consortium generally reflects a unique sector of industry, such as cyber, robotic systems, or vertical lift. Congress explicitly addressed its intent to maximize use of follow-on production contracts and transactions entered into pursuant to this section to promote access to the participants' products, as appropriate, by any organization within DoD.[134]

Additionally, Section 806 of the FY 2017 NDAA, codified in 10 U.S.C. § 2447d, Mechanisms to Speed Deployment of Successful Weapon System Component or Technology Prototypes for Major Weapons Systems, provides the following authority:

> *(a) Selection of Prototype Project for Production and Rapid Fielding.-A weapon system component or technology prototype project may be selected by the service acquisition executive of the military department concerned for a follow-on production contract or other transaction without the use of competitive procedures, notwithstanding the requirements of section 2304 of this title, if-*
>
> *(1) the follow-on production project addresses a high priority warfighter need or reduces the costs of a weapon system;*
>
> *(2) competitive procedures were used for the selection of parties for participation in the original prototype project;*
>
> *(3) the participants in the original prototype project successfully completed the requirements of the project; and*
>
> *(4) a prototype of the system to be procured was demonstrated in a relevant environment.*

Further increasing DoD's ability to rapidly field successful prototype projects, this provision authorizes use of OTs for follow-on production under circumstances similar to those in 10 U.S.C. § 2371b(f) but

[132] Ibid. FY 2018 NDAA, Pub. L. No. 115-91 (2017).
[133] FY 2018 NDAA, Report 115-125 to accompany S. 1519, Subtitle H—Other Transactions, Other Transaction Authority, 191, accessed November 2, 2018, https://www.congress.gov/115/crpt/srpt125/CRPT-115srpt125.pdf.
[134] Ibid.

without requiring the follow-on contract or agreement to be with a participant in the prototype project. This section lays out funding and flexible acquisition approaches for DoD to "experiment with, prototype, and rapidly deploy" only "weapon system components and other technologies."[135] DoD has yet to issue implementing guidance, but if it is determined that *weapon system* modifies both *components* and *other technologies*, the application of § 2447b could be rather limited.

Discussion

OTs can help overcome barriers to commercial participation in the government market. Stripped of most of the government procurement regulatory and legal idiosyncrasies, OTs allow the government to conduct business with industry on more familiar terms and fosters nontraditional contractors' willingness to provide innovative solutions. The Senate Armed Services Committee instructed agreements officers to use any acquisition tool available, including modification to the original consortium-based or individual prototype project award, a separate OT, or a FAR acquisition instrument to maximize DoD's ability to move from successful prototype to production.[136] By using broader follow-on production authority, DoD can achieve a "swifter, seamless transition of cutting-edge technologies to the warfighter throughout the acquisition process."[137]

To address rapidly emerging threats, Congress provided DoD authority to pursue rapid prototyping and rapid fielding for efforts intended to be completed within 2 to 5 years, as opposed to the typical 10 to 14 year timeline for major systems.[138] Using OTs is not explicitly authorized by this *middle tier acquisition* authority. Although an OT could be used for rapid prototyping and follow-on production, an OT would not be authorized for rapid fielding of existing technology. The rapid fielding authority does not help DoD overcome the barriers to accessing nontraditional sources in the same way that OTs do. Delivering capability and lethality at the speed of relevance, at least from certain nontraditional sources, may require expanded OT authority.

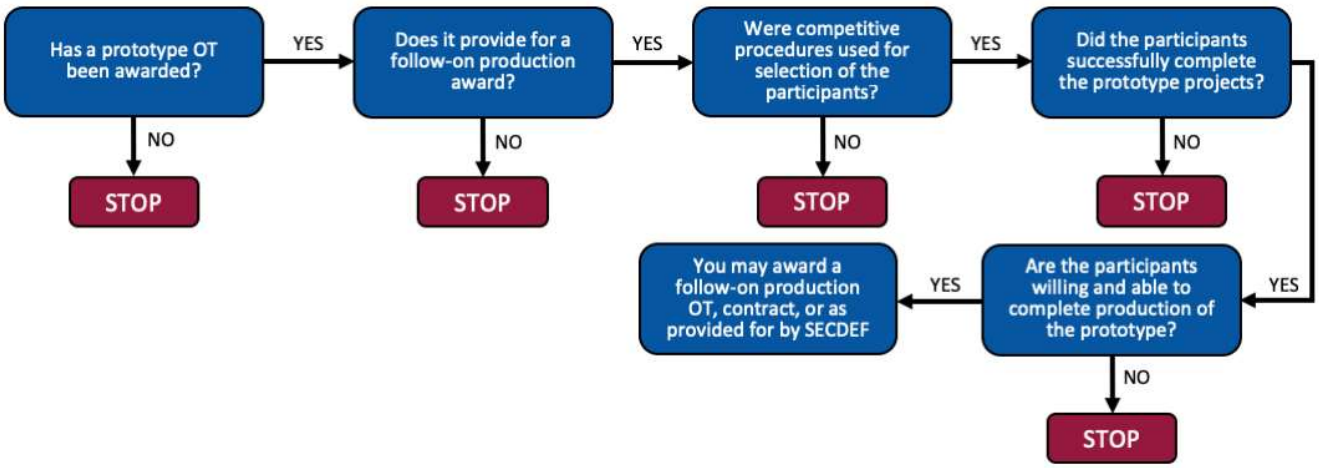
Although there is a trend of increased OT use, recent events have demonstrated that DoD has yet to resolve all the challenges associated with moving quickly from prototype to production. In one example, the Defense Innovation Unit, with contracting support from the Army, issued the largest follow-on production award to date in February 2018, to REAN Cloud.[139] The follow-on production award under 10 U.S.C. § 2371b(f) was for cloud migration services, and while the prototype award was originally valued at a total of $2,426,799, the follow-on production OT had a not-to-exceed value of $950,000,000.[140] Oracle protested on numerous grounds to GAO, despite having not competed for the original prototype OT.[141] In the first-ever follow-on production award protest, GAO found that Oracle was an interested party due to the difference between the solicitation and work contemplated in the follow-on award. GAO sustained the protest because the agency failed to include the option for a

[135] FY 2017 NDAA, Conference Report 114-840 to Accompany S. 2943, November 30, 2016, accessed November 2, 2018, https://www.congress.gov/114/crpt/hrpt840/CRPT-114hrpt840.pdf.
[136] FY 2018 NDAA, Report 115-125 to accompany S. 1519, Subtitle H—Other Transactions, Other Transaction Authority, 191, accessed November 2, 2018, https://www.congress.gov/115/crpt/srpt125/CRPT-115srpt125.pdf.
[137] Ibid.
[138] Section 804 of FY 2016, Pub. L. No. 114–92, 129 Stat. 882 (2015).
[139] GAO, *Decision: Matter of Oracle America, Inc., B-416061,* May 31, 2018, accessed November 2, 2018, https://www.gao.gov/assets/700/692327.pdf.
[140] Ibid.
[141] Ibid.

follow-on production award in the original prototype OT and because the entire prototype project provided for in the prototype OTA had not been completed prior to award of the follow-on production OT.[142]

In the FY 2019 NDAA, Congress addressed one aspect of the Oracle protest by detailing when a prototype project reaches *successful completion*.[143] Section 211 provides an update to 10 U.S.C. § 2371b(f), giving the Secretary of Defense the ability to determine that an individual prototype or subproject as part of a consortium is successfully completed by the participants. Use of a follow-on production OT is still not available in situations for which the prototype OT does not include the option of a follow-on production OT. Additional scenarios for which a production OT may be necessary but would not be authorized under § 2371b(f) are depicted in Figure 7-3.

Figure 7-3. Paths to a Production OT under the Current 10 U.S.C. § 2371b



The decision in *Oracle* highlights two limitations on use of production OTs to get capabilities developed or prototyped by technology firms and start-ups into production under § 2371b. In the Oracle case, GAO made several findings that will shape the conversation within DoD on follow-on production OTs for the foreseeable future.

GAO's findings are the result of a strict interpretation of the statutory language in § 2371b(f), at least as it relates to Subsection (f) requiring that the prototype OT affirmatively reserve the option of the follow-on production contract or transaction to use the noncompetitive follow-on production authority.[144] The statutory language states that "a prototype project may provide for the award of a follow-on production contract or transaction."[145] This narrow interpretation can leave existing OTs without the option of a follow-on production transaction, even if, as in the REAN Cloud case, the

[142] Ibid.
[143] Section 211 of FY 2019 NDAA, Pub. L. No. 115–232 (2018).
[144] GAO, *Decision: Matter of Oracle America, Inc., B-416061,* May 31, 2018, accessed November 2, 2018, https://www.gao.gov/assets/700/692327.pdf.
[145] Authority of the Department of Defense to Carry Out Certain Prototype Projects, 10 U.S.C. § 2371b(f)(1).

publication and solicitation of the prototype OT provided notice of the potential for sole-source follow-on production award to the awardee of the prototype OT.[146]

Including the follow-on production option in the prototype OT does not ensure notice to potential awardees, as its inclusion is only required in the actual agreement and not the solicitation. Thus, this interpretation has the effect of ensuring strict compliance for compliance's sake with a statute that Congress has repeatedly pleaded with DoD to interpret broadly and use liberally. It provides no additional transparency to potential competitors, which Subsection (f) appears most concerned about as it permits award of the follow-on production contract or transaction without additional competition provided competitive procedures were used to select participants to the original transaction.[147] It is a box-check procedure with no underlying purpose other than the statute, arguably, says to include it in the prototype OT. This or similar language is not included in the § 2447d prototype and production OTA. Removing this language from § 2371(f) would harmonize the two production OTAs.

The requirement for participants to successfully complete the prototype project is a more straight forward analysis, though it illuminates a limitation with the statute. It is unclear what *successfully completed* means; accordingly, GAO made the determination for the agency, finding that work on the prototype project, including all modifications made under the OT, must be completed according to the specifications in the OT.[148] Using the plain meaning of *successfully completed* yielded a result that Congress likely did not intend when it gave the follow-on production authority to DoD—that GAO, not the requiring activity, would be the ultimate arbiter of what constitutes a successfully completed prototype.

In this case, REAN Cloud completed all work required under the original prototype OT; however, it had not completed additional work required by a later modification at the time the agency signed the determination and findings approving the production OT award.[149] Again, this decision supports the idea of strict compliance of a statute intended to be interpreted broadly. It also incentivizes agencies to modify transaction agreements prior to awarding a follow-on transaction to remove requirements that are incomplete or identify new subprojects to move forward with production. In the absence of CICA applicability, such modification cannot be challenged. This approach could fuel the argument that the regulatory free space that OTs operate in lacks transparency and fairness. If the original prototype project or subproject is not completed but a different result that DoD needs to rapidly field is produced, the current authority would preclude the use of a follow-on noncompetitive production OT.

Outside of limitations highlighted by the *Oracle* protest, there are other limitations to follow-on production authority. Follow-on awards through either contract or production OT can be made without competition if the requirements under § 2371b(f) or § 2447d(a) are met. These requirements are not entirely consistent and there is no explicit authority for awarding a production OT through competitive procedures. Another limitation that exists in § 2371b(f) but does not exist in § 2447d(a) is

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[146] GAO, *Decision: Matter of Oracle America, Inc., B-416061,* May 31, 2018, accessed November 2, 2018, https://www.gao.gov/assets/700/692327.pdf.
[147] Authority of the Department of Defense to Carry Out Certain Prototype Projects, 10 U.S.C. § 2371b(f)((2)(A).
[148] GAO, *Decision: Matter of Oracle America, Inc., B-416061,* May 31, 2018, 18-19, accessed November 2, 2018, https://www.gao.gov/assets/700/692327.pdf.
[149] Ibid, 18.

that the follow-on production contract or transaction may only be awarded to the participants of the original prototype OT.[150] This limitation could force agreements officers to initiate a traditional procurement, including a new competition under CICA, if the participants of that project are unwilling or unable to develop or scale the prototype in follow-on production. This limitation is also included in the flow chart in Figure 7-3.

Without a path to awarding a follow-on OT in § 2371b(f) to a consortium or contractor that was not a participant in the prototype project, except under § 2447d authority, DoD would struggle to field technology fast enough to be relevant and timely. OTs are more flexible than other contracting methods, but relegating their use to the prototype stage in all but a few projects that meet the other statutory requirements and are performed by participants willing and able to carry out production, unnecessarily restrains DoD's ability to efficiently transition from prototype to fielding emerging technology. One consortium that is performing on multiple prototype OTs for DoD explained that the consortium has no interest in entering into follow-on production OTs. The members want to provide prototype solutions and then move on to the next hard problem DoD needs help solving. Under the current § 2371b(f) authority, unless one of the consortium members that participated in the prototype project was willing to accept a follow-on production OT outside of the consortium umbrella, that option would not be available to DoD.

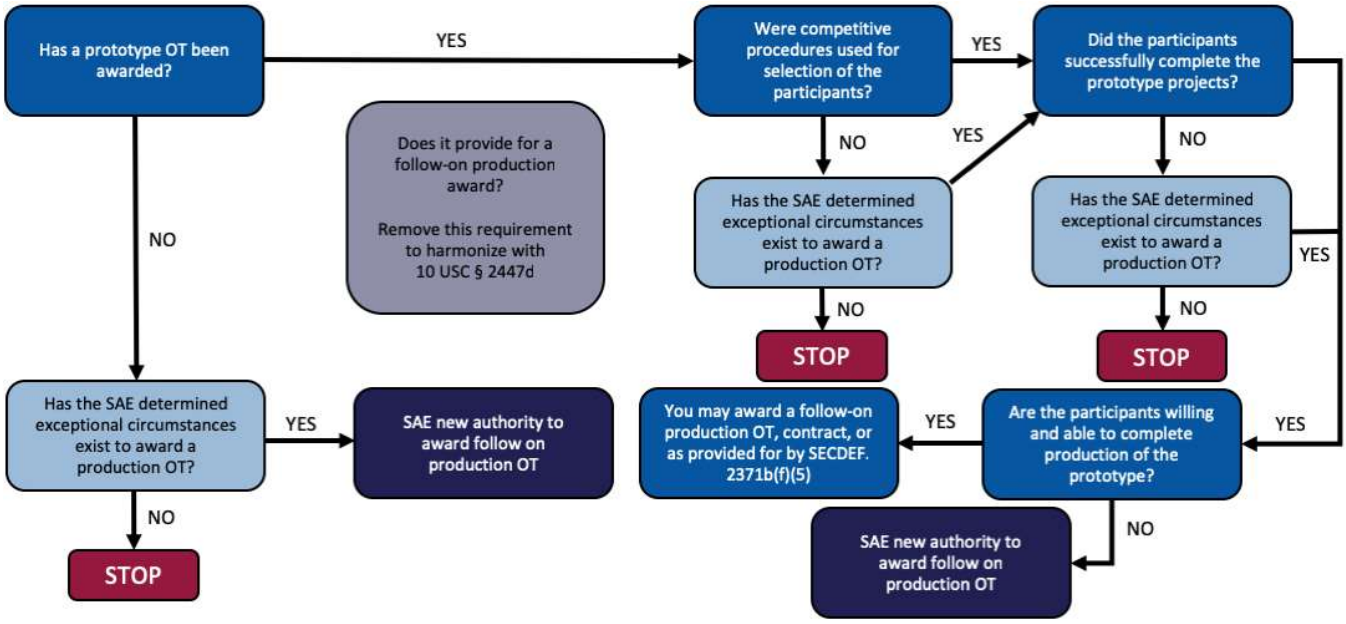
Authority does not yet exist to use OTs when DoD needs to acquire more mature capabilities from nontraditional companies that are unwilling to do business with DoD under a FAR-based contract. Professional Services Council Senior Advisor for Research and Defense, Bill Greenwalt, recently argued that "OTAs (Other Transactions Authority) are currently the only way to remove the barriers necessary to get these non-traditional sources of innovation to do business with the military."[151] If a nontraditional source of innovation has already produced a working porotype or production-ready solution, rendering a prototype OT unnecessary, the only option available to DoD to rapidly field that capability would be a FAR-based production contract. The authority to use a production OT may be required for DoD to procure emergent technologies that have already been successfully prototyped at private expense or are otherwise ready for production. The effectiveness of the rapid fielding authority in § 804(c)(3) of the FY 2016 NDAA will be limited by the inability to use production OTs when a prototype is not needed. OTA should not be seen as a convenient means of avoiding the FAR, and their use should be limited to exceptional circumstances as determined by the agency's service acquisition executive (SAE).

In addition to expanding the SAE's ability to authorize follow-on production OTs, one clarification to the statutory language would be prudent. It is unclear whether follow-on production OTs are subject to the same participation requirements as prototype OTs are under subsection (d). For prototype projects performed exclusively by traditional defense contractors under § 2371b(d)(1)(C), it is unclear whether a cost share of at least one-third of the total cost of the follow-on production from nonfederal sources would be required. Given the potential scale of production, it is unlikely Congress intended to require nonfederal funding of production from traditional defense contractors. The statute should be clarified

[150] Authority of the Department of Defense to Carry Out Certain Prototype Projects, 10 U.S.C. § 2371b(f)(1).
[151] "GAO Decision Threatens US Military Dominance; Reject It," Bill Greenwalt, Breaking Defense, June 27, 2018, accessed October 30, 2018, https://breakingdefense.com/2018/06/gao-decision-threatens-us-military-dominance-reject-it/.

to exempt the participation requirements from follow-on production transactions. These proposed prototype authorities are listed in Figure 7-4.

Figure 7-4. Recommended Changes to 10 U.S.C. § 2371b Paths to Production



Conclusions

Expanding and clarifying follow-on production authorities under § 2371b and better aligning them with those available in § 2447d would address the challenges of moving quickly from a prototype to production and ensure DoD has access to nontraditional sources of innovation. Agency SAEs should be granted authority to approve use of production OTs under each of the circumstances depicted in Figure 7-4 above and discussed in this section SAEs should be granted production OTA under exceptional circumstances to address a high priority warfighter need that would be at risk for going unmet if an OT were not awarded in the following three scenarios:

- The production OT is being used to rapidly field an existing technology.
- The prototype project has not been successfully completed.
- The competitive procedures were not used to award the prototype project

The authority to determine if a prototype project has been successfully completed should be maintained at the lowest possible level within DoD.

Making these adjustments should provide participants in the prototype project the right of first refusal for a follow-on production, as well as allow a different supplier to receive the production OT when the participants refuse or do not have the capacity to move into production. The SAE should have authority to award follow-on production OTs in situations where the prototype OT does not specify the option for follow-on production. In each of these circumstances, the SAE should have the authority to enter into an OT structured as determined appropriate for the requirement (whether sole source or competitive). To maintain whatever technological edge the U.S. military currently has over its near-peer competitors and to adapt as rapidly as the nonstate actors that threaten our national security are

able to adapt, DoD must have an OTA that provides more opportunity for rapid fielding of innovative capabilities.

Implementation

Legislative Branch

- Revise 10 U.S.C. § 2371b to correspond with the clarification and expansion of follow-on production transaction authority recommended above.

Executive Branch

- Direct the Military Services and Defense Agencies to delegate authority to the lowest practicable level to determine a prototype or prototype subproject as part of a consortium is successfully completed by the participants under 10 U.S.C. § 2371b(f)(3).

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

RECOMMENDATIONS 81 AND 82 SHARE THE COMMON THEME: MODERNIZING THE ARMED SERVICES BOARD OF CONTRACT APPEALS

Recommendation 82: Provide Armed Services Board of Contract Appeals authority to require filing of contract appeals through an electronic case management system.

Problem

The Armed Services Board of Contract Appeal (ASBCA) would benefit from clarity on authorities related to its forthcoming electronic case management system (ECMS) to facilitate implementation of that system.

Background

ASBCA is an independent, quasijudicial DoD agency. ASBCA's mission is to provide impartial, informal, expeditious, and inexpensive resolution of disputes arising out of or related to contracts entered into by DoD, including the Military Services, the National Aeronautics and Space Administration (NASA), and other departments and agencies as permitted by law.

ASBCA provides the primary forum to resolve DoD contract disputes between DoD agencies and contractors under DoD contracts, which makes it a critical part of the DoD acquisition system. Most Board appeals involve monetary claims, but ASBCA also adjudicates contract interpretation claims, certain contractor claims regarding performance ratings, and other nonmonetary claims.

DoD contractors have a choice to appeal adverse contracting officers' final decisions either to the COFC, within a year, or to ASBCA within 90 days. ASBCA is the forum for the vast majority of DoD contract disputes, particularly for small businesses.

To manage increasing caseloads and facilitate ASBCA operations, ASBCA has been pursuing an ECMS, similar to those used by all federal courts, and the vast majority of state courts, to allow electronic filing and offer some sort of electronic case management and docketing capabilities. ECMS will facilitate the day-to-day operations of the board. ABSCA expects to award a contract for an ECMS sometime before the end of 2018, and to have the system online within a year to 18 months of contract award.

Discussion

The ASBCA caseload has about doubled from 532 in 2009. In the last 3 fiscal years, the number of cases pending has ranged from 1,087 (at the end of FY 2015) to 970 (at the end of FY 2017). Cases before ASBCA range in size from small cases of less than $10,000 to appeals of $100 million or more. There are nine currently pending cases. At least two cases before ASBCA have exceeded $2 billion. The number of cases filed, the dollar amounts at issue, and the relative complexity of the cases have all steadily increased over the last decade.

Document filings at ASBCA include pleadings, motions, briefs, and evidence submitted to the presiding judges. All federal, and the vast majority of state, courts currently allow electronic filing and offer some sort of electronic case management/docketing capabilities. Board members frequently travel to hear cases, requiring ASBCA to ship hundreds of paper documents. The ability to review these files electronically, including the use of keyword searches, facilitates the decision-making process. In an effort to avoid undue burden on administrative staff, ASBCA would like to ensure mandatory use of the new system.

On May 1, 2018, the GAO implemented a mandatory web-based electronic filing and document dissemination system for the procurement protest system. The system was required by Congress in 31 U.S.C. § 355(c), as amended by Section 1501 of the Legislative Branch Appropriations Act, 2014 (Div. I of Pub. L. No. 113–76). Under this statute, GAO is also allowed to collect filing fees to offset the costs of the electronic filing system. ASBCA would welcome similar language from Congress to require establishment and operation of a mandatory electronic case management system that includes electronic filing and document management, as well as internal case tracking software. Congress should also provide ASBCA the discretionary authority to collect fees to offset the costs of operating and maintaining the system without obligation to use it, in case collection of these fees becomes feasible in the future.

Because many of the companies doing business with DoD also do business with other agencies of the federal government, these authorities should apply to all agency boards as defined by 41 U.S.C. § 7101.

Conclusions

Using ECMS will facilitate ASBCA's day-to-day operations. Revising Title 41 to ensure mandatory contractor and contracting officer use of the system—in line with the statutory authority granted to GAO when it adopted a similar system—will facilitate adoption of the electronic case management system and ease administrative burden. The Defense Acquisition Regulations (DAR) Council should

coordinate regulatory implementation at the FAR level. The new processes that will come on line with the system will ultimately increase ASBCA productivity.

Implementation

Legislative Branch

- Revise Title 41 to facilitate establishment of a case management system at the Armed Services Board of Contract Appeals.

Executive Branch

- There are no regulatory changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

- The recommendation stated here has implications for other federal agency Board of Contract Appeals (BCAs); the FAR Council should revise FAR Part 33.2, Disputes and Appeals, to align with the recommended statutory revision to authorize the establishment of case management systems and corresponding fee structures at the relevant BCAs.

Recommendation 83: Raise the monetary threshold to provide agency boards of contract appeals accelerated, small business, and small claims (expedited) procedures to $250,000 and $150,000 respectively.

Problem

ASBCA and corresponding agency boards want more cases to use the accelerated and expedited procedures to resolve cases more quickly, necessitating a higher threshold for those procedures.

Background

ASBCA is an independent, quasijudicial DoD agency. ASBCA's mission is to provide impartial, informal, expeditious, and inexpensive resolution of disputes arising from or related to DoD contracts, including the Military Services, Defense Agencies, NASA, and other departments and agencies as permitted by law.

To ensure a timely resolution to small-dollar claim amount contract disputes, ASBCA and the civilian agency boards have both expedited and accelerated procedures. These procedures are not limited to small businesses. If the appeal claim dollar value is $50,000 or less, the contractor can choose expedited procedures to get a decision within 120 days. If the dollar value is $100,000 or less, the contractor can choose accelerated procedures for a decision within 180 days. A contractor with a $50,000 claim can elect either expedited or accelerated procedures, but a contractor with a claim between $50,001 and

$100,000 can only elect accelerated procedures.[152] These dollar thresholds were established pursuant to the Contract Disputes Act of 1978 (CDA) (41 U.S.C. § 7106). Additionally, the CDA was amended in 2006 to allow that a small business can elect to use the small claims procedures up to $150,000.[153]

The difference in the various timelines originates in shortened discovery periods. Under procedures that apply above these thresholds, the parties to the appeal generally dictate the schedule. The decision timeline is extended substantially by conducting discovery and deposing witnesses for 12 to 18 months and the parties may request extensions to briefing deadlines multiple times.[154]

Discussion

CDA provides the Administrator of the OFPP the authority to review and adjust the threshold amounts "from time to time," in accordance with "economic indexes selected by the Administrator."[155] The amounts have only been adjusted once during the 40 years since CDA's inception—in 1994 the dollar limit for accelerated appeals was increased from $50,000 to $100,000, and the dollar limit for *s*mall *c*laims appeals was raised from $10,000 to $50,000. No further adjustments to the maximum amounts for applicability have been made since 1994. Adjusted for inflation, the thresholds would be $172,359 for accelerated procedures, $86,179 for expedited procedures, and $190,611 for use by small businesses.[156] ASBCA indicated for the 2018 case load only 15 percent of claims are eligible for accelerated procedures at $100,000 and 9 percent at the expedited level of $50,000. If the thresholds were raised, about 25 percent of cases would be eligible for accelerated procedures at the $250,000 level and 19 percent would be eligible for expedited procedures at the $150,000 level.[157] Although the caseload data would differ for the other agency boards, the thresholds should be the same to maintain consistency and avoid confusion.

It is reasonable to expect that increasing the dollar limits would lead to more contractors (large and small) electing these procedures. Because appeals would be decided in a shorter period, the pendency rate for appeals at the board would be lowered. ASBCA requested the Section 809 Panel review these thresholds, and supports the recommendation of raising these thresholds. Raising these thresholds would accommodate achieving fast resolution of as many claims as possible while balancing increased administrative demands.

Conclusions

Raising the threshold for the expedited and accelerated procedures will allow for additional claims to be treated and closed sooner. To simultaneously simplify the thresholds and raise them, small businesses should be allowed to select the procedures up to $250,000, and all others be allowed to select accelerated procedures at a threshold of $250,000. The expedited procedure threshold should be $150,000. These thresholds should be reviewed along with the other acquisition-related thresholds every 5 years.

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[152] ASBCA, email to Section 809 Panel, July 27, 2018.
[153] Agency Board Procedures for Accelerated and Small Claims, 41 U.S.C. § 7106.
[154] ASBCA, email to Section 809 Panel, July 27, 2018.
[155] Agency Board Procedures for Accelerated and Small Claims, 41 U.S.C. § 7106.
[156] Calculated using the Bureau of Labor Statistics, Consumer Price Index, accessed October 26, 2018, https://www.bls.gov/data/.
[157] ASBCA, email to Section 809 Panel, August 8, 2018.

Implementation

Legislative Branch

- Revise Title 41, Armed Services Board of Contract Appeals, to reflect the new threshold values.

Executive Branch

- There are no regulatory changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

- Implementing the recommended changes will affect other agencies, because they will be subject to claims at the higher threshold level.

Section 7
Simplifying Procurement and Contracting

Implementation Details

Recommendations 74 and 75

RECOMMENDED REPORT LANGUAGE

SEC. ___. ADMINISTRATIVE SIMPLIFICATION.

This section would revise procurement planning and compliance by making a number of repeals and amendments to current law. Specifically, this section would repeal Section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 2306 note) to eliminate certain approval requirements for cost-type contracts. This section would also repeal Section 2304a(d) of title 10, United States Code and Section 4103(d) of title 41, United States Code, to eliminate determinations by the head of the agency before making a single source award of a task order or delivery order contract. This section would amend Section 326(a) of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102-484; 10 U.S.C. 2302 note) to repeal the limitation of delegation of authority with respect to contracts requiring use of certain ozone-depleting substances. Further, this section would be amended to repeal expired reporting requirements. Finally, this section would require the Department of Defense to consolidate or eliminate redundant or unnecessary requirements in the Federal Acquisition Regulation, its defense supplement, and defense acquisition directives

This committee notes this section is intended to eliminate processes, reviews, and approvals that are redundant, non-value-added, or unduly restrictive, which ultimately reduce acquisition agility and delay delivery of capability to the warfighter. The committee expects these amendments would advance efforts to streamline acquisition procedures, reducing procurement lead time and associated costs while maintaining rigor in oversight.

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SEC. ___. ADMINISTRATIVE SIMPLIFICATION.

(a) REPEAL OF APPROVAL REQUIREMENT FOR COST-TYPE CONTRACTS ABOVE A CERTAIN THRESHOLD.—

(1) REPEAL.—Section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 2306 note) is amended by striking subsection (b).

(2) TECHNICAL AMENDMENT.—Such section is further amended by striking "(a) and all that follows through "to establish" and inserting "The Defense Federal Acquisition Regulation Supplement shall establish".

(b) REPEAL OF REQUIREMENT FOR CERTAIN DETERMINATIONS BY HEAD OF AGENCY BEFORE MAKING A SINGLE SOURCE AWARD OF A TASK OR DELIVERY ORDER CONTRACT EXCEEDING $112,000,000.—

(1) DEFENSE CONTRACTS.—Section 2304a(d) of title 10, United States Code, is amended by striking paragraph (3).

(2) CIVILIAN AGENCY CONTRACTS.—Section 4103(d) of title 41, United States Code, is amended by striking paragraph (3).

(c) REPEAL OF LIMITATION ON DELEGATION OF CERTAIN AUTHORITY WITH RESPECT TO CONTRACTS REQUIRING USE OF CERTAIN OZONE-DEPLETING SUBSTANCES.—

(1) LIMITATION ON DELEGATION.—Section 326(a) of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102-484; 10 U.S.C. 2302 note) is amended by striking the second sentence of paragraph (3).

(2) EXPIRED REPORTING REQUIREMENT.—Such section is further amended by striking paragraphs (4) and (5).

(d) REDUCTION IN REGULATORY REDUNDANCY, ETC.—

(1) The Secretary of Defense shall revise the DFARS and defense acquisition directives as necessary—

(A) to eliminate redundancy in those documents with requirements in the FAR;

(B) to eliminate or reduce, to the extent possible, requirements (including requirements for documentation) in those documents that are redundant or unnecessary;

(C) with respect to the Acquisition Plan and Acquisition Strategy for a program or system, to provide for reduction and elimination of redundant requirements (including requirements for documentation) and, to the extent possible, for consolidation of the Plan and Strategy.

(2) DEFINITIONS.— In this section:

(A) DEFENSE ACQUISITION DIRECTIVES.—The term "defense acquisition directives" means the following:

(i) Department of Defense Instruction 5000.02.

(ii) Department of Defense Instruction 5000.74.

(iii) Department of Defense Instruction 5000.75.

(B) FAR.—The term "FAR" means the Federal Acquisition Regulation.

(C) DFARS.—The term "DFARS" means the defense supplement to the FAR.

(3) LIMITATION.—Paragraph (1) does not authorize the Secretary of Defense to eliminate a regulation that implements a requirement imposed by law or Executive order.

(4) DEADLINE.—The Secretary shall complete the actions required by paragraph (1) not later than one year after the date of the enactment of this Act.

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RECOMMENDED REGULATORY REVISIONS

Recommendation 74a

Revise DFARS by adding proposed language below:

SUBPART 246.7—WARRANTIES

246.704 Authority for use of warranties.

(1) Unless included as part of an approved Acquisition Plan or Acquisition Strategy the chief of the contracting office must approve use of a warranty, except in acquisitions for—

(i) Commercial items (see FAR 46.709);

(ii) Technical data, unless the warranty provides for extended liability (see 246.708);

(iii) Supplies and services in fixed-price type contracts containing quality assurance provisions that reference higher-level contract quality requirements (see 246.202-4); or

(iv) Supplies and services in construction contracts when using the warranties that are contained in Federal, military, or construction guide specifications.

(2) The chief of the contracting office shall approve the use of a warranty only when the benefits are expected to outweigh the cost.

Revise FAR by adding proposed language below:

Subpart 17.2 – Options

17.205 -- Documentation.

(a) The contracting officer shall justify in writing the quantities or the term under option, the notification period for exercising the option, and any limitation on option price under 17.203(g); and shall include the justification document in the contract file unless included as part of an approved Acquisition Plan or an Acquisition Strategy.

Revise FAR by adding proposed language below:

Subpart 15.3 -- Source Selection

15.304 -- Evaluation Factors and Significant Subfactors.

[see DoD deviation below]

(a) The award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition.

(b) Evaluation factors and significant subfactors must --

(1) Represent the key areas of importance and emphasis to be considered in the source selection decision; and

(2) Support meaningful comparison and discrimination between and among competing proposals.

(c) The evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of agency acquisition officials, subject to the following requirements:

(1) Price or cost to the Government shall be evaluated in every source selection (10 U.S.C. 2305(a)(3)(A) (ii) and 41 U.S.C. 3306(c)(1)(B)) (also see Part 36 for architect-engineer contracts).

(2) The quality of the product or service shall be addressed in every source selection through consideration of one or more non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience (10 U.S.C. 2305(a)(3)(A)(i) and 3306(c)(1)(A).

(3)

(i) Past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.

[Deviation per DAR Tracking Number: 2013-O0018, 15.304-(c)(3)(i), Effective until incorporated in the FAR or DFARS or otherwise rescinded.]

215.304 Evaluation factors and significant subfactors (DEVIATION).

(c)

(3)

(i) In lieu of the threshold specified at FAR 15.304(c)(3)(i), except as provided at FAR 15.304(c)(3)(iii), evaluate past performance in source selections for negotiated competitive acquisitions as follows:

(A) For systems and operations support acquisitions expected to exceed $5,000,000;

(B) For services and information technology acquisitions expected to exceed $1,000,000; and

(C) For ship repair and overhaul acquisitions expected to exceed $500,000.

(ii) For solicitations that are not set aside for small business concerns, involving consolidation or bundling, that offer a significant opportunity for subcontracting, the contracting officer shall include a factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans (15 U.S.C. 637(d)(4)(G)(ii)).

(iii) Past performance need not be evaluated if the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition. When documented as part of an approved Acquisition Plan or Acquisition Strategy no additional file documentation is required.

Revise FAR by adding proposed language below:

Subpart 39.2 – Electronic and Information Technology

39.203 Applicability.

(a) Unless an exception at 39.204 applies, acquisitions of EIT supplies and services must meet the applicable accessibility standards at 36 CFR part 1194.

(b)

(1) Exception determinations are required prior to contract award, except for indefinite-quantity contracts (see paragraph (b)(2) of this section).

(2) Exception determinations are not required prior to award of indefinite-quantity contracts, except for requirements that are to be satisfied by initial award. Contracting offices that award indefinite-quantity contracts must indicate to requiring and ordering activities which supplies and services the contractor indicates as compliant, and show where full details of compliance can be found (*e.g.,* vendor's or other exact website location).

(3) Requiring and ordering activities must ensure supplies or services meet the applicable accessibility standards at 36 CFR part 1194, unless an exception applies, at the time of issuance of task or delivery orders. Accordingly, indefinite-quantity contracts may include noncompliant items; however, any task or delivery order issued for noncompliant items must meet an applicable exception.

(c)

(1) When acquiring commercial items, an agency must comply with those accessibility standards that can be met with supplies or services that are available in the commercial marketplace in time to meet the agency's delivery requirements.

(2) Unless included as part of an Acquisition Plan IAW FAR 7.103(q) or Acquisition Strategy , the requiring official must document in writing the nonavailability, including a description of market research performed and which standards cannot be met, and provide documentation to the contracting officer for inclusion in the contract file.

39.204 Exceptions.

The requirements in 39.203 do not apply to EIT that--

(a) Is purchased in accordance with Subpart 13.2 (micro-purchases) prior to April 1, 2005. However, for micro-purchases, contracting officers and other individuals designated in accordance with 1.603-3 are strongly encouraged to comply with the applicable accessibility standards to the maximum extent practicable;

(b) Is for a national security system;

(c) Is acquired by a contractor incidental to a contract;

(d) Is located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment; or

(e) Would impose an undue burden on the agency.

(1) *Basis*. In determining whether compliance with all or part of the applicable accessibility standards in 36 CFR part 1194 would be an undue burden, an agency must consider--

(i) The difficulty or expense of compliance; and

(ii) Agency resources available to its program or component for which the supply or service is being acquired.

(2) *Documentation.*

(i) Unless included as part of an Acquisition Plan IAW FAR 7.103(q) or Acquisition Strategy, the requiring official must document in writing the basis for an undue burden decision and provide the documentation to the contracting officer for inclusion in the contract file.

(ii) When acquiring commercial items, an undue burden determination is not required to address individual standards that cannot be met with supplies or service available in the commercial marketplace in time to meet the agency

delivery requirements (see 39.203(c)(2) regarding documentation of nonavailability).

◆ Revise FAR by adding proposed language below:

7.107 – Additional Requirements for Acquisitions Involving Consolidation, Bundling, or Substantial Bundling.

7.107-2 -- Consolidation.

(a) Consolidation may provide substantial benefits to the Government. However, because of the potential impact on small business participation, before conducting an acquisition that is a consolidation of requirements with an estimated total dollar value exceeding $2 million, the senior procurement executive or chief acquisition officer shall make a written determination that the consolidation is necessary and justified in accordance with 15 U.S.C. 657q, after ensuring that--

(1) Market research has been conducted;

(2) Any alternative contracting approaches that would involve a lesser degree of consolidation have been identified;

(3) The determination is coordinated with the agency's Office of Small Disadvantaged Business Utilization or the Office of Small Business Programs;

(4) Any negative impact by the acquisition strategy on contracting with small business concerns has been identified; and

(5) Steps are taken to include small business concerns in the acquisition strategy.

(b) The senior procurement executive, ~~or~~ chief acquisition officer, or designee may determine that the consolidation is necessary and justified if the benefits of the acquisition would substantially exceed the benefits that would be derived from each of the alternative contracting approaches identified under paragraph (a)(2) of this subsection, including benefits that are quantifiable in dollar amounts as well as any other specifically identified benefits.

(c) Such benefits may include cost savings or price reduction and, regardless of whether quantifiable in dollar amounts--

(1) Quality improvements that will save time or improve or enhance performance or efficiency;

(2) Reduction in acquisition cycle times;

(3) Better terms and conditions; or

(4) Any other benefit.

(d) *Benefits*.

(1) Benefits that are quantifiable in dollar amounts are substantial if individually, in combination, or in the aggregate the anticipated financial benefits are equivalent to--

(i) Ten percent of the estimated contract or order value (including options) if the value is $94 million or less; or

(ii) Five percent of the estimated contract or order value (including options) or $9.4 million, whichever is greater, if the value exceeds $94 million.

(2) Benefits that are not quantifiable in dollar amounts shall be specifically identified and otherwise quantified to the extent feasible.

(3) Reduction of administrative or personnel costs alone is not sufficient justification for consolidation unless the cost savings are expected to be at least 10 percent of the estimated contract or order value (including options) of the consolidated requirements, as determined by the senior procurement executive or chief acquisition officer (15 U.S.C. 657q(c)(2)(B)).

(e)

(1) Notwithstanding paragraphs (a) through (d) of this subsection, the approving authority identified in paragraph (e)(2) of this subsection may determine that consolidation is necessary and justified when--

(i) The expected benefits do not meet the thresholds for a substantial benefit at paragraph (d)(1) of this subsection but are critical to the agency's mission success; and

(ii) The procurement strategy provides for maximum practicable participation by small business.

(2) The approving authority is--

(i) For the Department of Defense, the senior procurement executive, or approving authority for an Acquisition Plan or Acquisition Strategy when included within the plan or strategy; or

(ii) For the civilian agencies, the Deputy Secretary or equivalent, or approving authority for an Acquisition Plan or Acquisition Strategy when included within the plan or strategy.

(f) If a determination is made that consolidation is necessary and justified, the contracting officer shall include it in the acquisition strategy documentation and provide it to the Small Business Administration (SBA) upon request.

Recommendation 74b

Revise FAR by adding proposed language below:

16.203 -- Fixed-Price Contracts with Economic Price Adjustment.

16.203-3 -- Limitations.

A fixed-price contract with economic price adjustment shall not be used unless the contracting officer determines that it is necessary either to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor's established prices. When included as part of an approved Acquisition Plan IAW or Acquisition Strategy, additional file documentation is not required.

Revise FAR by adding and striking proposed language below:

Subpart 16.4 -- Incentive Contracts

16.401 -- General.

(a) Incentive contracts as described in this subpart are appropriate when a firm-fixed-price contract is not appropriate and the required supplies or services can be acquired at lower costs and, in certain instances, with improved delivery or technical performance, by relating the amount of profit or fee payable under the contract to the contractor's performance. Incentive contracts are designed to obtain specific acquisition objectives by--

(1) Establishing reasonable and attainable targets that are clearly communicated to the contractor; and

(2) Including appropriate incentive arrangements designed to --

(i) motivate contractor efforts that might not otherwise be emphasized and

(ii) discourage contractor inefficiency and waste.

(b) When predetermined, formula-type incentives on technical performance or delivery are included, increases in profit or fee are provided only for achievement that surpasses the targets, and decreases are provided for to the extent that such targets are not met. The incentive increases or decreases are applied to performance targets rather than minimum performance requirements.

(c) The two basic categories of incentive contracts are fixed-price incentive contracts (see 16.403 and 16.404) and cost-reimbursement incentive contracts (see 16.405). Since it is usually to the Government's advantage for the contractor to assume substantial cost responsibility and an appropriate share of the cost risk, fixed-price incentive contracts are preferred when contract costs and performance requirements are reasonably certain. Cost-reimbursement incentive contracts are subject to the overall limitations in 16.301 that apply to all cost-reimbursement contracts.

(d) Unless included as part of an approved Acquisition Plan or Acquisition Strategy , a determination and finding, signed by the chief of the contracting office ~~head of the contracting activity~~, shall be completed for all incentive- and award-fee contracts justifying that the use of this type of contract is in the best interest of the Government. This determination shall be documented in the contract file and, for award-fee contracts, shall address all of the suitability items in 16.401(e)(1).

(e) Award-fee contracts are a type of incentive contract.

(1) Application. An award-fee contract is suitable for use when--

(i) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, schedule, and technical performance;

(ii) The likelihood of meeting acquisition objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the Government with the flexibility to evaluate both actual performance and the conditions under which it was achieved; and

(iii) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the Determination and Findings or Acquisition Plan or Acquisition Strategy referenced in 16.401(e)(5)(iii).

(2) Award-fee amount. The amount of award fee earned shall be commensurate with the contractor's overall cost, schedule, and technical performance as measured against contract requirements in accordance with the criteria stated in the award-fee plan. Award fee shall not be earned if the contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory. The basis for all award-fee determinations shall be documented in the contract file to include, at a minimum, a determination that overall cost, schedule and technical performance in the aggregate is or is not at a satisfactory level. This determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government.

(3) Award-fee plan. All contracts providing for award fees shall be supported by an award-fee plan that establishes the procedures for evaluating award fee and an Award-Fee Board for conducting the award-fee evaluation. Award-fee plans shall--

(i) Be approved by the FDO unless otherwise authorized by agency procedures;

(ii) Identify the award-fee evaluation criteria and how they are linked to acquisition objectives which shall be defined in terms of contract cost, schedule, and technical performance. Criteria should motivate the contractor to enhance performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas;

(iii) Describe how the contractor's performance will be measured against the award-fee evaluation criteria;

(iv) Utilize the adjectival rating and associated description as well as the award-fee pool earned percentages shown below in Table 16-1. Contracting officers may supplement the adjectival rating description. The method used to determine the adjectival rating must be documented in the award-fee plan;

Award-Fee Adjectival Rating	Award-Fee Pool Available To Be Earned	Description
Excellent	91%--100%	Contractor has exceeded almost all of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Very Good	76%--90%	Contractor has exceeded many of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Good	51%--75%	Contractor has exceeded some of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Satisfactory	No Greater Than 50%.	Contractor has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Unsatisfactory	0%	Contractor has failed to meet overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.

(v) Prohibit earning any award fee when a contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory;
(vi) Provide for evaluation period(s) to be conducted at stated intervals during the contract period of performance so that the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected (e.g. six months, nine months, twelve months, or at specific milestones); and

(vii) Define the total award-fee pool amount and how this amount is allocated across each evaluation period.

(4) Rollover of unearned award fee. The use of rollover of unearned award fee is prohibited.

(5) Limitations. No award-fee contract shall be awarded unless--

(i) All of the limitations in 16.301-3, that are applicable to cost-reimbursement contracts only, are complied with;

(ii) An award-fee plan is completed in accordance with the requirements in 16.401(e)(3); and

(iii) A determination and finding is completed in accordance with 16.401(d) addressing all of the suitability items in 16.401(e)(1), unless included as part of an approved Acquisition Plan or Acquisition Strategy .

Revise DFARS by adding and striking proposed language below:

PGI 216.4—INCENTIVE CONTRACTS

PGI 216.401 General.

(e) *Award-fee contracts*.

(i) It is DoD policy to utilize objective criteria, whenever possible, to measure contract performance. In cases where an award-fee contract must be used due to lack of objective criteria, the contracting officer shall consult with the program manager and the fee determining official when developing the award-fee plan. Award-fee criteria shall be linked directly to contract cost, schedule, and performance outcomes objectives.

(ii) Award fees must be tied to identifiable interim outcomes, discrete events or milestones, as much as possible. Examples of such interim milestones include timely completion of preliminary design review, critical design review, and successful system demonstration. In situations where there may be no identifiable milestone for a year or more, consideration should be given to apportioning some of the award fee pool for a predetermined interim period of time based on assessing progress toward milestones. In any case, award fee provisions must clearly explain how a contractor's performance will be evaluated.

(iii) FAR 16.401(d) requires a determination and findings (D&F) to be completed, unless included in an approved Acquisition Plan or Acquisition Strategy, for all incentive- and award-fee contracts, justifying that the use of this type of contract is in the best interest of the Government. The D&F for award-fee contracts shall be signed by the chief of the contracting office, unless included in an approved Acquisition Plan or Acquisition Strategy. ~~head of the contracting activity or designee no lower than one level below the head of the contracting activity.~~ The D&F required by FAR 16.401(d) for all other incentive contracts may be signed at one level above the contracting officer. This authority may not be further delegated.

~~(iv) The head of the contracting activity for each defense agency shall retain the D&F for (a) all acquisition category (ACAT) I or II) programs, and (b) all non-ACAT I or II contracts with an~~

~~estimated value of $50 million or more. The head of the contracting activity shall forward the D&Fs for ACAT I programs to Defense Procurement and Acquisition Policy/ Contract Policy and International Policy directorate (DPAP/CPIC) within 1 month of the end of the quarter. Copies of D&Fs on all contracts shall also be included in the contract file.~~

Revise FAR by adding and striking proposed language below:

Subpart 16.6 -- Time-and-Materials, Labor-Hour, and Letter Contracts

16.601 -- Time-and-Materials Contracts.

(a) Definitions for the purposes of Time-and-Materials Contracts.
"Direct materials" means those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product or service.
"Hourly rate" means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualification of a labor category specified in the contract that are—

(1) Performed by the contractor;
(2) Performed by the subcontractors; or
(3) Transferred between divisions, subsidiaries, or affiliates of the contractor under a common control.

"Materials" means—

(1) Direct materials, including supplies transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;
(2) Subcontracts for supplies and incidental services for which there is not a labor category specified in the contract;
(3) Other direct costs (*e.g.*, incidental services for which there is not a labor category specified in the contract, travel, computer usage charges, etc.); and
(4) Applicable indirect costs.

(b) *Description.* A time-and-materials contract provides for acquiring supplies or services on the basis of—

(1) Direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and
(2) Actual cost for materials (except as provided for in 31.205-26(e) and (f)).

(c) *Application.* A time-and-materials contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. See 12.207(b) for the use of time-and-material contracts for certain commercial services.

(1) *Government surveillance.* A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.
(2) *Fixed hourly rates.*

(i) The contract shall specify separate fixed hourly rates that include wages, overhead, general and administrative expenses, and profit for each category of labor (see 16.601(f)(1)).

(ii) For acquisitions of noncommercial items awarded without adequate price competition (see 15.403-1(c)(1)), the contract shall specify separate fixed hourly rates that include wages, overhead, general and administrative expenses, and profit for each category of labor to be performed by—

(A) The contractor;

(B) Each subcontractor; and

(C) Each division, subsidiary, or affiliate of the contractor under a common control.

(iii) For contract actions that are not awarded using competitive procedures, unless exempt under paragraph (c)(2)(iv) of this section, the fixed hourly rates for services transferred between divisions, subsidiaries, or affiliates of the contractor under a common control—

(A) Shall not include profit for the transferring organization; but

(B) May include profit for the prime contractor.

(iv) For contract actions that are not awarded using competitive procedures, the fixed hourly rates for services that meet the definition of commercial item at 2.101 that are transferred between divisions, subsidiaries, or affiliates of the contractor under a common control may be the established catalog or market rate when—

(A) It is the established practice of the transferring organization to price interorganizational transfers at other than cost for commercial work of the contractor of any division, subsidiary or affiliate of the contractor under a common control; and

(B) The contracting officer has not determined the price to be unreasonable.

(3) M*aterial handling costs.* When included as part of material costs, material handling costs shall include only costs clearly excluded from the labor-hour rate. Material handling costs may include all appropriate indirect costs allocated to direct materials in accordance with the contractor's usual accounting procedures consistent with Part 31.

(d) *Limitations.* A time-and-materials contract or order may be used only if—

(1) The contracting officer prepares a determination and findings that no other contract type is suitable, unless the rationale is included in an approved Acquisition Plan or Acquisition Strategy. The determination and finding shall be—

(i) Signed by the contracting officer prior to the execution of the base period or any option periods of the contracts; and

(ii) Approved by the chief of the contracting office ~~head of the contracting activity~~ prior to the execution of the contract ~~base period when the base period plus any option periods exceeds three years~~; and

(2) The contract or order includes a ceiling price that the contractor exceeds at its own risk. Also see 12.207(b) for further limitations on use of time-and-materials or labor hour contracts for acquisition of commercial items.

Revise DFARS by adding and striking proposed language below:

SUBPART 216.6--TIME-AND-MATERIALS, LABOR-HOUR, AND LETTER CONTRACTS

216.601 Time-and-materials contracts. (*DEVIATION 2018-O0018*)

(d) *Limitations*.

(i)(A) *Approval of determination and findings for time-and-materials or labor-hour contracts.*

(*1*) ~~*Base period plus any option periods is three years or less.*~~

(*i*) For contracts (including indefinite-delivery contracts) and orders in which the portion of the requirement performed on a time-and-materials or labor-hour basis exceeds $1 million, the approval authority for the determination and findings shall be the chief of the contracting office, unless included in an approved Acquisition Plan or Acquisition Strategy. ~~senior contracting official within the contracting activity. This authority may not be delegated.~~

(*ii*) For contracts (including indefinite-delivery contracts) and orders in which the portion of the requirement performed on a time-and-materials or labor-hour basis is less than or equal to $1 million, the determination and findings shall be approved one level above the contracting officer, unless included in an approved Acquisition Plan or Acquisition Strategy.

~~(*2*) *Base period plus any option periods exceeds three years.* The authority of the head of the contracting activity to approve the determination and findings may not be delegated.~~

~~(*3*) *Exception.* The approval requirements in paragraphs (d)(i)(A)(*1*) and (*2*) of this section do not apply to contracts that, as determined by the head of the contracting activity—~~

~~(*i*) Support contingency or humanitarian or peacekeeping operations; or~~

~~*(ii)* Facilitate defense against or recovery from conventional, cyber, nuclear, biological, chemical or radiological attack;~~

~~(*iii*) Facilitate the provision of international disaster assistance; or~~

~~(*iv*) Support response to an emergency or major disaster.~~

Recommendation 74c

Revise FAR by striking language below:

Subpart 16.5 -- Indefinite-Delivery Contracts

16.504 -- Indefinite-Quantity Contracts.

(a) *Description*. An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.

(1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.

(2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

(3) The contract may also specify maximum or minimum quantities that the Government may order under each task or delivery order and the maximum that it may order during a specific period of time.

(4) A solicitation and contract for an indefinite quantity must—

(i) Specify the period of the contract, including the number of options and the period for which the Government may extend the contract under each option;

(ii) Specify the total minimum and maximum quantity of supplies or services the Government will acquire under the contract;

(iii) Include a statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services the Government will acquire under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

(iv) State the procedures that the Government will use in issuing orders, including the ordering media, and, if multiple awards may be made, state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order (see 16.505(b)(1));

(v) Include the name, address, telephone number, facsimile number, and e-mail address of the agency task and delivery order ombudsman (see 16.505(b)(8)) if multiple awards may be made;

(vi) Include a description of the activities authorized to issue orders; and

(vii) Include authorization for placing oral orders, if appropriate, provided that the Government has established procedures for obligating funds and that oral orders are confirmed in writing.

(b) *Application*. Contracting officers may use an indefinite-quantity contract when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period, and it is inadvisable for

the Government to commit itself for more than a minimum quantity. The contracting officer should use an indefinite-quantity contract only when a recurring need is anticipated.

(c) *Multiple award preference—*

(1) *Planning the acquisition.*

(i) Except for indefinite-quantity contracts for advisory and assistance services as provided in paragraph (c)(2) of this section, the contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.

(ii)

(A) The contracting officer must determine whether multiple awards are appropriate as part of acquisition planning. The contracting officer must avoid situations in which awardees specialize exclusively in one or a few areas within the statement of work, thus creating the likelihood that orders in those areas will be awarded on a sole-source basis; however, each awardee need not be capable of performing every requirement as well as any other awardee under the contracts. The contracting officer should consider the following when determining the number of contracts to be awarded:

(1) The scope and complexity of the contract requirement.

(2) The expected duration and frequency of task or delivery orders.

(3) The mix of resources a contractor must have to perform expected task or delivery order requirements.

(4) The ability to maintain competition among the awardees throughout the contracts' period of performance.

(B) The contracting officer must not use the multiple award approach if--

(1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;

(2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;

(3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;

(4) The projected orders are so integrally related that only a single contractor can reasonably perform the work;

(5) The total estimated value of the contract is less than the simplified acquisition threshold; or

(6) Multiple awards would not be in the best interests of the Government.

(C) The contracting officer must document the decision whether or not to use multiple awards in the acquisition plan or contract file. The contracting officer may determine that a class of acquisitions is not appropriate for multiple awards (see subpart 1.7).

~~(D)~~

~~*(1)* No task or delivery order contract in an amount estimated to exceed $112 million (including all options) may be awarded to a single source unless the head of the agency determines in writing that—~~

~~*(i)* The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;~~

~~*(ii)* The contract provides only for firm fixed price (see 16.202) task or delivery orders for—~~

~~*(A)* Products for which unit prices are established in the contract; or~~

~~*(B)* Services for which prices are established in the contract for the specific tasks to be performed;~~

~~*(iii)* Only one source is qualified and capable of performing the work at a reasonable price to the Government; or~~

~~*(iv)* It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.~~

~~*(2)* The head of the agency must notify Congress within 30 days after any determination under paragraph (c)(1)(ii)(D)*(1)(iv)* of this section.~~

~~*(3)* The requirement for a determination for a single-award contract greater than $112 million—~~

~~*(i)* Is in addition to any applicable requirements of Subpart 6.3; and~~

~~*(ii)* Is not applicable for architect-engineer services awarded pursuant to Subpart 36.6.~~

(2) *Contracts for advisory and assistance services.*

(i) Except as provided in paragraph (c)(2)(ii) of this section, if an indefinite-quantity contract for advisory and assistance services exceeds 3 years and $13.5 million, including all options, the contracting officer must make multiple awards unless--

(A) The contracting officer or other official ~~designated by the head of the agency~~ determines in writing, as part of acquisition planning, that multiple awards are not practicable. The contracting officer or other official must determine that only one contractor can reasonably perform the work because either the scope of work is unique or highly specialized or the tasks so integrally related;

(B) The contracting officer or other official ~~designated by the head of the agency~~ determines in writing, after the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or

(C) Only one offer is received.

(ii) The requirements of paragraph (c)(2)(i) of this section do not apply if the contracting officer or other official ~~designated by the head of the agency~~

determines that the advisory and assistance services are incidental and not a significant component of the contract.

Recommendation 75a

Revise DFARS by striking language below:

SUBPART 215.3--SOURCE SELECTION

215.371 Only one offer.
215.371-1 Policy.
It is DoD policy, if only one offer is received in response to a competitive solicitation—

(a) To take the required actions to promote competition (see 215.371-2); and

(b) To ensure that the price is fair and reasonable (see 215.371-3) and to comply with the statutory requirement for certified cost or pricing data (see FAR 15.403-4).

215.371-2 Promote competition.
Except as provided in sections 215.371-4 and 215.371-5—

(a) If only one offer is received when competitive procedures were used and the solicitation allowed fewer than 30 days for receipt of proposals, the contracting officer shall—

(1) Consult with the requiring activity as to whether the requirements document should be revised in order to promote more competition (see FAR 6.502(b) and 11.002); and

~~(2) Resolicit, allowing an additional period of at least 30 days for receipt of proposals; and~~

(b) For competitive solicitations in which more than one potential offeror expressed an interest in an acquisition, but only one offer was ultimately received, follow the procedures at PGI 215.371-2.

215.371-3 Fair and reasonable price.

(a) If there was "reasonable expectation… that …two or more offerors, competing independently, would submit priced offers" but only one offer is received, this circumstance does not constitute adequate price competition unless an official at a level above the contracting officer approves the determination that the price is reasonable (see FAR 15.403-1(c)(1)(ii)).

(b) Except as provided in section 215.371-4(a), if only one offer is received when competitive procedures were used and the solicitation allowed at least 30 days for receipt of proposals (unless the 30-day requirement is not applicable in accordance with 215.371-4(a)(3) or has been waived in accordance with section 215.371-5), the contracting officer shall—

(1) Determine through cost or price analysis that the offered price is fair and reasonable and that adequate price competition exists (with approval of the determination at a level above the contracting officer) or another exception to the requirement for certified cost or pricing data applies (see FAR 15.403-1(c) and 15.403-4). In these circumstances, no further cost or pricing data is required; or

(2)(i) Obtain from the offeror cost or pricing data necessary to determine a fair and reasonable price and comply with the requirement for certified cost or pricing data at FAR 15.403-4. For acquisitions that exceed the cost or pricing data threshold, if no exception at FAR 15.403-1(b) applies, the cost or pricing data shall be certified; and

(ii) Enter into negotiations with the offeror as necessary to establish a fair and reasonable price. The negotiated price should not exceed the offered price.

215.371-4 Exceptions. ***(DEVIATION 2018-O0018)***

(a) The requirements at sections 215.371-2 do not apply to—

(1) Acquisitions at or below the simplified acquisition threshold;

(2) Acquisitions, as determined by the head of the contracting activity, in support of contingency or humanitarian or peacekeeping operations; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate the provision of international disaster assistance; or to support response to an emergency or major disaster;

Class Deviation- 2018-O0018, Micro-Purchase Threshold, Simplified Acquisition Threshold, and Special Emergency Procurement Authority. This clause deviation is effective on August 31, 2018, and remains in effect until incorporated into the FARS or DFARS, or until otherwise rescinded.

(a) The requirements at sections 215.371-2 do not apply to—

(1) Acquisitions at or below the simplified acquisition threshold;

(2) Acquisitions in support of contingency or humanitarian or peacekeeping operations; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate the provision of international disaster assistance; or to support response to an emergency or major disaster;

(3) Small business set-asides under FAR subpart 19.5, set asides offered and accepted into the 8(a) Program under FAR subpart 19.8, or set-asides under the HUBZone Program (see FAR 19.1305(c)), the Service-Disabled Veteran-Owned Small Business Procurement Program (see FAR 19.1405(c)), or the Women-Owned Small Business Program (see FAR 19.1505(d));

(4) Acquisitions of basic or applied research or development, as specified in FAR 35.016(a), that use a broad agency announcement; or

(5) Acquisitions of architect-engineer services (see FAR 36.601-2).

(b) The applicability of an exception in paragraph (a) of this section does not eliminate the need for the contracting officer to seek maximum practicable competition and to ensure that the price is fair and reasonable.

~~**215.371-5 Waiver.**~~

~~(a) The head of the contracting activity is authorized to waive the requirement at 215.371-2 to resolicit for an additional period of at least 30 days.~~

~~(b) This waiver authority cannot be delegated below one level above the contracting officer.~~

215.371-6 Solicitation provision.

Use the provision at 252.215-7007, Notice of Intent to Resolicit, in competitive solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial

items, that will be solicited for fewer than 30 days, unless an exception at 215.371-4 applies or the requirement is waived in accordance with 215.371-5.

252.215-7007 Notice of Intent to Resolicit.
As prescribed at 215.371-6, use the following provision:

NOTICE OF INTENT TO RESOLICIT (JUN 2012)

This solicitation provides offerors fewer than 30 days to submit proposals. In the event that only one offer is received in response to this solicitation, the Contracting Officer may cancel the solicitation and resolicit for an additional period ~~of at least 30 days~~ in accordance with 215.371-2.

Recommendation 75b

Revise FAR by adding proposed language below:

SUBPART 17.5 -- INTERAGENCY ACQUISITIONS

17.500 -- Scope of Subpart.

(a) This subpart prescribes policies and procedures applicable to all interagency acquisitions under any authority, except as provided for in paragraph (c) of this section. In addition to complying with the interagency acquisition policy and procedures in this subpart, nondefense agencies acquiring supplies and services on behalf of the Department of Defense shall also comply with the policy and procedures at subpart 17.7.
(b) This subpart applies to interagency acquisitions, see 2.101 for definition, when—
(1) An agency needing supplies or services obtains them using another agency's contract; or
(2) An agency uses another agency to provide acquisition assistance, such as awarding and administering a contract, a task order, or delivery order.
(c) This subpart does not apply to—
(1) Interagency reimbursable work performed by Federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction; or
(2) Orders of $550,000 or less issued against Federal Supply Schedules.
(3) Direct acquisitions for orders placed under OMB Best In Class (BIC) designated contracts.

Revise DFARS by adding proposed language below:

SUBPART 217.7-- INTERAGENCY ACQUISITIONS: ACQUISITIONS BY NONDEFENSE AGENCIES ON BEHALF OF THE DEPARTMENT OF DEFENSE
(Revised September 21, 2015)

217.700 Scope of subpart.
This subpart—

(a) Implements section 854 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108-375), section 801 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181), and section 806 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84); and

(b) Prescribes policy for the acquisition of supplies and services through the use of contracts or orders issued by non-DoD agencies.

217.701 Definitions.

As used in this subpart—

"Assisted acquisition" means the type of interagency contracting through which acquisition officials of a non-DoD agency award a contract or a task or delivery order for the acquisition of supplies or services on behalf of DoD.

"Direct acquisition" means the type of interagency contracting through which DoD orders a supply or service from a Governmentwide acquisition contract maintained by a non-DoD agency.

"Governmentwide acquisition contract" means a task or delivery order contract that–

(i) Is entered into by a non-defense agency; and

(ii) May be used as the contract under which property or services are procured for one or more other departments or agencies of the Federal Government

217.702 Exceptions.

(a) Direct acquisitions for orders placed under OMB Best In Class (BIC) designated contracts are not subject to this subpart.

217.770 Procedures.

Departments and agencies shall establish and maintain procedures for reviewing and approving orders placed for supplies and services under non-DoD contracts, whether through direct acquisition or assisted acquisition, when the amount of the order exceeds the simplified acquisition threshold. These procedures shall include—

(a) Evaluating whether using a non-DoD contract for the acquisition is in the best interest of DoD. Factors to be considered include—

(1) Satisfying customer requirements;

(2) Schedule;

(3) Cost effectiveness (taking into account discounts and fees). In order to ensure awareness of the total cost of fees associated with use of a non-DoD contract, follow the procedures at PGI 217.770(a)(3); and

(4) Contract administration (including oversight);

(b) Determining that the tasks to be accomplished or supplies to be provided are within the scope of the contract to be used;

(c) Reviewing funding to ensure that it is used in accordance with appropriation limitations; and

(d) Collecting and reporting data on the use of assisted acquisition for analysis. Follow the reporting requirements in subpart 204.6.

Recommendation 75c

Revise FAR by striking language below:

Subpart 22.8 -- Equal Employment Opportunity

22.805 ~~-- Procedures.~~Reserved.

~~(a) *Preaward clearances for contracts and subcontracts of $10 million or more (excluding construction).*~~

~~(1) Except as provided in paragraphs (a)(4) and (a)(8) of this section, if the estimated amount of the contract, subcontract is $10 million or more, the contracting officer shall request clearance from the appropriate OFCCP regional office before --~~

~~(i) Award of any contract, including any indefinite delivery contract or letter contract; or~~

~~(ii) Modification of an existing contract for new effort that would constitute a contract award.~~

~~(2) Preaward clearance for each proposed contract and for each proposed first-tier subcontract of $10 million or more shall be requested by the contracting officer directly from the OFCCP regional office(s). Verbal requests shall be confirmed by letter or facsimile transmission.~~

~~(3) When the contract work is to be performed outside the United States with employees recruited within the United States, the contracting officer shall send the request for a preaward clearance to the OFCCP regional office serving the area where the proposed contractor's corporate home or branch office is located in the United States, or the corporate location where personnel recruiting is handled, if different from the contractor's corporate home or branch office. If the proposed contractor has no corporate office or location within the United States, the preaward clearance request action should be based on the location of the recruiting and training agency in the United States.~~

~~(4) The contracting officer does not need to request a preaward clearance if --~~

~~(i) The specific proposed contractor is listed in OFCCP's National Preaward Registry via the Internet at https://ofccp.dol-esa.gov/preaward/pa_reg.html;~~

~~(ii) The projected award date is within 24 months of the proposed contractor's Notice of Compliance completion date in the Registry; and~~

~~(iii) The contracting officer documents the Registry review in the contract file.~~

~~(5) The contracting officer shall include the following information in the preaward clearance request:~~

~~(i) Name, address, and telephone number of the prospective contractor and of any corporate affiliate at which work is to be performed.~~

~~(ii) Name, address, and telephone number of each proposed first-tier subcontractor with a proposed subcontract estimated at $10 million or more.~~

~~(iii) Anticipated date of award.~~

~~(iv) Information as to whether the contractor and first-tier subcontractors have previously held any Government contracts or subcontracts.~~

~~(v) Place or places of performance of the prime contract and first-tier subcontracts estimated at $10 million or more, if known.~~

~~(vi) The estimated dollar amount of the contract and each first-tier subcontract, if known.~~

~~(6) The contracting officer shall allow as much time as feasible before award for the conduct of necessary compliance evaluation by OFCCP. As soon as the apparently successful offeror can be determined, the contracting officer shall process a preaward clearance request in accordance with agency procedures, assuring, if possible, that the preaward clearance request is submitted to the OFCCP regional office at least 30 days before the proposed award date.~~

~~(7) Within 15 days of the clearance request, OFCCP will inform the awarding agency of its intention to conduct a preaward compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a preaward compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a preaward compliance evaluation, OFCCP shall be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance shall be presumed and the awarding agency is authorized to proceed with the award.~~

~~(8) If the procedures specified in (a)(6) and (a)(7) of this section would delay award of an urgent and critical contract beyond the time necessary to make award or beyond the time specified in the offer or extension thereof, the contracting officer shall immediately inform the OFCCP regional office of the expiration date of the offer or the required date of award and request clearance be provided before that date. If the OFCCP regional office advises that a preaward evaluation cannot be completed by the required date, the contracting officer shall submit written justification for the award to the head of the contracting activity, who, after informing the OFCCP regional office, may then approve the award without the preaward clearance. If an award is made under this authority, the contracting officer shall immediately request a postaward evaluation from the OFCCP regional office.~~

~~(9) If, under the provisions of (a)(8) of this section, a postaward evaluation determines the contractor to be in noncompliance with E.O. 11246, the Deputy Assistant Secretary may authorize the use of the enforcement procedures at 22.809 against the noncomplying contractor.~~

~~(b) *Furnishing posters*. The contracting officer shall furnish to the contractor appropriate quantities of the poster entitled "Equal Employment Opportunity Is The Law." These shall be obtained in accordance with agency procedures.~~

Recommendation 75d

Revise FAR by adding and striking the proposed language below:

Subpart 19.8 -- Contracting with the Small Business Administration (The 8(a) Program)

19.815 – Release for Non-8(a) Procurement.

(a) Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements shall remain in the 8(a) program unless there is a mandatory source (see 8.002 or 8.003) or SBA agrees to release the requirement from the 8(a) program in accordance with 13 CFR 124.504(d).
(b) To obtain release of a requirement for a non-8(a) procurement (other than a mandatory source listed at 8.002 or 8.003), the contracting officer shall make a written request to, and receive concurrence from, the SBA Associate Administrator for Business Development.
(c)

(1) The written request to the SBA Associate Administrator for Business Development shall indicate—

(i) Whether the agency has achieved its small disadvantaged business goal;
(ii) Whether the agency has achieved its HUBZone, SDVOSB, WOSB, or small business goal(s); and
(iii) Whether the requirement is critical to the business development of the 8(a) contractor that is currently performing the requirement.

(2) Generally, a requirement that was previously accepted into the 8(a) program will only be released for procurements outside the 8(a) program when the contracting activity agency agrees to set aside the requirement under the small business, HUBZone, SDVOSB, or WOSB programs.
(3) The requirement that a follow-on procurement must be released from the 8(a) program in order for it to be fulfilled outside the 8(a) program does not apply to task or delivery orders offered to and accepted into the 8(a) program, where the basic contract was not accepted into the 8(a) program.

(d) Within 15 working days of the request, the SBA will inform the awarding agency contracting officer of its decisions to concur or non-concur. If the SBA does not inform the awarding agency within that period, release from the 8(a) program shall be presumed and the awarding agency is authorized to proceed with soliciting and award outside the 8(a) program.

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Recommendation 76

RECOMMENDED REPORT LANGUAGE

SEC. ___. STREAMLINED ORDERING UNDER TASK AND DELIVERY ORDER CONTRACTS.

This section would amend section 2304c, title 10, United States Code, and section 4106, title 41, United States Code, to increase the threshold for enhanced competition for task and delivery orders from $5,000,000 to $7,000,000 and provide additional flexibility to contracting officers conducting these order competitions. This flexibility includes removing the requirement for the use of subfactors and the disclosure of the relative importance of evaluation factors.

The committee notes that too frequently the more cumbersome and prescriptive source selection procedures in FAR 15.3 are used in competitions for task and deliver orders, whereas the fair opportunity procedures in FAR 16.5 are more appropriate and more efficient. The committee expects these amendments would advance efforts to further simplify the fair opportunity process and increase its use.

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SEC. ___. STREAMLINED ORDERING UNDER TASK AND DELIVERY ORDER CONTRACTS.

(a) TITLE 10, UNITED STATES CODE.—

(1) FAIR OPPORTUNITY REQUIREMENTS.—Subsection (d) of section 2304c of title 10, United States Code, is amended—

(A) by striking "$5,000,000" in the subsection heading and text and inserting "$7,000,000"; and

(B) in paragraph (1), by inserting "and a statement that the selection process will be conducted using fair opportunity procedures" after "requirements";

(C) in paragraph (3)—

(i) by striking "and subfactors"; and

(ii) by striking ", and their relative importance";

(D) in paragraph (4), by striking "and the relative importance of quality and price or cost factors"; and

(E) in paragraph (5), by inserting ", if requested by a contractor that submitted a proposal" before the period at the end.

(2) SCOPE OF WORK.—Subsection (c) of such section is amended to read as follows:

"(c) SCOPE.—A task or delivery order shall specify—

"(1) the property to be delivered under the order; or

"(2) in the case of an order for services, the outcomes sought or the tasks to be performed (or a combination of outcomes sought and tasks to be performed).".

(3) STYLISTIC AMENDMENTS.—Subsection (d) of such section, as amended by paragraph (1), is further amended—

(A) by striking "is not met unless all such contractors are provided, at a minimum—" and inserting "includes a requirement that each such contractor be provided the following:";

(B) by capitalizing the first letter of the first word of each of paragraphs (1) through (5);

(C) by striking the semicolon at the end of each of paragraphs (1), (2), and (3) and inserting a period; and

(D) by striking "; and" at the end of paragraph (4) and inserting a period.

(b) TITLE 41, UNITED STATES CODE.—

(1) FAIR OPPORTUNITY REQUIREMENTS.—Subsection (d) of section 4106 of title 41, United States Code, is amended—

(A) by striking "$5,000,000" in the subsection heading and text and inserting "$7,000,000"; and

(B) in paragraph (1), by inserting "and a statement that the selection process will be conducted using fair opportunity procedures" after "requirements";

(C) in paragraph (3)—

(i) by striking "and subfactors"; and

(ii) by striking ", and their relative importance";

(D) in paragraph (4), by striking "documenting—" and all that follows and inserting "the basis for the award."; and

(E) in paragraph (5), by inserting ", if requested by a contractor that submitted a proposal" before the period at the end.

(2) SCOPE OF WORK.—Subsection (e) of such section is amended to read as follows:

"(e) SCOPE.—A task or delivery order shall specify—

"(1) the property to be delivered under the order; or

"(2) in the case of an order for services, the outcomes sought or the tasks to be performed (or a combination of outcomes sought and tasks to be performed).".

(3) STYLISTIC AMENDMENTS.—Subsection (d) of such section, as amended by paragraph (1), is further amended—

(A) by striking "is not met unless all such contractors are provided, at a minimum—" and inserting "includes a requirement that each such contractor be provided the following:";

(B) by capitalizing the first letter of the first word of each of paragraphs (1) through (5); and

(C) by striking the semicolon at the end of each of paragraphs (1), (2), and (3) and inserting a period..

SECTIONS AFFECTED BY THE PROPOSAL

[The material below shows changes proposed to be made by the legislative text above to the text of existing statutes. Matter proposed to be deleted is shown in ~~stricken through~~ text; matter proposed to be inserted is shown in *bold italic*.]

TITLE 10, UNITED STATES CODE

§2304c. Task and delivery order contracts: orders

(a) ISSUANCE OF ORDERS.—The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for such order under section 1708 of title 41 or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

(2) Except as provided in subsection (b), a competition (or a waiver of competition approved in accordance with section 2304(f) of this title) that is separate from that used for entering into the contract.

(b) MULTIPLE AWARD CONTRACTS.—When multiple task or delivery order contracts are awarded under section 2304a(d)(1)(B) or 2304b(e) of this title, all contractors awarded such contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of $2,500 that is to be issued under any of the contracts unless—

(1) the agency's need for the services or property ordered is of such unusual urgency that providing such opportunity to all such contractors would result in unacceptable delays in fulfilling that need;

(2) only one such contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on competitive basis;

(4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee; or

(5) the task or delivery order satisfies one of the exceptions in section 2304(c) of this title to the requirement to use competitive procedures.

(c) ~~STATEMENT OF WORK~~ ***SCOPE***.—A task or delivery order shall ~~include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order~~ ***specify—***

(1) the property to be delivered under the order; or

(2) in the case of an order for services, the outcomes sought or the tasks to be performed (or a combination of outcomes sought and tasks to be performed).

(d) ENHANCED COMPETITION FOR ORDERS IN EXCESS OF ~~$5,000,000~~ ***$7,000,000***.—In the case of a task or delivery order in excess of ~~$5,000,000~~ ***$7,000,000***, the requirement to provide all contractors a fair opportunity to be considered under subsection (b) ~~is not met unless all such contractors are provided, at a minimum~~ ***includes a requirement that each such contractor be provided the following:***

(1) ~~a~~ ***A*** notice of the task or delivery order that includes a clear statement of the agency's requirements~~;~~ ***and a statement that the selection process will be conducted using fair opportunity procedures.***

(2) ~~a~~ ***A*** reasonable period of time to provide a proposal in response to the notice~~;~~ **.**

(3) ~~disclosure~~ ***Disclosure*** of the significant factors ~~and subfactors~~, including cost or price, that the agency expects to consider in evaluating such proposals~~, and their relative importance;~~**.**

(4) ~~in~~ ***In*** the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award ~~and the relative importance of quality and price or cost factors; and~~**.**

(5) ~~an~~ ***An*** opportunity for a post-award debriefing***, if requested by a contractor that submitted a proposal***.

(e) PROTESTS.—***

(f) TASK AND DELIVERY ORDER OMBUDSMAN.—***

(g) APPLICABILITY.—This section applies to task and delivery order contracts entered into under sections 2304a and 2304b of this title.

TITLE 41, UNITED STATES CODE

§4106. Orders

(a) APPLICATION.—This section applies to task and delivery order contracts entered into under sections 4103 and 4105 of this title.

(b) ACTIONS NOT REQUIRED FOR ISSUANCE OF ORDERS.—The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for such order under section 1708 of this title or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

(2) Except as provided in subsection (c), a competition (or a waiver of competition approved in accordance with section 3304(e) of this title) that is separate from that used for entering into the contract.

(c) MULTIPLE AWARD CONTRACTS.—When multiple contracts are awarded under section 4103a(d)(1)(B) or 4105(f) of this title, all contractors awarded the contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of $2,500 that is to be issued under any of the contracts, unless—

(1) the executive agency's need for the services or property ordered is of such unusual urgency that providing such opportunity to all those contractors would result in unacceptable delays in fulfilling that need;

(2) only one of those contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on competitive basis; or

(4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee.

(d) ENHANCED COMPETITION FOR ORDERS IN EXCESS OF ~~$5,000,000~~ ***$7,000,000***.—In the case of a task or delivery order in excess of ~~$5,000,000~~ ***$7,000,000***, the requirement to provide all contractors a fair opportunity to be considered under subsection (c) ~~is not met unless all such contractors are provided, at a minimum~~ ***includes a requirement that each such contractor be provided the following:***

(1) ~~a~~ ***A*** notice of the task or delivery order that includes a clear statement of the executive agency's requirements~~;~~ ***and a statement that the selection process will be conducted using fair opportunity procedures.***

(2) ~~a~~ ***A*** reasonable period of time to provide a proposal in response to the notice~~;~~ **.**

(3) ~~disclosure~~ ***Disclosure*** of the significant factors ~~and subfactors~~, including cost or price, that the executive agency expects to consider in evaluating such proposals~~, and their relative importance;~~**.**

(4) ~~in~~ ***In*** the case of an award that is to be made on a best value basis, a written statement documenting—

~~(A)~~ the basis for the award~~; and~~

~~(B) the relative importance of quality and price or cost factors; and~~**.**

(5) ~~an~~ ***An*** opportunity for a post-award debriefing***, if requested by a contractor that submitted a proposal***.

(e) ~~STATEMENT OF WORK~~ ***SCOPE***.—A task or delivery order shall ~~include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order~~ ***specify—***

(1) the property to be delivered under the order; or

(2) in the case of an order for services, the outcomes sought or the tasks to be performed (or a combination of outcomes sought and tasks to be performed).

(f) PROTESTS.—***

(g) TASK AND DELIVERY ORDER OMBUDSMAN.—***

RECOMMENDED REGULATORY REVISIONS

FEDERAL ACQUISITION REGULATION

16.505 -- Ordering

(a) *General*

…

(b) *Orders under multiple-award contracts*--

(1) *Fair opportunity*.

(i) The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding $3,500 issued under multiple delivery-order contracts or multiple task-order contracts, except as provided for in paragraph (b)(2) of this section.

(ii) ***The contracting officer shall use streamlined fair opportunity procedures. Justification for use of other than streamlined fair opportunity procedures, such as those in Subpart 15.3, shall be approved by a level above the contracting officer.*** The contracting officer may exercise broad discretion in developing appropriate ***streamlined fair opportunity*** order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. If the order does not exceed the simplified acquisition threshold, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. The competition requirements in Part 6 and the policies in Subpart 15.3 do not apply to the ordering process. However, the contracting officer must--

(A) Develop placement procedures that will provide each awardee a fair opportunity to be considered for each order and that reflect the requirement and other aspects of the contracting environment;

(B) Not use any method (such as allocation or designation of any preferred awardee) that would not result in fair consideration being given to all awardees prior to placing each order;

(C) Tailor the procedures to each acquisition; ***and***

~~(D) Include the procedures in the solicitation and the contract; and~~

~~(E)~~***(D)*** Consider price or cost under each order as one of the factors in the selection decision.

(iii) Orders exceeding the simplified acquisition threshold.

(A) Each order exceeding the simplified acquisition threshold shall be placed on a competitive basis in accordance with paragraph (b)(1)(iii)(B) of this section, unless supported by a written determination that one of the circumstances described at 16.505(b)(2)(i) applies to the order and the requirement is waived on the basis of a justification that is prepared in accordance with 16.505(b)(2)(ii)(B);

(B) The contracting officer shall—

(1) Provide a fair notice of the intent to make a purchase, including a clear description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made to all contractors offering the required supplies or services under the multiple-award contract; and

(2) Afford all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

(iv) *Orders exceeding ~~$5.5~~**$7** million*. For task or delivery orders in excess of ~~$5.5~~***$7*** million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include, at a minimum—

(A) A notice of the task or delivery order that includes a clear statement of the agency's requirements~~;~~ ***and a statement that the selection process will be conducted using streamlined fair opportunity procedures;***

(B) A reasonable response period;

(C) Disclosure of the significant factors ~~and subfactors~~, including cost or price, that the agency expects to consider in evaluating proposals~~, and their relative importance~~;

(D) Where award is made on a best value basis, a written statement documenting the basis for ***the*** award ~~and the relative importance of quality and price or cost factors~~; and

(E) An opportunity for a postaward debriefing in accordance with paragraph (b)(6) of this section***, if requested by a contractor that submitted a proposal***.

(v) The contracting officer should consider the following when developing the procedures:

(A)

(1) Past performance on earlier orders under the contract, including quality, timeliness and cost control.

(2) Potential impact on other orders placed with the contractor.

(3) Minimum order requirements.

(4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(5) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as—

(i) Seeking comments from two or more contractors on draft statements of work;

(ii) Using a multiphased approach when effort required to respond to a potential order may be resource intensive (*e.g.*, requirements are complex or need continued development), where all contractors are initially considered on price considerations (*e.g.*, rough estimates), and other considerations as appropriate (*e.g.*, proposed conceptual approach, past performance). The contractors most likely to submit the highest value solutions are then selected for one-on-one sessions with the Government to increase their understanding of the requirements, provide suggestions for refining requirements, and discuss risk reduction measures.

~~(B) Formal evaluation plans or scoring of quotes or offers are not required.~~

(B) Basis of award: The contracting officer has broad discretion in fashioning suitable evaluation procedures under this subpart.

(1) The solicitation should make it clear that the selection process is being conducted under this subpart and not Subpart 15.3. Conduct of the selection process must be consistent with that statement.

(2) Use of best value tradeoff is encouraged.

(3) Submission of detailed technical and management plans, the use of formal evaluation plans, use of a competitive range, conducting discussions or exchanges to make an offer acceptable, scoring quotations and offers, and final price revisions are not required and are generally discouraged as inconsistent with the objective of simplification under the subpart. (see 41 USC §4106 and 10 U.S.C. §2304c)

(4) Contracting officers shall state the evaluation factor(s) to be used as the basis for award. Use of subfactors is not required. Solicitations under this subpart are not required to establish the relative importance of each evaluation factor or subfactor (thereby making them of equal importance).

(5) When evaluating past performance, use of a formal database is not required. The evaluation may be based on the contracting officer's knowledge and prior experience with the awardee on the multiple-award contract, customer surveys, PPIRS, or any reasonable basis. There is no obligation to discuss adverse past performance.

Recommendation 78

RECOMMENDED REGULATORY REVISIONS

Federal Acquisition Regulation 5.202
Volume 3

FAR Subpart 5.202-- Exceptions.

5.202 -- Exceptions

"(b) The contracting officer need not submit the notice required by 5.303 when –

(1) The proposed contract action is made for the supply of basic energy (i.e., natural gas, electricity, heating oil, or similar basic energy commodities subject to price volatility)."

(c) ~~(b)~~ The head of the agency determines in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that advance notice is not appropriate or reasonable.

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Recommendation 79

RECOMMENDED REPORT LANGUAGE

SEC. ___. ADVANCE PAYMENTS.

This section would amend section 2307, title 10, United States Code, 10 U.S.C. 2307, Contract Financing, to allow for lower levels of approval for security requirements below the head of the agency for the use of advance payments and raise the advance payment rate to 20% for small businesses supplying commercial items. The committee is aware of the financial challenges faced by small businesses developing emerging technology to support the Department of Defense (DoD) and the lack of contract financing may be a barrier to entry to the defense market that current accelerated payment processes do not address. This section would provide flexibility for contracting officials to authorize advance payments to small businesses at lower organizational levels and also, by raising the advance payment level to 20%, incentivize more market participation by small businesses, especially in cases where emerging technology is dependent on the modification or integration of commercial products or services into a new innovative product. The committee notes this section would make it easier to approve small business financing and create a more open and competitive marketplace for small businesses to engage in DoD innovation.

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SEC. ___. ADVANCE PAYMENTS.

(a) PUBLIC INTEREST DETERMINATION AS A CONDITION FOR ADVANCE PAYMENTS.—Subsection (d) of section 2307 of title 10, United States Code, is amended by striking "by the head of the agency" and inserting "by a cognizant authority or delegate below the head of the agency".

(b) ADVANCE PAYMENTS TO SMALL BUSINESSES SUPPLYING COMMERCIAL ITEMS.—Subsection (f)(2) of such section is amended by inserting before the period at the end the following: ", except that a small business supplying commercial items may receive advance payments of not more than 20 percent of the contract price".

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§2307. Contract financing

(a) PAYMENT AUTHORITY.—(1) The head of any agency may***

***

(d) SECURITY FOR ADVANCE PAYMENTS.— Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination ~~by the head of the agency~~ ***by a cognizant authority or delegate below the head of the agency*** that to do so would be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the United States.

(e) ***

(f) CONDITIONS FOR PAYMENTS FOR COMMERCIAL ITEMS.—(1) Payments under subsection (a) for commercial items may be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States. The head of the agency shall obtain adequate security for such payments. If the security is in the form of a lien in favor of the United States, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) Advance payments made under subsection (a) for commercial items may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract***, except that a small business supplying commercial items may receive advance payments of not more than 20 percent of the contract price***.

(3) The conditions of subsections (d) and (e) need not be applied if they would be inconsistent, as determined by the head of the agency, with commercial terms and conditions pursuant to paragraphs (1) and (2).

(g) ***

Recommendation 80

RECOMMENDED REPORT LANGUAGE

SEC. ___. PREFERENCE FOR COMMERCIAL PRODUCTS AND SERVICES RELATIVE TO SMALL BUSINESS SET-ASIDES.

This section would amend section 3307, title 41, United States Code, and section 2377, title 10, United States Code, to make clear the preference for acquiring commercial products, commercial services, and non-developmental items takes priority over any small business set-aside program. In instances, where the government determines its need can be met by a commercial product, commercial service, or non-developmental item, and two or more small businesses offer a commercial product, commercial services or non-developmental item, a set-aside may still be used.

Both statute and regulation establish a preference for acquiring commercial products and commercial services when available to satisfy the government's need. The statutes do not specifically establish a preference for awards to small business but establishes the overarching policy of *assuring a fair proportion* of awards are made to small business. The Court of Federal Claims noted in Analytical Graphics, Inc. v. United States (135 Fed Cl. 378,412 (2017)) that the statutes are silent on any conflict between the preference for commercial products or commercial services and small business set-asides. The committee is concerned that without articulating a priority, contracting officers have no obligation to determine whether the government's requirements can be satisfied by commercial products or services before deciding whether to set-aside the procurement for small businesses, potentially leading to the unnecessary use of set-asides to procure noncommercial products and services when commercial products and services are available in the market.

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SEC. ___. PREFERENCE FOR COMMERCIAL PRODUCTS AND SERVICES RELATIVE TO SMALL BUSINESS SET-ASIDES.

(a) TITLE 41.—Section 3307(a) of title 41, United States Code, is amended by adding at the end the following new paragraph:

"(3) SMALL BUSINESS ACT.—In conducting a procurement of supplies or services, the head of an executive agency shall apply the requirements of this section in preference to applying section 15(j) of the Small Business Act (15 U.S.C. 644(j)).".

(b) TITLE 10.—Section 2377 of title 10, United States Code, is amended by adding at the end following new subsection:

"(f) SMALL BUSINESS ACT.—In conducting a procurement of supplies or services, the head of an agency shall apply the requirements of this section in preference to applying section 15(j) of the Small Business Act (15 U.S.C. 644(j)).".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to contracts entered into under solicitations issued after the end of the 180-day period beginning on the date of the enactment of this Act.

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RECOMMENDED REGULATORY REVISIONS

FAR 6.203, Set -asides for small business concerns

(a) To fulfill the statutory requirements relating to small business concerns, contracting officers may set aside solicitations to allow only such business concerns to compete. This includes contract actions conducted under the Small Business Innovation Research Program established under Pub. L. 97-219.

(b) No separate justification or determination and findings is required under this part to set aside a contract action for small business concerns.

(c) Subpart 19.5 prescribes policies and procedures that shall be followed with respect to set-asides.

(d) The acquisition of commercial products and commercial services shall apply in preference to any small business set-aside program.

FAR 12.102, Applicability

(a) This part shall be used for the acquisition of supplies or services that meet the definition of commercial ~~items~~ products and commercial services at 2.101.

(b) Contracting officers shall use the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition.

(c) Contracts for the acquisition of commercial ~~items~~ products and commercial services are subject to the policies in other parts of the FAR. When a policy in another part of the FAR is inconsistent with a policy in this part, this part 12 shall take precedence for the acquisition of commercial items.

(d) The acquisition of commercial products and commercial services shall apply in preference to any small business set-aside program.

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Recommendation 81

RECOMMENDED REPORT LANGUAGE

SEC. ___. PRODUCTION CONTRACTS AND PRODUCTION TRANSACTION AUTHORITY AS FOLLOW-ON TO CERTAIN PROTOTYPE PROJECTS.

This section would amend 10 U.S.C. § 2371b to conform this other transaction authority with the recently enacted authority found in 10 U.S.C. § 2447d which does not require the follow-on production contract or transaction be provided for in the original prototype transaction. The committee notes that having greater consistency in what is required to be provided for in a prototype transaction will be beneficial to those negotiating and entering into these transactions among the Department of Defense and industry.

This section, as amended, would allow a follow-on production contract or transaction be awarded, with or without using competitive procedures, to the participants in a prototype project or to a party other than the participants in the prototype project. The committee recognizes that there may be situations where contractors or consortium involved in a prototype project are not willing or able to enter into a follow-on production contract or transaction yet the Department of Defense may still need access to certain non-traditional sources of supply that a production other transaction affords. The committee notes that limiting the Department of Defense to production through a procurement contract, if none of the prototype participants are willing or able to enter into production, could inhibit rapid fielding of successfully prototyped solutions to warfighter needs.

This section further would authorize the component or service acquisition executives to enter into a production contract or transaction, under exceptional circumstances, without using competitive procedures when a critical warfighter need is at stake. Those situations could be where the prototype transaction was awarded without using competitive procedures, and where the participants in the prototype project have not completed the prototype project or subproject. The committee recognizes that the Department of Defense may have a critical warfighter need that some aspect of the prototype development could address which would require moving into production before the intended prototype is complete. The committee also notes that in the commercial technology marketplace there may be patented technologies that require a non-competitive prototype transaction and non-competitive follow-on production transaction.

This section also would authorize the component or service acquisition executives, under exceptional circumstances to meet a critical warfighter need, to award a production transaction for a solution that has been prototyped and demonstrated at private expense, where the Department of Defense cannot acquire the solution through a standard procurement contract. The committee recognizes that advanced technologies such as artificial intelligence are rapidly being developed and prototyped at private expense by small non-traditional companies

that are not equipped, or have no desire, to enter into a standard Department of Defense procurement contract. The committee notes that where small non-traditional companies refuse to enter into, or do not have the complex business systems necessary for entering into a Department of Defense procurement contract, the Department of Defense may be precluded from accessing the innovative products those companies offer without this expanded transaction authority.

SEC. ___. PRODUCTION CONTRACTS AND PRODUCTION TRANSACTION AUTHORITY AS FOLLOW-ON TO CERTAIN PROTOTYPE PROJECTS.

(a) AUTHORITY.—Subsection (a)(1) of section 2371b of title 10, United States Code, is amended by inserting ", and may carry out production contracts or transactions entered into pursuant to subsection (f) or (g)," after "prototype projects".

(b) FOLLOW-ON PRODUCTION CONTRACTS OR TRANSACTIONS .—Subsection (f) of such section is amended—

(1) in paragraph (1), by striking the first sentence and inserting the following: "A prototype project under this section may be selected for a follow-on production contract or transaction to be awarded to one or more of the participants in the transaction or, if none of the participants in the transaction are willing or able to enter into such a contract or transaction, to any other party using competitive procedures.";

(2) in paragraph (2), by striking "to the participants in the transaction" and inserting "to one or more of the participants in the transaction or, if none of the participants in the transaction are willing or able to enter into such a contract or transaction, to any other party,";

(3) in paragraph (5), by inserting "and subsection (g) after "this subsection"; and

(4) by adding at the end the following new paragraph:

"(6) A production contract or transaction may be awarded pursuant to this subsection without regard to subparagraphs (A) and (B) of paragraph (2) if the appropriate component executive determines in writing that exceptional circumstances justify the use of such a contract or transaction to address a high priority warfighter need.".

(c) AUTHORITY TO AWARD A PRODUCTION TRANSACTION TO RAPIDLY FIELD AN EXISTING CAPABILITY.—Such section is further amended—

(1) by redesignating subsections (g) and (h) as subsections (h) and (i), respectively; and

(2) by inserting after subsection (f) the following new subsection (g):

"(g) AUTHORITY TO AWARD A PRODUCTION TRANSACTION TO RAPIDLY FIELD AN EXISTING CAPABILITY.—A production transaction may be awarded without the use of competitive procedures, to acquire emergent and proven technologies and field production quantities of new or upgraded systems that do not require additional development and have been demonstrated in a relevant environment when the appropriate component acquisition executive determines in writing that exceptional circumstances justify the use of such a transaction to address a high priority warfighter need.".

(e) DEFINITION.—Subsection (e) of such section is amended by adding at the end the following new paragraph:

"(3) The term 'component acquisition executive' means—

"(A) in the case of a military department, the service acquisition executive for that military department; and

"(B) in the case of a component of the Department of Defense other than a military department, the authority performing for that component the functions that a service acquisition executive performs for a military department.".

(f) CONFORMING AMENDMENTS.—Such section is further amended—

(1) in subsection (a)(2)—

(A) by striking "follow-on" in subparagraph (A); and

(B) by inserting "or (g)" after "subsection (f)" in subparagraphs (A) and (B);

(2) in subsection (h), as redesignated by subsection (c)(1)—

(A) by striking "FOLLOW-ON" in the subsection heading;

(B) by striking "follow-on contract" and inserting "production contract";

(C) by inserting "or (g)" after "subsection (f)"; and

(D) striking "follow-on" after "prototypes or".

(g) SECTION HEADING.—

(1) The heading of such section is amended to read as follows:

"**§ 2371b. Authority of the Department of Defense to carry out certain prototype projects and follow-on production transactions".**

(2) The item relating to such section in the table of sections at the beginning of chapter 139 of such title is amended to read as follows:

"2371b. Authority of the Department of Defense to carry out certain prototype projects and follow-on production transactions.".

SECTIONS OF CURRENT LAW AFFECTED BY THE PROPOSAL

[The material below shows changes proposed to be made by the legislative text above to the text of existing statutes. Matter proposed to be deleted is shown in ~~stricken through~~ text; matter proposed to be inserted is shown in *bold italic*.]

TITLE 10, UNITED STATES CODE

§ 2371b. Authority of the Department of Defense to carry out certain prototype projects *and follow-on production transactions*

(a) AUTHORITY.—(1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of this title,

carry out prototype projects***, and may carry out production contracts or transactions entered into pursuant to subsection (f) or (g),*** that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

(2) The authority of this section—

(A) may be exercised for a transaction for a prototype project, and any ~~**follow-on**~~ production contract or transaction that is awarded pursuant to subsection (f) ***or (g)***, that is expected to cost the Department of Defense in excess of $100,000,000 but not in excess of $500,000,000 (including all options) only upon a written determination by the senior procurement executive for the agency as designated for the purpose of section 1702(c) of title 41, or, for the Defense Advanced Research Projects Agency or the Missile Defense Agency, the director of the agency that—

(i) the requirements of subsection (d) will be met; and

(ii) the use of the authority of this section is essential to promoting the success of the prototype project; and

(B) may be exercised for a transaction for a prototype project, and any production contract or transaction that is awarded pursuant to subsection (f) ***or (g),*** that is expected to cost the Department of Defense in excess of $500,000,000 (including all options) only if—

(i) the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment determines in writing that—

(I) the requirements of subsection (d) will be met; and

(II) the use of the authority of this section is essential to meet critical national security objectives; and

(ii) the congressional defense committees are notified in writing at least 30 days before such authority is exercised.

(3) The authority of a senior procurement executive or director of the Defense Advanced Research Projects Agency or Missile Defense Agency under paragraph (2)(A), and the authority of the Under Secretaries of Defense under paragraph (2)(B), may not be delegated.

(b) EXERCISE OF AUTHORITY.—

(1) Subsections (e)(1)(B) and (e)(2) of such section 2371 shall not apply to projects carried out under subsection (a).

(2) To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out the prototype projects under subsection (a).

(c) COMPTROLLER GENERAL ACCESS TO INFORMATION.— ***

(d) APPROPRIATE USE OF AUTHORITY.— ***

(e) DEFINITIONS.—In this section:

(1) The term "nontraditional defense contractor" has the meaning given the term under section 2302(9) of this title.

(2) The term "small business" means a small business concern as defined under section 3 of the Small Business Act (15 U.S.C. 632).

(3) The term "component acquisition executive" means—

(A) in the case of a military department, the service acquisition executive for that military department; and

(B) in the case of a component of the Department of Defense other than a military department, the authority performing for that component the functions that a service acquisition executive performs for a military department.

(f) FOLLOW-ON PRODUCTION CONTRACTS OR TRANSACTIONS.—(1) A ~~**transaction entered into under this section for a**~~ prototype project ***under this section may be selected*** ~~**may provide for the award of**~~ ***for*** a follow-on production contract or transaction to ***be awarded to one or more of*** the participants in the transaction ***or, if none of the participants in the transaction are willing or able to enter into such a contract or transaction, to any other party using competitive procedures***. A transaction includes all individual prototype subprojects awarded under the transaction to a consortium of United States industry and academic institutions.

(2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded ~~**to the participants in the transaction**~~ ***to one or more of the participants in the transaction or, if none of the participants in the transaction are willing or able to enter into such a contract or transaction, to any other party,*** without the use of competitive procedures, notwithstanding the requirements of section 2304 of this title, if—

(A) competitive procedures were used for the selection of parties for participation in the transaction; and

(B) the participants in the transaction successfully completed the prototype project provided for in the transaction.

(3) A follow-on production contract or transaction may be awarded, pursuant to this subsection, when the Department determines that an individual prototype or prototype subproject as part of a consortium is successfully completed by the participants.

(4) Award of a follow-on production contract or transaction pursuant to the terms under this subsection is not contingent upon the successful completion of all activities within a consortium as a condition for an award for follow-on production of a successfully completed prototype or prototype subproject within that consortium.

(5) Contracts and transactions entered into pursuant to this subsection ***and subsection (g)*** may be awarded using the authority in subsection (a), under the authority of chapter 137 of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

(6) A production contract or transaction may be awarded pursuant to this subsection without regard to subparagraphs (A) and (B) of paragraph (2) if the appropriate component acquisition executive determines in writing that exceptional circumstances justify the use of such a contract or transaction to address a high priority warfighter need.

(g) AUTHORITY TO AWARD A PRODUCTION TRANSACTION TO RAPIDLY FIELD AN EXISTING CAPABILITY—A production transaction may be awarded, with or

without the use of competitive procedures, to acquire emergent and proven technologies and field production quantities of new or upgraded systems that do not require additional development and have been demonstrated in a relevant environment when the appropriate component acquisition executive determines in writing that exceptional circumstances justify the use of such a transaction to address a high priority warfighter need.

~~(g)~~ ***(h)*** AUTHORITY TO PROVIDE PROTOTYPES AND ~~**FOLLOW-ON**~~ PRODUCTION ITEMS AS GOVERNMENT-FURNISHED EQUIPMENT.—An agreement entered into pursuant to the authority of subsection (a) or a ~~**follow-on**~~ ***production*** contract or transaction entered into pursuant to the authority of subsection (f) ***or (g)*** may provide for prototypes or ~~**follow-on**~~ production items to be provided to another contractor as Government-furnished equipment.

~~(h)~~ ***(i)*** APPLICABILITY OF PROCUREMENT ETHICS REQUIREMENTS.—An agreement entered into under the authority of this section shall be treated as a Federal agency procurement for the purposes of chapter 21 of title 41.

Recommendation 82

RECOMMENDED REPORT LANGUAGE

SEC. ___. ELECTRONIC CASE MANAGEMENT SYSTEMS FOR BOARDS OF CONTRACT APPEALS.

This section would amend section 7105, title 41, United States Code, to facilitate establishment of an electronic case management system at agency Boards of Contract Appeals.

The committee is aware that the Government Accountability Office (GAO) recently implemented a mandatory web-based electronic filing and document dissemination system for the procurement protest system, as required by Section 1501 of the Legislative Branch Appropriations Act, 2014 (Public Law 113–76). Under this statute, GAO is allowed to collect filing fees to offset the costs of the electronic filing system. The committee notes that providing similar authority to the Boards, including authority to collect fees to offset the costs of operating and maintaining the system, would facilitate establishment of electronic case management systems, ease administrative burdens, and improve the Boards' productivity.

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SEC. ___. ELECTRONIC CASE MANAGEMENT SYSTEMS FOR BOARDS OF CONTRACT APPEALS.

Section 7105 of title 41, United States Code, is amended by adding at the end the following new subsection:

"(h) ELECTRONIC CASE MANAGEMENT SYSTEM.—

"(1) IN GENERAL.—An agency board may establish and operate an electronic case management system for submission, document dissemination, and processing of appeals under subsection (e)(1) under which, in accordance with the procedures prescribed by the agency board—

"(A) a contractor submitting an appeal to the agency board may be required to submit the appeal through the electronic case management system; and

"(B) all documents and information required with respect to an appeal may be disseminated and made available to the contractor and the contracting officer through the electronic case management system.

"(2) WAIVERS.—The chairman of an agency board may waive a requirement under subparagraph (A) or (B) of paragraph (1) when compliance with such requirement is determined to place an undue burden on the contractor, the Federal Government, or the agency board.

"(3) IMPOSITION OF FEES.—An agency board may require any contractor who submits an appeal to the board to pay a fee to support the establishment and operation of the electronic system of the board under this subsection, without regard to whether or not

the contractor uses the system with respect to the appeal. The amount of the fee shall be established in the rules of the agency board.

"(4) TREATMENT OF AMOUNTS COLLECTED.—

"(A) If the Armed Services Board exercises the authority under paragraph (3) to impose a fee on contractors submitting appeals to it, the Secretary of Defense shall establish a separate account among the accounts of the Department of Defense for the electronic system of the Armed Services Board under this subsection, and all amounts received by the Armed Services Board as fees under paragraph (3) shall be deposited into the account and shall be available as provided in subparagraph (E).

"(B) If the Civilian Board exercises the authority under paragraph (3) to impose a fee on contractors submitting appeals to it, the Administrator of General Services shall establish a separate account among the accounts of the General Services Administration for the electronic system of the Civilian Board under this subsection, and all amounts received by the Civilian Board as fees under paragraph (3) shall be deposited into the account and shall be available as provided in subparagraph (E).

"(C) If the board of contract appeals of the Tennessee Valley Authority exercises the authority under paragraph (3) to impose a fee on contractors submitting appeals to it, the Board of Directors of the Tennessee Valley Authority shall establish a separate account among the accounts of the Tennessee Valley Authority for the electronic system of the board of contract appeals of the Tennessee Valley Authority under this subsection, and all amounts received by

that board as fees under paragraph (3) shall be deposited into the account and shall be available as provided in subparagraph (E).

"(D) If the Postal Service Board of Contract Appeals exercises the authority under paragraph (3) to impose a fee on contractors submitting appeals to it, the Postmaster General shall establish a separate account among the accounts of the Postal Service for the electronic system of the Postal Service Board of Contract Appeals under this subsection, and all amounts received by the that board as fees under paragraph (3) shall be deposited into the account and shall be available as provided in subparagraph (E).

"(E) Amounts in the accounts established under this paragraph shall be available to the respective agency boards, without fiscal year limitation, solely to establish and operate their respective electronic systems under this subsection.".

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Recommendation 83

RECOMMENDED REPORT LANGUAGE

SEC. ___. INCREASE IN THRESHOLDS FOR USE OF ACCELERATED PROCEDURES AND SMALL CLAIM PROCEDURES BY BOARDS OF CONTRACT APPEALS.

This section would amend section 7106, title 41, United States Code, to increase the thresholds for use of expedited case resolution procedures by Department of Defense and agency Boards of Contract Appeals. This section would further amend such section to require periodic adjustments every five years to the thresholds. The committee notes that raising these thresholds would accommodate achieving fast resolution of as many claims as possible while balancing increased administrative demands.

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SEC. ___. INCREASE IN THRESHOLDS FOR USE OF ACCELERATED PROCEDURES AND SMALL CLAIM PROCEDURES BY BOARDS OF CONTRACT APPEALS.

(a) INCREASED THRESHOLDS.—

(1) ACCELERATED PROCEDURE.—Subsection (a) of section 7106 of title 41, United States Code, is amended by striking "$100,000" in the subsection heading and text and inserting "$250,000".

(2) SMALL CLAIMS PROCEDURE.—Subsection (b) of such section is amended—

(A) by striking "$50,000" and inserting "$150,000"; and

(B) by striking "$150,000" and inserting "$250,000".

(b) PERIODIC ADJUSTMENT OF THRESHOLDS.—Such section is further amended—

(1) in subsection (b), by striking paragraph (6); and

(2) by adding at the end the following new subsection:

"(c) PERIODIC ADJUSTMENT OF THRESHOLD AMOUNTS.—Effective on October 1 of each year that is divisible by 5, each amount set forth in subsection (a) or (b) shall be adjusted in accordance with section 1908 of this title.".

(c) TECHNICAL AMENDMENTS FOR INTERNAL CONSISTENCY.—Subsection (a) of such section, as amended by subsection (a)(1), is further amended—

(1) by designating the first and second sentences as paragraph (1) and inserting "IN GENERAL.—" before "The rules of"; and

(2) by designating the third sentence as paragraph (2) and inserting "TIME OF DECISION.—" before "An appeal".

(d) SECTION HEADING.—

(1) IN GENERAL.—The heading of such section is amended to read as follows:

"§7106. Agency board procedures: thresholds for use of accelerated procedure and small claims procedure".

(2) CLERICAL AMENDMENT.—The item relating to such section in the table of sections at the beginning of chapter 71 of such title is amended to read as follows:

"7106. Agency board procedures: thresholds for use of accelerated procedure and small claims procedure.".

(e) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply with respect to appeals from decisions of contracting officers that are filed with a board of contract appeals after the date of the enactment of this Act.

SECTIONS AFFECTED BY THE PROPOSAL

[The material below shows changes proposed to be made by the legislative text above to the text of existing statutes. Matter proposed to be deleted is shown in ~~stricken through~~ text; matter proposed to be inserted is shown in *bold italic*.]

TITLE 41, UNITED STATES CODE

§7106. Agency board procedures ~~for accelerated and small claims~~*: thresholds for use of accelerated procedures and small claims procedures*

(a) ACCELERATED PROCEDURE WHERE ~~$100,000~~ ***$250,000*** OR LESS IN DISPUTE.—

(1) IN GENERAL.—The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is ~~$100,000~~ ***$250,000*** or less. The accelerated procedure is applicable at the sole election of the contractor.

(2) TIME OF DECISION.—An appeal under the accelerated procedure shall be resolved, whenever possible, within 180 days from the date the contractor elects to use the procedure.

(b) SMALL CLAIMS PROCEDURE.—

(1) IN GENERAL.—The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is ~~$50,000~~ ***$150,000*** or less, or in the case of a small business concern (as defined in the Small Business Act (15 U.S.C. 631 et seq.) and regulations under that Act), ~~$150,000~~ ***$250,000*** or less. The small claims procedure is applicable at the sole election of the contractor.

(2) SIMPLIFIED RULES OF PROCEDURE.—The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal. An appeal under the small

claims procedure may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(3) TIME OF DECISION.—An appeal under the small claims procedure shall be resolved, whenever possible, within 120 days from the date the contractor elects to use the procedure.

(4) FINALITY OF DECISION.—A decision against the Federal Government or against the contractor reached under the small claims procedure is final and conclusive and may not be set aside except in cases of fraud.

(5) NO PRECEDENT.—Administrative determinations and final decisions under this subsection have no value as precedent for future cases under this chapter.

~~(6) REVIEW OF REQUISITE AMOUNTS IN CONTROVERSY.—The Administrator, from time to time, may review the dollar amounts specified in paragraph (1) and adjust the amounts in accordance with economic indexes selected by the Administrator.~~

(c) PERIODIC ADJUSTMENT OF THRESHOLD AMOUNTS.—Effective on October 1 of each year that is divisible by 5, each amount set forth in subsection (a) or (b) shall be adjusted in accordance with section 1908 of this title.

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Section 8
Government-Industry Interactions

The consequences of failing to understand the elements of commercial market economics impede DoD's ability to meet its warfighting mission. Broad and open communications with all market stakeholders are indispensable to provide warfighters the means to maintain an overwhelming technical advantage.

RECOMMENDATIONS

Rec. 84: Direct DoD to communicate with the marketplace concerning acquisition from development of the need/requirement through contract closeout, final payment, and disposal.

Rec. 85: Establish a Market Liaison at each acquisition activity to facilitate communication with industry.

Rec. 86: Encourage greater interaction with industry during market research.

Recommendations continued on following page.

RECOMMENDATIONS

Rec. 87: Establish a market intelligence capability throughout DoD to facilitate communication that enhances the government's industry knowledge through open, two-way communication.

INTRODUCTION

> *New commercial technology will change society and, ultimately, the character of war. Maintaining the Department's technological advantage will require changes to industry culture, investment sources, and protection across the National Security Innovation Base.*[1]
>
> *Cultivating a competitive mindset requires that we optimize our relationships with industry to drive higher performance while always remaining within the letter and spirit of ethics and procurement regulations.*[2]

Communication is key to harnessing commercial technology in a complex regulatory environment. The 2018 National Defense Strategy (NDS) includes commercial technology in its description of the modern security landscape. The rapid pace of technological change and the proliferation of commercial technologies combine to erode some of the U.S. military's strategic advantage. To regain strategic overmatch, the NDS and other high-level DoD documents mandate that the defense acquisition workforce and the industrial base improve how they exchange information and communicate needs. In a March 2018 memo, then-Deputy Defense Secretary Patrick Shanahan emphasizes that communications with industry are both necessary and already permitted. The memo states, "Industry is often the best source of information concerning market conditions and technological capabilities."[3] The consequences of failing to understand commercial markets are direct and meaningful. Without appropriate communications with industry, warfighters are likely to receive more costly, less advanced equipment later than desired.

Compounding the challenge of resetting how DoD and industry communicate is an ever-expanding series of federal regulations, most notably the FAR. As an example, the Armed Services Procurement Regulation of 1947 had 125 pages. When the FAR was codified in April 1984, it was 1,953 pages. By July 2014, the FAR had 2,193 pages and the DFARS was 1,554 pages.[4] When Jacques Gansler testified in 2015, the full Code of Federal Regulations (CFR) was estimated to be 180,000 pages and growing by 2,000 pages every year.[5] The regulatory burden on the acquisition workforce has grown so acute in recent years that the Defense Business Board's primary recommendation in its FY 2012 report, *Linking and Streamlining the Defense Requirements, Acquisition, and Budget Processes,* was to "zero-base the entire system, including all directives and regulations."[6]

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[1] DoD, *2018 National Defense Strategy,* 3, accessed November 20, 2018, https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf.
[2] Deputy Defense Secretary Patrick Shanahan, Memorandum, *Engaging with Industry,* March 2, 2018, accessed November 20, 2018, http://ogc.osd.mil/defense_ethics/resource_library/engaging_with_industry_policy.pdf.
[3] Ibid.
[4] Allen Friar, "Swamped by Regulations: Perils of an Ever-Increasing Burden," *Defense AT&L Magazine,* January-February 2015, 34, accessed November 20, 2018, https://apps.dtic.mil/dtic/tr/fulltext/u2/a621269.pdf.
[5] Scott Chandler, "Rethinking Defense Acquisition: Zero-Base the Regulations," War on the Rocks, January 6, 2017, accessed November 20, 2018, https://warontherocks.com/2017/01/rethinking-defense-acquisition-zero-base-the-regulations/. Jacques S. Gansler, PhD, *Testimony to the United States Senate Committee on Armed Services,* December 1, 2015, accessed November 20, 2018, https://www.armed-services.senate.gov/imo/media/doc/Gansler_12-01-15.pdf.
[6] Defense Business Board, *Report to the Secretary of Defense: Linking and Streamlining the Defense Requirements, Acquisition, and Budget Processes,* Report FY 12-02, accessed November 20, 2018, https://dbb.defense.gov/Portals/35/Documents/Reports/2012/FY12-2_Linking_And_Streamlining_The_Defense_Requirements_Acquisition_Budget_Processes_2012-4.pdf.

Short of starting from scratch, DoD can do much to improve its acquisition processes and its ability to procure goods and services in support of the NDS. At the heart of these efforts is communication. A culture of open communication allows the acquisition workforce to share best practices, learn from mistakes, and align missions among stakeholders. A culture of open communication also allows the federal government and its contractors to better understand each other's needs, constraints, and areas for confluence. The Section 809 Panel recommends building a more open and flexible acquisition culture.

Communication within the acquisition workforce is key to truly optimizing the FAR and other acquisition regulations. Developing expertise in working with only a few FAR Parts often takes a decade. Acquisition teams must work together to leverage expertise and to train new members of the workforce.[7] Leadership at all levels must facilitate this team culture and encourage new approaches to working within the system. Support for experimenting and learning comes from a leadership culture that allows for and accounts for mistakes. Providing *top cover* to acquisition teams is an important element of leadership. Leaders must inculcate a passion for lessons learned. For example, acquisition teams should communicate their lessons learned in group settings. Through this emphasis on supportive leadership and communication, the workforce can offset the complexity of the regulatory system to illuminate and operate within the full breadth of the FAR.

This section focuses on DoD's communication with contractors and potential contractors. In many cases, the FAR and other regulations allow for more interaction with industry than is common practice. The following recommendations offer specific ways in which DoD can better communicate with industry. Recommendation 84 emphasizes that communications with industry are authorized and encouraged. It also recommends that DoD submit annual reports on its plans to improve its communications with industry and its successes therein. Recommendation 85 establishes and enables a market liaison position to simplify the way in which industry communicates with DoD. A single, named point of contact could advocate on behalf of industry within the acquisition community and could work to resolve issues between the two. This program would increase clarity and communication in a regulatory system demanding more of both. Recommendation 86 emphasizes market research for commercial goods and services. In this area, DoD can improve it understanding of the commercial marketplace in terms of price and availability through existing rules and procedures. Recommendation 87 establishes a market intelligence capability.

RECOMMENDATIONS

Recommendation 84: Direct DoD to communicate with the marketplace concerning acquisition from development of the need/requirement through contract closeout, final payment, and disposal.

Problem

Despite attempts by governmentwide and DoD acquisition leaders since Congress passed the Federal Acquisition Streamlining Act of 1994 (FASA), DoD acquisition personnel and individuals in the

[7] Statement of Guiding Principles for the Federal Acquisition System, FAR 1.102(c) and (d).

marketplace have expressed concern about communicating with each other openly and frequently throughout the acquisition process, for fear of legal violations.[8] They report fear of being challenged by both oversight functions in government and through the protest processes, yet this fear is rooted in lore, rather than law. There are very few restrictions that apply to communication with the marketplace.

Background

Congress has not explicitly directed the acquisition team to communicate with the marketplace but has *encouraged and permitted* communication with industry.[9] The difference between *directing* and *encouraging and permitting* is key in terms of DoD culture and behavior regarding communication with industry. Over time, the perceived risks that members of the acquisition team have attached to communication between government and the marketplace have created a perception that such communication is risky and may even be prohibited.

The Office of Federal Procurement Policy (OFPP), the FAR Council, the office of the Secretary of Defense, and the DAR Council have issued numerous policy documents directing and encouraging communications with the marketplace.[10] In a March 2018 policy memorandum to secretaries of the Military Services, then-Deputy Secretary of Defense Patrick Shanahan encouraged communication with the marketplace. Shanahan noted although operating within required ethical guidelines is essential, doing so must not preclude frequent communication with industry at all points in the acquisition process. He emphasized, "Conducting effective, responsible, and efficient procurement of supplies and services while properly managing the resultant contracts requires Department personnel to engage in early, frequent, and clear communications with suppliers."[11] Even this clear direction from DoD leadership has not been sufficient to address the acquisition workforce's reticence to communicate with

[8] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103–355 (1994). There are very few restrictions that apply to communications with the marketplace. This recommendation is needed to affirmatively debunk the "lore."

[9] FAR 1.102(c) states, "The Acquisition Team consists of all participants in Government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services."

[10] OMB Memorandum, *"Myth-Busting": Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process,* February 2, 2011, accessed November 7, 2018, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/Myth-Busting.pdf. OMB Memorandum, *"Myth-Busting 2": Addressing Misconceptions and Further Improving Communication During the Acquisition Process,* May 7, 2012, accessed November 7, 2018, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/myth-busting-2-addressing-misconceptions-and-further-improving-communication-during-the-acquisition-process.pdf. OMB Memorandum, *"Myth-busting 3": Further Improving Industry Communication with Effective Debriefings,* January 5, 2017, accessed November 7, 2018, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/myth-busting_3_further_improving_industry_communications_with_effectiv....pdf. Market Research, FAR Part 10. OSD Memorandum, *Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending,* September 14, 2010, accessed November 7, 2018, https://www.acq.osd.mil/fo/docs/USD_ATL_Guidance_Memo_September_14_2010_FINAL.PDF. OSD Memorandum, *Better Buying Power 2.0: Continuing the Pursuit for Greater Efficiency and Productivity in Defense Spending,* November 13, 2012, accessed November 7, 2018, https://www.acq.osd.mil/fo/docs/USD(ATL)%20Signed%20Memo%20to%20Workforce%20BBP%202%200%20(13%20Nov%2012)%20with%20attachments.pdf. OSD Memorandum, *Implementation Directive for Better Buying Power 3.0 – Achieving Dominant Capabilities through Technical Excellence and Innovation,* April 9, 2015, accessed November 7, 2018, https://www.acq.osd.mil/fo/docs/betterBuyingPower3.0(9Apr15).pdf. Market Research, DFARS Part 210.

[11] DoD Memorandum, *Engaging with Industry,* March 2, 2018, accessed October 23, 2108, http://www.ndia.org/-/media/sites/press-releases/documents/dsd_letter_engaging_with_industry.ashx?la=en.

industry, which leaves congressional direction as the only remaining avenue for promulgating this essential behavioral and cultural change.

Discussion

Every aspect of the acquisition process is adversely affected by acquisition team members' apprehensiveness when communicating with the marketplace. This apprehension is reinforced by legal advice provided by the various offices of general counsel, staff judge advocate's offices, and fear of protests. It discourages communication between government and the private sector even when the related fear is unfounded. The potential costs of failing to communicate adequately with the private sector include added time to already inherently lengthy acquisitions processes and lost opportunities to access the innovative solutions accessible to nonstate actors and the nation's near-peer competitors.

The acquisition team is defined in FAR Part 1 as "all participants in Government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services." The perceived limitations on communication hinder team members' ability to work together to identify and deliver capability to warfighters.

This fear of communicating with the marketplace extends to the formulation of policy applicable to the acquisition system, despite permissive language in the Office of Federal Procurement Policy Act, the Administrative Procedures Act, and policy statements by every administration for at least the last 20 years. The myriad rules that govern doing business with DoD present a great enough challenge. The fact that those rules often do not mirror how the private sector buys and sells further complicates the acquisition process. To foster successful procurement in the marketplace DoD must communicate with the private sector in the form of policy formulation and market research.

Market research should not be limited to contracting officers. It should include communication among acquisition team members as they discern what products or services are available. It should also include communication with industry such as identifying potential suppliers' respective capabilities, considering the possible applications marketplace solutions might offer, and even exploring the disposal side of acquisition. Applications of a solution may evolve over time, necessitating continued communication throughout the acquisition process.

In 1994, Congress enacted FASA, which included landmark language in Title VIII regarding acquisition of commercial products and services, placing even greater emphasis on the need for and proper conduct of market research.[12] Section 8104, Preference for Acquisition of Commercial Items, included a section on market research that was codified at 41 U.S.C. § 3307 and 10 U.S.C. § 2377 which state, in part, the following: [13]

[12] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3390 (1994).
[13] The Panel believes that this applies equally to its proposal on readily available and readily available with customization. See Recommendation 35 in Section 1 of this *Volume 3 Report.*

> *(d) MARKET RESEARCH. —*
>
> *(1) WHEN TO BE USED. —The head of an executive agency shall conduct market research appropriate to the circumstances—*
>
> *(A) before developing new specifications for a procurement by that executive agency; and*
>
> *(B) before soliciting bids or proposals for a contract in excess of the simplified acquisition threshold.*
>
> *(2) USE OF RESULTS. —The head of an executive agency shall use the results of market research to determine whether commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, non-developmental items other than commercial items are available that—*
>
> *(A) meet the executive agency's requirements;*
>
> *(B) could be modified to meet the executive agency's requirements; or*
>
> *(C) could meet the executive agency's requirements if those requirements were modified to a reasonable extent.*

10 U.S.C. § 2377 includes a broad additional requirement for DoD personnel to receive training in conducting market research:

> *(e) MARKET RESEARCH TRAINING REQUIRED. —The Secretary of Defense shall provide mandatory training for members of the armed forces and employees of the Department of Defense responsible for the conduct of market research required under subsections (c) and (d). Such mandatory training shall, at a minimum—*
>
> *(1) provide comprehensive information on the subject of market research and the function of market research in the acquisition of commercial items;*
>
> *(2) teach best practices for conducting and documenting market research; and*
>
> *(3) provide methodologies for establishing standard processes and reports for collecting and sharing market research across the Department.*

Market research serves as the foundation for learning about many important procuring-activity decisions such as availability of commercial products or services to meet agency needs, as well as nondevelopmental products or services, the appropriate procurement method, the likelihood of competition, appropriate terms and conditions, pricing, and more.

Congress has continued to focus on market research though additional requirements in NDAAs. For example, the FY 2008 NDAA required DoD to develop market research training focused primarily on contracting officers and prime contractors.[14] Section 855 of the FY 2016 NDAA addressed market

[14] FY 2008 NDAA, Pub. L. No. 110-181, div A, title VIII, § 826(b) (2008).

research in a much more inclusive manner.[15] It makes clear the importance Congress places on the proper conduct of market research:

> *(a) GUIDANCE REQUIRED. —Not later than 90 days after the date of the enactment of this Act, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall issue guidance to ensure that acquisition officials of the Department of Defense fully comply with the requirements of section 2377 of title 10, United States Code, regarding market research and commercial items. The guidance issued pursuant to this subsection shall, at a minimum—*
>
> > *(1) provide that the head of an agency may not enter into a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items unless the head of the agency determines in writing that no commercial items are suitable to meet the agency's needs as provided in subsection (c)(2) of such section; and*
> >
> > *(2) ensure that market research conducted in accordance with subsection (c) of such section is used, where appropriate, to inform price reasonableness determinations.*

Section 855 included language that demonstrates Congress's intent that market research be conducted across the acquisition community and not solely by contracting officers:

> *(b) REVIEW REQUIRED.—Not later than 180 days after the date of the enactment of this Act, the Chairman and the Vice Chairman of the Joint Chiefs of Staff, in consultation with the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall review Chairman of the Joint Chiefs of Staff Instruction 3170.01, the Manual for the Operation of the Joint Capabilities Integration and Development System, and other documents governing the requirements development process and revise these documents as necessary to ensure that the Department of Defense fully complies with the requirement in section 2377(c) of title 10, United States Code, and section 10.001 of the Federal Acquisition Regulation for Federal agencies to conduct appropriate market research before developing new requirements.*

Congress defined the term *market research* for purposes of Section 855 to include the exchange of information between "knowledgeable individuals in Government and industry." Section 855 states the following:

> *(c) MARKET RESEARCH DEFINED. —For the purposes of this section, the term ''market research'' means a review of existing systems, subsystems, capabilities, and technologies that are available or could be made available to meet the needs of the Department of Defense in whole or in part. The review may include any of the techniques for conducting market research provided in section 10.002(b)(2) of the Federal Acquisition Regulation and shall include, at a minimum, contacting knowledgeable individuals in Government and industry regarding existing market capabilities.*

[15] FY 2015 NDAA, Pub. L. No. 114-92, div. A, title VIII, § 855 (2015).

This definition of market research in Section 855 is more detailed than the very generic definition currently found in FAR 2.101, Definitions:

> *"Market research" means collecting and analyzing information about capabilities within the market to satisfy agency needs.*

The 2016 NDAA was even more specific on this question of the exchanges between government and industry personnel as part of market research. Section 887 encourages "responsible and constructive exchanges with industry."

> *Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall prescribe a regulation making clear that agency acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry, so long as those exchanges are consistent with existing law and regulation and do not promote an unfair competitive advantage to particular firms.*

The new definition and the congressional direction have not yet been adopted in the FAR or DFARS. The difficulty with this language is that it is permissive and not directive in nature. To change the current culture of apprehension and fear the language must be directive. In the absence of clear direction, there will always be advice to the effect, "you may communicate with the marketplace, but…" The *but*, though not prohibitive, clearly creates a risk to be avoided.

Communication between members of the acquisition team and industry is essential so that DoD customers who determine the requirements, program managers, contracting officers, contract managers, and sustainers can ensure warfighters benefit from the most innovative solutions available. It is apparent that a congressional mandate is the only condition that will convince government acquisition team members that they really are empowered to search the marketplace, ask questions about the products or services they believe meet their needs, negotiate for the purchase of that product or service, and continue a dialogue with the seller as they put the product in service or the seller performs the service.

There will be those who criticize the potential for corruption created by a direction to communicate with the marketplace without a caveat about various forms of prohibited activity from lack of competition to criminal conduct. Such critics should note the host of specific rules that already exist governing behavior set out in detail in the federal standards of conduct at 5 CFR 2635.101. Those standards provide that federal government employees must abide by a series of independent duties that make up the basic tenets of public service, including the duties of providing an honest effort in performing their functions and a duty to act impartially in dealing with nongovernmental entities. Federal agencies place additional obligations for fairness and honesty in supplemental agency ethics guidance.

Although there have been some isolated standards of conduct breaches, they are rare. Considering the huge number of interactions between federal employees and the public every year, the standards have proven to be an effective method of ensuring that fraud, waste, and abuse of the public trust rarely occur. Just in case those standards are not inherently enough to control bad behavior, Congress has

enacted protections for *whistleblowers* embedded throughout the standards, such that if a breach occurs, institutional incentives support identifying and sanctioning those behaviors

Fundamentally, the cultural fear of ethics breaches, illegal, or bad behavior that has taken hold in agencies for the past 20 years has led to generalized fear of open communication. This fear is an irrational response to a disproportionately small number of standards breaches or abuses of the duty of fair dealings. It should not be a reason to limit communications related to acquisition on either procedural or substantive reasons.

In Recommendations 59-61, the Section 809 Panel addresses both the training and education members of the acquisition team require before they are authorized to act on behalf of warfighters and taxpayers. Private-sector firms also train their acquisition team members on the various requirements for doing business with the government. The vast majority have their own codes of conduct and educate their employees on the consequences of violating those codes.

Current law does not specifically clarify that communications with the marketplace are not only permitted, but most importantly, directed throughout the acquisition process. The current statutory construct does not make it clear that when there is a question about whether there should be a communication with the marketplace, members of the acquisition team should err in favor of that communication.

Conclusions

To overcome the current cultural fear within DoD's acquisition team of communicating with the marketplace, Congress must direct that communications with the marketplace, at all stages of the procurement process, including policy making, sustainment, and disposal, are required.

Providing acquisition team members appropriate training and education before authorizing them to act on behalf of warfighters and taxpayers is key to supporting ethical behavior. It is important that Congress not caveat its direction to communicate with the marketplace with warnings about various forms of prohibited activity. This sort of qualified mandate will obscure the clear-cut break with current practice that is recommendation is intended to create.

Congress should express the sense that communications with the marketplace are not only authorized but encouraged throughout the acquisition process, to include policy development, facilitating an approach of *when in doubt, authorize communication*. Congress should also direct DoD, by statute, to communicate with the marketplace concerning acquisition from development of the need/requirement through contract closeout, final payment and disposal and submit an annual report for the 5 years following enactment of this statute articulating DoD's plans for communicating with industry and its accomplishments in implementing the direction to communicate with industry. Nothing in these recommendations eliminates the requirements governing ethical behavior by the acquisition team.

Implementation

Legislative Branch

- Express the sense of Congress that communications with the marketplace are not only authorized but encouraged during every step of the process from development of the requirement through disposal. This communication specifically includes policy development and makes clear that when in doubt, DoD should authorize communication.
- Direct DoD, by statute, to communicate with the marketplace concerning acquisition from development of the need/requirement through contract closeout, final payment, and disposal.
- Direct DoD to submit an action plan to the congressional defense committees within 30 days of enactment that identifies barriers and restrictions and steps to remove them. Require DoD to submit annual updates.

Executive Branch

- There are no regulatory changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 8.

Implications for Other Agencies

- These recommendations will affect all contracting agencies within the government if adopted as governmentwide policy. The FAR, as well as agency supplements, will require changes.

Recommendation 85: Establish a Market Liaison at each acquisition activity to facilitate communication with industry.

Problem

DoD continually seeks new suppliers to refresh its supplier base and is especially interested in attracting potential new suppliers that offer innovative, state-of-the art technologies and software. A free flow of communication between government and a variety of potential suppliers is essential to ensure DoD obtains the best products available. This flow of information must be with potential suppliers unfamiliar with government bureaucracy, as well as current suppliers.

Generally, DoD's large and complex buying activities reside on DoD facilities that include a mix of operational units, tenant organizations, and confusing organizational acronyms and symbols. Websites for these operations can be out of date or so information-heavy that locating needed help is difficult. Organization charts, especially with phone numbers, are frequently unavailable.

To facilitate effective dialogue with industry that fosters competition, quickly addresses supplier issues, and attracts new suppliers, DoD needs to establish clear points of entry to make it more accessible to the marketplace and facilitate simple, predictable communications between its acquisition establishment and the marketplace.

Background

DoD has taken a number of steps to address the kinds of communication gaps typical of a large bureaucracy. In the acquisition arena, DoD established specialized responsibilities focused on specific acquisition-related matters or communities such as the following:

- **Small Business Ombudsman for Defense Audit Agencies (10 U.S.C. § 204)**
  In general, these ombudsmen "serve as the defense audit agency's [DCAA and DCMA] primary point of contact and source of information for small business concerns." The Defense Contract Audit Agency (DCAA) and Defense Contract Management Agency (DCMA) small business ombudsmen are identified through links on their respective home pages. DCAA's website identifies the ombudsman as a "small business focal point," DCMA website identifies the ombudsman as the "DCMA Connect Point for Industry/Contractor Concerns."

- **Memorandum of Agreement: DoD Ombudsman for Foreign Signatories (10 U.S.C. § 2350h)**
  This ombudsman "shall assist officials of those foreign governments in understanding and complying with procedures and requirements of the Department of Defense (and, as appropriate, other departments and agencies of the United States) insofar as they relate to any such memorandum of agreement." This ombudsman's responsibility resides in DoD with the Defense Pricing and Contracting (DPC) office and can be found on the DPC website under "International Contracting."

- **Task and Delivery Order Ombudsman (10 U.S.C. § 2304c(f) and 41 U.S.C. § 4106(g)**
  This ombudsman is "responsible for reviewing complaints from the contactors on such [task and delivery order] contracts and ensuring that all the contractors are afforded a fair opportunity to be considered for task or delivery orders." Each agency that awards task or delivery order contracts must appoint such an ombudsman. To date, it appears few agencies have publicized the availability of this specialized ombudsman. FAR case 2017–020 is in process to develop a standard clause for use in task and delivery order contracts with contact information for these ombudsmen.[16]

The Army Materiel Command (AMC) established a much broader acquisition-focused ombudsman at the headquarters and several subordinate commands. [17] The AMC ombudsmen serve as a point of entry for business inquiries, concerns, and complaints, and supports other AMC activities in industry outreach. The Defense Logistics Agency (DLA) established an industry ombudsman primarily focused exclusively on external outreach and engagement.[18] DLA Procurement Technical Assistance Centers also assist industry in engaging with the DoD acquisition establishment, but they are not well suited to answer questions about particular procuring activities or determining the most appropriate contacts for industry at procuring activities they do not work with often.

[16] Federal Acquisition Regulation: Ombudsman for Indefinite Delivery Contracts, Fed. Reg. Vol. 83, No. 212 (Nov. 1, 2018).
[17] "AMC Business Connections: Ombudsman," Army Materiel Command, accessed November 30, 2018, https://www.amc.army.mil/Connect/Business-Connections.
[18] "DLA Strategic Plan 2018–2026, Industry Engagement Plan," Defense Logistics Agency, accessed November 30, 2018, http://www.dla.mil/Info/strategicplan/IndustryEngagementPlan/.

Discussion

Although there are examples of several different approaches DoD has taken to improve two-way communication with industry, no standard manner exists for industry to approach an unfamiliar DoD acquisition organization or pose a question or suggestion outside the confines of an acquisition. It is ironic that DoD has an ombudsman specifically designated to "assist officials of those foreign governments in understanding and complying with procedures and requirements of the Department of Defense," but no parallel office exists for U.S. companies unfamiliar with the procedures and requirements.

Businesses have indicated that when they considered offering their commercial products or services to DoD for the first time they found identifying the proper channel for communications with government procuring activities very difficult. Such businesses may have little understanding of the DoD acquisition establishment, how to communicate with the establishment, and no idea where to find information on these topics. This observation is discussed in more detail in the Section 809 Panel's *Volume 1 Report*, Recommendation 21, Refocus DoD's small business policies and programs to prioritize mission and advance warfighter capabilities and capacities. The report included the following observations:

> *Small and large businesses alike express frustration over the lack of clear entry points into the defense market. Companies can spend months or years searching for the appropriate person or office with the authority to initiate the acquisition process.*

> *Anecdotal evidence gathered by the Section 809 Panel indicates that the example above is not a unique experience; companies with new technologies unknown to DoD cannot easily introduce their products and services into the defense market, to the detriment of warfighters.*[19]

Companies considering doing business with DoD for the first time, may question who in the acquisition establishment might be interested in a particular technology, how to find out what acquisitions are being considered in the future, or how to get cleared to come onto the facility. Companies that become frustrated with the pursuit of the proper DoD contact may feel pressure to hire a consultant simply to help untangle the bureaucracy or may decide not pursue business with DoD.

Incumbent contractors generally understand how their customers are organized and with whom they can communicate when they have questions or concerns. Often, these companies have former DoD personnel on staff who can guide the business through the bureaucracy. Even though communication with their customer may be smooth, familiarity with one DoD procuring activity does not necessarily translate to ease of communication with an unfamiliar acquisition activity.

Often, suppliers have a question or concern about an activity's procurement processes or have a concern with a particular individual or organization's handling of a situation. The contracting officer clearly serves as the point of contact for communication with potential suppliers/offerors during the formal solicitation (FAR 15.2) and source selection phases (FAR 15.3). There needs to be a clear channel

[19] Section 809 Panel, *Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3,* 21, 178–179 (2018).

to a disinterested party at the senior level of the procuring activity, however, to provide an outlet for those concerns and questions outside the boundaries of the formal solicitation, proposal, and source selection process. Addressing questions early will foster competition and may avoid more complex issues later in a particular procurement.

Recommendation 87 of this report recommends programs and portfolios establish a market intelligence capability. The market intelligence capability would be an important element of an activity's market research responsibilities and would proactively engage in two-way communications to labs, universities, and companies large and small (both existing suppliers and prospective new suppliers) to explain the government's needs and to search for new and innovative technologies, software, or processes for use in a particular program or portfolio of programs. This proactive external search for focused market intelligence is distinct from the more general need for the government to be open and easily accessible to industry in a predictable way, and to be available to assist industry in piercing the often imposing DoD acquisition bureaucracy.

Conclusions

Regardless of size, new potential suppliers, with new technologies, services, or ideas of potential interest to DoD must be able to quickly identify and communicate with the appropriate DoD acquisition contact. Even companies currently doing business with DoD may have questions about doing business with a particular organization. The bureaucracy is complex and often difficult to penetrate. To be open and welcoming to industry, DoD must create a culture in which communication is simple and predictable.

To address this shortcoming, each DoD acquisition activity should establish a market liaison capability. This procuring activity-focused market liaison would serve as the activity's point of entry for new or existing suppliers with new ideas, products, or services, as well as those with questions or concerns about the activity's acquisition processes. The individuals assigned this responsibility should have sufficient experience, knowledge, and insight into the operation of the procuring activity to meaningfully assist those businesses making an inquiry. The market liaison capability would be widely publicized, standard across all DoD procuring activities, and readily accessible on activity web sites so potential suppliers know there is one easy-to-locate point of entry for anyone seeking information at a particular procuring activity.

Implementation

Legislative Branch

- Revise Title 10 at 10 U.S.C. § XXX to establish the requirement for and responsibilities of the procuring activity Market Liaison.

Executive Branch

- There are no regulatory changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 8.

Implications for Other Agencies

- These recommendations will affect all contracting agencies within the government if adopted as governmentwide policy. The FAR, as well as agency supplements, will require changes.

Recommendation 86: Encourage greater interaction with industry during market research.

Problem

Market research is the foundation of any successful procurement of products and services, especially commercially available products and services. Numerous statutes and regulations prescribe elements of market research, but thorough market research is often hampered by concerns about the extent to which buying activities can engage in exchanges with industry.

Background

Market research is an important component of any successful procurement in the commercial or defense marketplace. In 1994, Congress enacted FASA[20] which included landmark language in Title VIII regarding acquisition of commercial products and services, placing even greater emphasis on the need for and proper conduct of market research. Section 8104, Preference for Acquisition of Commercial Items, included a section on market research that was codified at 41 U.S.C. § 3307 and 10 U.S.C. § 2377.

Market research serves as the foundation for many important procuring activity decisions, such as the availability of commercial products or services to meet an agency's need, the appropriate procurement method, the likelihood of competition, appropriate terms and conditions, pricing, and more.

Section 887 of the FY 2016 NDAA has specific language on exchanges between government and industry personnel as part of market research. FAR case 2016-005, implementing Section 887, is currently in the proposed rule stage and proposes to amend the existing language at FAR 1.102-2 Performance Standards.[21] FAR 1-102-2(a)(4) currently reads as follows:

> *(4) The Government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the commercial marketplace. The Government will maximize its use of commercial products and services in meeting Government requirements.*

The proposed rule would simply add a sentence to address the requirement of Section 887:

> *(4) The Government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the commercial marketplace. ~~The Government will maximize its use of commercial products and services in meeting~~*

[20] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994).
[21] FAR: Effective Communication Between Government and Industry, FAR Case 2016-005, Fed. Reg. Volume 81, Issue 229 (Nov. 29, 2016).

> ~~*Government requirements*~~. ***Government acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry as part of market research (see 10.002), so long as those exchanges are consistent with existing laws, regulations, and promote a fair competitive environment.***

There are several issues with this proposed rule. The proposed new sentence appears in FAR Part 1, *Federal Acquisition Regulations System.* It would be unlikely for contracting officers to refer to Part 1 for guidance on how to conduct exchanges with industry. It would be particularly unlikely for other members of the acquisition team other than contracting officers to even be aware of this guidance in Part 1. This approach satisfies only the letter, but not the spirit, of Section 887 by literally repeating the language of Section 887, with no emphasis on the desirability and appropriateness of conducting such exchanges. The added language in the law expends almost as many words warning the acquisition team about the dangers of conducting exchanges with industry ("so long as those exchanges are consistent with existing laws, regulations, and promote a fair competitive environment") as it does declaring that it is *permitted and encouraged.* Finally, having warned the acquisition team about the dangers of exchanges, it provides no guidance on their proper conduct.

Exchanges between government and industry are essential to creating knowledgeable buyers and establishing well-founded requirements. Much more than the proposed one sentence warning is in order.

Exchanges can occur under four circumstances. The proper distinction among these circumstances is critically important because conducting exchanges is different in each circumstance with the latter two being carefully controlled by the contracting officer.

- On-going exchanges with industry that occur as part of government acquisition teams' responsibility to remain attuned to the current capabilities and future trends in their assigned area of responsibility for the procurement of products or services. Government acquisition teams, requirements teams, or even end users may conduct this type of market research for broadly defined categories of products or services, or for specific inquiries focused on the ability of the current marketplace to satisfy particular needs. They may conduct this kind of research by engaging in industry days, participating in industry technical and professional association forums, reviewing professional literature, attending product demonstrations, or holding one-on-one meetings for the general purpose of becoming more knowledgeable buyers (see FAR 10.001). These types of exchanges may, but are not required to, involve contracting officers (although in the Section 809 Panel's vision of the dynamic marketplace, contracting officers should be *highly encouraged*, if not *required*, to become more knowledgeable of the products, services and markets that are available to satisfy customers' needs).

- Exchanges with industry conducted during the market research phase of a *particular* procurement prior to issuance of a solicitation for a product or service. For these exchanges, the government has a specific need identified and is further refining its understanding of market place capabilities to satisfy that need through one-on-one exchanges with potential offerors or those interested in subcontract opportunities (see FAR 10.001). There is no requirement to regulate such industry exchanges through contracting or legal staffs; however, the best

outcomes are achieved when the *entire* acquisition team is involved in open, flexible dialog with industry. It is not necessary to have the *same* communication with each potential offeror to have fair communication. The type of questions and answers will vary from offeror to offeror, as each firm tries to capitalize on its innovations and unique strengths. The government does not have to disclose the content of exchanges with one firm to all interested firms to maintain transparency. It is likely that truly innovative approaches will involve proprietary information that offerors would want protected, and the government may give assurances it will be. Only if an exchange in this phase results in the government changing its requirement does the agency have to provide the reason for such a change to all potential offerors.

- Exchanges with industry subsequent to the issuance of a government solicitation and prior to the government's receipt of proposals or quotations are tightly regulated. (See FAR 15.201.)
- Exchanges with industry subsequent to the receipt of proposals and prior to the subsequent contract award are also tightly regulated. (See FAR 15.306.)

Discussion

The importance of market research to DoD is clear. Exchanges between government and industry are an essential component of market research. The government cannot shut itself off from these necessary exchanges by policy, fear, or lack of training, and then expect to emerge as *knowledgeable* buyers when a specific requirement is identified. This assertion is particularly true in the market for commercial products and services. Market research is a continuous and engaged activity common and essential to any entity's procurement of products or services.

Comparisons are frequently made between government procurement and commercial industry procurement. In industry, buyers tend to be more specialized than their government counterparts. Frequently, buyers in commercial businesses focus on a particular industry, commodity, product, or service and conduct continuous market research to ensure they are best positioned to meet their business's needs in that specialized area. This continuous research is key to becoming a *knowledgeable* buyer and necessarily includes exchanges with others in that specialized market.

Government acquisition personnel are hesitant to engage in the kind of one-on-one exchanges common in the commercial marketplace and encouraged by Congress. The reason for this reluctance is unclear, but anecdotal evidence points to concerns that such exchanges are either inappropriate or will eventually lead to a protest.

The effect of this reluctance to engage in market research is apparent in a recent Government Accountability Office (GAO) report that focused on the steps DoD is taking to better engage with companies that do not typically do business with DoD.[22] GAO identified six challenges that deter these companies from selling their products and services to DoD, one of which was the "inexperienced DoD contracting workforce." General inexperience, coupled with inexperience with the details of a particular product or service and how it is typically procured in the marketplace can lead to a variety of

[22] GAO, *DoD is Taking Steps to Address Challenges Faced by Certain Companies, GAO-17-644,* accessed October 25, 2018, https://www.gao.gov/assets/690/686012.pdf.

issues later in the process. Market research is key to overcoming this experience in a given marketplace for products or services.

Conclusions

Policy guidance is helpful, but not widely used. OFPP took an important step in addressing these questions though a series of *myth-busting* memoranda.[23] These memoranda, though widely applauded by both government and industry, appear to have received little attention beyond the Washington, D.C. area and higher headquarter staffs.[24] The proposed rule implementing the direction in Section 887 of the FY 2016 NDAA is also useful, but it is unlikely to draw much attention in a little-read section of FAR Part 1. Despite this laudable guidance, contracting officers remain reluctant to talk to industry as part of market research, especially in one-on-one meetings. Important elements of the *myth-buster* memorandum related to market research should be incorporated into a new FAR Subpart 10.1, Exchanges With Industry During Market Research. [25]

Market research is not well defined for the broad purpose of conducting acquisition. Market research is defined in Section 855 of the FY 2016 NDAA, for purposes of that section only. Market research is also defined in 10 U.S.C. 2410n, applicable only to that section on products of federal prison industries. FAR Part 2, Definitions, defines market research for the FAR, but does so very narrowly and in a manner that suggests market research can be conducted as a solicitation-specific activity without exchanges or interaction with *knowledgeable* experts in the government and industry. A more inclusive definition of market research is needed at 41 U.S.C. § 117, 10 U.S.C. § 2302, and FAR 2.101.

The current FAR guidance does not adequately make distinctions in industry exchanges.[26] FAR Part 10, Market Research, lays out the responsibilities and steps to be taken in conducting market research. It does not distinguish *market research* and related exchanges with industry from exchanges conducted after issuance of solicitations and receipt of proposals. This important distinction is not well described in the FAR. The FAR also does not adequately address the concerns contracting officers frequently express with regard to the timing and appropriateness of one-on-one exchanges with industry.

FAR 15.201, Exchanges with Industry Before Receipt of Proposals, confuses the important distinction between exchanges before and after the issuance of the formal solicitation. Further confusing the matter, much of 15.201 duplicates the list of "techniques to promote early exchanges of information with industry" already found in FAR 10.001 and 10.002 and related to exchanges conducted before release of a solicitation. FAR 15.201(f) compounds the confusion by beginning with a sentence about

[23] OFPP Memorandum, "Myth-Busting: Addressing Misconceptions to Improve Communication with Industry During the Acquisition Process," February 2, 2011, accessed October 25, 2018, https://interact.gsa.gov/document/%E2%80%9Cmyth-busting%E2%80%9D-addressing-misconceptions-improve-communication-industry-during-acquisition-. Two subsequent memoranda dated May 7, 2012, and January 5, 2017, addressed related policy.
[24] Nash & Cibinic Report, "Enhancing Communications During the Acquisition Process: Proposing the Wrong Fix," 31 No. 1 (2015).
[25] The recommended language in FAR Subpart 10.1 draws heavily on OFPP Memorandum, "Myth-Busting: Addressing Misconceptions to Improve Communication with Industry During the Acquisition Process," February 2, 2011, accessed October 25, 2018, https://interact.gsa.gov/document/%E2%80%9Cmyth-busting%E2%80%9D-addressing-misconceptions-improve-communication-industry-during-acquisition-.
[26] Nash & Cibinic Report, "Enhancing Communications During the Acquisition Process: Proposing the Wrong Fix," 31 No. 1 (2015).

the release of general information, followed by a sentence focused on control of exchanges after release of the solicitation, and a subsequent sentence pertaining to general release of information to the public.

Clear distinctions are needed among exchanges conducted prior to release of a solicitation (FAR Part 10), exchanges after issuance of a solicitation (FAR 15.201), and exchanges after receipt of proposals (FAR 15.306).

Market research information in Part 15 is misplaced. Market research applies to all types of procurement methods, including commercial products and services (Part 12), micro-purchases and simplified acquisitions (Part 13), sealed bidding (Part 14), and contracting by negotiation (Part 15). Including policies on market research in Part 15, speaks too narrowly to the importance of market research to all these methods.

FAR 15.201 should be focused on exchanges after issuance of a solicitation and all market research information should be placed in FAR Part 10.

Implementation

Legislative Branch

- Revise Title 41 at 41 U.S.C. § 117, to define *market research* to include exchanges among knowledgeable government and industry personnel.
- Revise Title 10 to reference the definition of market research at 41 U.S.C. § 117.

Executive Branch

- Revise FAR Part 2.101, Definitions, to incorporate the statutory definition of market research.
- Revise FAR Part 10, to add Subpart 10.1, Exchanges with Industry During Market Research.
- Revise FAR Part 15.2 and 15.201 to eliminate duplication with FAR 10.001 and to clarify the distinction between exchanges with industry during market research, after issuance of a solicitation, and after receipt of proposals.

Note: Explanatory report language and draft legislative and regulatory text can be found in the Implementation Details subsection at the end of Section 8.

Implications for Other Agencies

- These recommended changes to the U.S. Code and FAR will affect all government agencies that use the FAR. This widespread applicability is necessary, appropriate, and aligns with the existing governmentwide application of the OFPP policies referenced in this recommendation.

Recommendation 87: Establish a market intelligence capability throughout DoD to facilitate communication that enhances the government's industry knowledge through open, two-way communication.

Problem

DoD needs greater and more consistent knowledge and insight regarding emerging technologies and capabilities in industry that could be leveraged to address current and future needs. Articulated in Recommendations 84–86 above, government officials are reluctant to, or believe they are prohibited from, engaging with industry due to the nature of procurement competitions, source selections, and the possibility of disclosing sensitive information. These misperceptions create an information barrier between government and industry that reduces the government's ability to foresee technology opportunities and expand industry participation and limits innovative and timely resolutions by industry.

Background

The relationship between acquisition officials and industry has been unnecessarily constrained. The government is typically risk adverse and restricts communications rather than pursuing dynamic partnership with industry. Industry perceives the government as unable or unwilling to foster ongoing relationships beyond specific programs or capabilities. Although industry is eager to share with the government, programs are reluctant to engage with industry because officials misunderstand the distinction between ongoing, open, and interactive market research and the more constrained solicitation and source selection phases at which communications restrictions exist. Market research should be an ongoing process focused broadly on capabilities research and evolving technologies and focused narrowly in support of researching requirements for a particular program.

Market research is typically accomplished through limited and controlled engagements with industry or Internet searches. This approach leads to missed opportunities for DoD to gain insight into technology advancements and to proactively use knowledge to inform development of future requirements and strategic plans. Meanwhile, industry is missing the opportunity to gain insight into DoD's future needs.

Industry is looking to do the following:

- Share innovative new technologies and their development and/or trajectories with the government.
- Gain insight into the government's future needs and acquisitions strategies.
- Seek ways to respond better to RFPs/RFQs.
- Help the programs solve current and future needs and requirements.

DoD officials are constrained as follows

- Concerned about sharing too much information that could jeopardize acquisition strategies, source selections or result in future protests.

- Unwilling to meet with industry one-on-one during market research, believing it may give the appearance of favoritism.
- Focused on execution of current programs and not resourced to gather broader market intelligence for current and future applications.

Discussion

Government officials say they fear engaging in open and transparent dialogues with industry could lead to future protests.[27] U.S. agencies, which once owned "technology superiority and fielded cutting-edge technologies now find that off-the-shelf solutions may be more advanced than the solutions they are working on."[28] Open communication and information sharing would reduce industry's investment in non-value-added development activities, enabling companies to offer better solutions more efficiently. Enhanced communication and information sharing would improve DoD's ability to identify opportunities, particularly in emerging technologies and small businesses, which could decrease acquisition lead time needed to deliver innovative solutions to warfighters.

OFPP addressed this issue in 2011 when it published the first of three *myth busting* memos focused on improved communications with industry. Of note, the memo substantiates that "early, frequent, and constructive engagement with industry is especially important for complex, high-risk procurements."[29] The value of such interactions is not limited to one specific category of procurement but rather to the entire defense enterprise. The need exists for skilled, knowledgeable executives in the structures developed under the portfolio management concepts proposed in Section 2, for Military Service cohorts to gather market intelligence about technologies and capabilities in support of inventory managers and institutional buyers throughout DoD. This market intelligence capability would result in a continual assessment of market research and technology trajectories, and identify potential implications for applying this intelligence real-time to the program, PEO (PAE), military service leadership, and other DoD acquisition executives. Senior leaders would use this market intelligence regarding the path of technology and state of the market to inform and shape program strategies.

To maximize market intelligence capability, cohorts of experienced, knowledgeable acquisition professionals would need to understand the short- and long-term mission, technical requirements, and acquisition outlook. Market intelligence cohorts could reach out to industry seeking knowledge of existing products, technology, and project trajectories, and their potential future use or application throughout the entire acquisition lifecycle from requirements definition through sustainment.

Conclusions

DoD needs to establish an enduring market intelligence capability to facilitate continual two-way communications with industry about the factors impacting the marketplace, including developing

[27] Various government officials, interviews/data-gathering meetings with Section 809 Panel, February–March 2018.
[28] "The Red Queen Problem – Innovation in the DoD and Intelligence Community," Steve Blank, October 17, 2017, accessed October 30, 2018, https://steveblank.com/2017/10/17/the-red-queen-problem-innovation-in-the-dod-and-intelligence-community.
[29] OMB Memorandum, *"Myth-Busting": Addressing Misconceptions to Improve Communication with Industry During the Acquisition Process,* February 2, 2011, accessed October 30, 2018, https://www.whitehouse.gov/omb/management/office-federal-procurement-policy.

institutional knowledge on business cycles and the influence of factors such as geography and scarcity on economic fluctuations. Market intelligence responsibilities would include the following:

- Conduct market and technology research and conduct site visits.
- Represent the program/PEO (PAE)/Military Services/and other acquisition executives to industry.
- Identify and participate in relevant conferences, tradeshows, and other technology exchange venues to collect, establish, and maintain awareness of emerging technologies.
- Gain understanding and knowledge of technology, research, and development, and use it to decrease acquisition cycles, increase capabilities, and provide optimal solutions to warfighters.
- Provide market intelligence assessments and recommendations to the program/PEO (PAE)/Military Services/and other acquisition executives to inform and support requirements development and strategic planning.

Implementation

Legislative Branch

- There are no statutory changes required for this recommendation.

Executive Branch

- Establish market intelligence capability for programs, PEOs (PAEs), and Military Services. Individuals fulfilling the market intelligence role should,
  - Maintain in-depth knowledge of the technology, mission, and strategic needs of program, PEO, Military Service, or Defense Agency to effectively communicate current and future needs.
  - Gather intelligence on current and emerging technologies across key industries relative to the primary mission space and operational requirements of the program(s) and identify potential application of technologies.
  - Support the program, PEO (PAE), Military Service, and Defense Agency capability and technology roadmaps to inform and advise the future requirements writers of technology developments, maturity, and potential innovative applications of technology.

Note: Draft regulatory text can be found in the Implementation Details subsection at the end of Section 8.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

Section 8
Government-Industry Interactions

Implementation Details

Recommendation 84

RECOMMENDED REPORT LANGUAGE

SEC. ___. COMMUNICATION WITH THE MARKETPLACE.

This section would amend Chapter 137, title 10, United States Code, to insert a new section 2301 that would express the Sense of Congress that communications with the marketplace are not only authorized but must occur during every step of the process from development of the requirement through disposal. This section also would direct the Department of Defense (DoD) to submit annual updates for the first five years after date of enactment to the congressional defense committees regarding implementation of this section.

The committee notes, that despite attempts by government-wide and DoD acquisition leaders since Congress enacted the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355), DoD acquisition personnel and individuals in the marketplace have expressed concern about communicating with each other openly and frequently, believing it is either prohibited or fraught with risk, fearing possible legal violations or being challenged by oversight functions in government and through the protest processes. The committee further notes, however, that this fear is rooted in lore, rather than law; there are very few restrictions that apply to communications with the marketplace.

The committee recognizes that communications with the marketplace on an ongoing basis are essential to acquiring intelligence in terms of what the marketplace has to offer and acquiring and maintaining technological superiority that might be employed by DoD to counter threats. More importantly, such communications would allow DoD to get inside the turn of our near peer competitors and non-state actors in terms of delivering lethality to our warfighter in a timely and cost-efficient manner. This section would finally make it clear that, with very limited exceptions, communications is not only encouraged and authorized, they are essential and required. This section would reinforce the direction that whenever DoD personnel engaged in an acquisition function are in doubt about whether to communicate with elements of the marketplace, they should err in favor of communication.

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SEC. ___. COMMUNICATION WITH THE MARKETPLACE.

(a) IN GENERAL.—Chapter 137 of title 10, United States Code, is amended by inserting before section 2302 the following new section :

"**§2301. Communication with the marketplace**

"(a) SENSE OF CONGRESS.—It is the sense of Congress that—

"(1) the Department of Defense must communicate with the marketplace when acquiring goods and services;

"(2) communication between the Department of Defense and the marketplace must occur at every step of the acquisition process, from the identification of a need or requirement through disposal of an item after being taken out of service;

"(3) such communication must include communication with respect to the development of policy from formulation of the concept to the issuance of the final policy; and

"(4) whenever Department of Defense personnel engaged in an acquisition function are in doubt about whether to communicate with elements of the marketplace, they should err in favor of communication.

"(b) REQUIREMENT FOR COMMUNICATION THROUGHOUT ACQUISITION PROCESS.—

"(1)The Secretary of Defense shall issue such regulations and directives as necessary to require the acquisition workforce, when conducting an acquisition of goods or services for the Department of Defense, to engage in responsible and constructive communication with industry at each stage of the acquisition process, from the identification of a need or requirement through disposal of an item after being taken out of service, including during policy development.

"(2) As part of those regulations and directives, the Secretary shall require that such communication be consistent with law and regulation.

"(3) As part of those regulations and directives and as the Secretary otherwise determines to be necessary, the Secretary shall take steps to inculcate within the acquisition workforce an environment conducive to communication with the marketplace as required under those regulations and directives.

"(c) ANNUAL REPORT.—Not later than February 1 of each year for the first five years after this section is enacted, the Secretary of Defense shall submit to the congressional defense committees a report on the actions taken by the Secretary to implement this section and the accomplishments of the Department in communicating with the marketplace.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserted before the item relating to section 2302 the following new item:

"2301. Communication with the marketplace.".

Recommendation 85

RECOMMENDED REPORT LANGUAGE

SEC. ___. MARKET LIAISON REQUIRED AT EACH DEPARTMENT OF DEFENSE PROCURING ACTIVITY.

This section would amend Chapter 141, title 10, United States Code, by inserting a new section 2387 to establish the requirement for, and responsibilities of, a procuring activity market liaison. This market liaison would serve primarily as the point of entry for companies seeking to do business with the Department of Defense (DoD), particularly companies unfamiliar with the DoD procurement process. The market liaison would also serve to assist industry with inquiries or concerns regarding the activities' acquisition processes.

The committee has long been concerned with the perceived difficulty the Department has in attracting new, innovative businesses to its supplier base, and in particular, companies in the commercial marketplace with state-of-the-art products. DoD procuring activities are often located in large, secured facilities not easily accessible to companies unfamiliar with the acquisition organization and its often-bureaucratic processes. The committee has learned from many companies about their difficulty deciphering the acquisition bureaucracy to find the right office to discuss how they might offer their products and services to satisfy the Department's requirements. The market liaison would serve as a common approach across DoD acquisition activities that industry may go to as a first point of entry or to obtain answers to questions or concerns of a general nature. The committee expects this responsibility to be executed in a manner that makes DoD acquisition more accessible and communications between the DoD activity and marketplace simple and predictable.

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SEC. ___. MARKET LIAISON REQUIRED AT EACH DEPARTMENT OF DEFENSE PROCURING ACTIVITY.

(a) REQUIREMENT.—

(1) IN GENERAL.—Chapter 141 of title 10, United States Code, is amended by inserting after section 2386 the following new section:

"§ 2387. Market liaison required at each procuring activity

"(a) REQUIREMENT.—The Secretary of Defense shall require that each procuring activity of the Department of Defense assign an individual within that procuring activity to be the market liaison for that activity.

"(b) FUNCTION.—The market liaison for a procuring activity shall serve as the activity's point of entry for new or existing suppliers with new ideas, products, or services, as well as those with questions or concerns about the activity's acquisition processes.

"(c) QUALIFICATIONS.—An individual assigned as the market liaison for a procuring activity should have sufficient experience, knowledge, and insight into the operation of the procuring activity to meaningfully assist those businesses making an inquiry.

"(d) ACCESSIBILITY.—The Secretary of Defense shall ensure that—

"(1) the market liaison responsibility is widely publicized;

"(2) the market liaison function is standard across all procuring activities; and

"(3) the market liaison for a particular procuring activity is readily accessible through the public web sites of that activity

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2386 the following new item:

"2387. Market liaison required at each procuring activity.".

(b) IMPLEMENTATION DEADLINE.—The Secretary of Defense shall implement section 2387 of title 10, United States Code, as added by subsection (a), not later than 180 days after the date of the enactment of this Act.

Recommendation 86

RECOMMENDED REPORT LANGUAGE

SEC. ___. DEFINITION OF MARKET RESEARCH FOR PURPOSES OF FEDERAL ACQUISITION STATUTES.

This section would amend Chapter I, title 41, United States Code, by inserting a new section 117 to establish a definition for market research, and make conforming amendments to related sections in Title 10, United States Code. This definition would clearly include exchanges with knowledgeable individuals in both government and industry as being within the scope of market research.

The committee notes that Congress has, on several occasions, emphasized the importance of market research to the success of procurements. Most recently, section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92) addressed market research and encompassed, for purposes of section 855, a definition of market research that includes government contact with knowledgeable individuals in government and industry regarding market capabilities. The committee is aware that acquisition personnel often have been hesitant to engage in exchanges with industry as part of market research because of lack of training or concerns about the proper extent to which such exchanges may occur at the buying activities, as well as fear of a protest. The market research definition would make it clear that it is both appropriate and necessary for the government to engage with industry to meet the needs of the Department of Defense. The committee notes that such emphasis on market research is appropriate as it serves as the foundation for many important procuring activity decisions such as the availability of commercial products or services to meet the agency's need; the appropriate procurement method; the likelihood of competition; and appropriate terms and conditions, and pricing.

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SEC. ___. DEFINITION OF MARKET RESEARCH FOR PURPOSES OF FEDERAL ACQUISITION STATUTES.

(a) TITLE 41.—

(1) IN GENERAL.—Chapter 1 of title 41, United States Code, is amended by inserting after section 116 the following new section:

"§ 117. Market research

"In this subtitle, the term 'market research' means obtaining information about capabilities, products, and services available in the private sector through a variety of means, which may include—

"(1) contacting knowledgeable individuals in government and industry;

"(2) interactive communication among industry, acquisition personnel, and customers; and

"(3) interchange meetings or pre-solicitation conferences with potential offerors.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 116 the following new item:

"117. Market research.".

(b) TITLE 10.—Title 10, United States Code, is amended as follows:

(1) CHAPTER 137.—Section 2302(3) is amended by adding at the end following new subparagraph:

"(M) The term 'market research'.".

(2) SECTION 2222.—Section 2222(i) is amended by adding at the end following new paragraph:

"(12) MARKET RESEARCH.—The term 'market research' has the meaning given that term in section 117 of title 41.".

(3) SECTION 2366a.—Section 2366a(d) is amended by adding at the end following new paragraph:

"(11) MARKET RESEARCH.—The term 'market research' has the meaning given that term in section 117 of title 41.".

(4) SECTION 2366b.—Section 2366b(g) is amended by adding at the end following new paragraph:

"(9) MARKET RESEARCH.—The term 'market research' has the meaning given that term in section 117 of title 41.".

(5) CHAPTER 140.—Section 2376 is amended by adding at the end following new paragraph:

"(4) The term 'market research' has the meaning given that term in section 117 of title 41.".

(6) SECTION 2431a.—Section 2431a(c)(2)(E)(iii) is amended by inserting "(as defined in section 117 of title 41)" after "market research".

(7) SECTION 2548.—Section 2548(b)(2)(A)(iii) is amended by inserting "(as defined in section 117 of title 41)" after "market research".

RECOMMENDED REGULATORY REVISIONS

FAR Subpart 2.101, Definition

"Market research" means ~~collecting and analyzing information about capabilities within the market to satisfy agency needs~~ obtaining information about capabilities, products and services available in the private sector through a variety of means, which may include contacting knowledgeable individuals in government and industry; interactive communication among industry, acquisition personnel, and customers; and interchange meetings or pre-solicitation conferences with potential offerors.

FAR – Part 10 Market Research

Subpart 10.1 – Exchanges with Industry During Market Research

(a) The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(b) As part of the continuous process of market research, agencies are encouraged to promote early exchanges of information about general government needs and future acquisitions. Such exchanges are particularly useful for understanding the commercial market place for a given product, service or technology. Government acquisition teams, requirements teams, or even end users may conduct this type of market research for broadly defined categories of products or services, or for specific inquiries focused on the ability of the current marketplace to satisfy particular needs. They may conduct this kind of research by engaging in industry days, participating in industry technical, and professional association forums, reviewing professional literature, attending product demonstrations, or holding one-on-one meetings for the general purpose of becoming a more knowledgeable buyer (See FAR 10.001). These types of exchanges may, but aren't required to, involve contracting officers.

(c) For specific acquisitions, an early exchange of information among industry and the program manager, contracting officer, and other participants can identify and resolve concerns regarding matters such as the feasibility of the requirement, the acquisition strategy, proposed contract type; key terms and conditions; acquisition planning schedules;, including performance requirements, statements of work; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions.

(d) Government officials – including the program manager, subject matter technical experts, users, and/or contracting officer – may meet with potential offerors to exchange general information and conduct market research related to an acquisition. Exchanges of information are encouraged with interested parties during the pre-solicitation process, ending with issuance of the solicitation. To make it clear that one-on-one communication is available to all potential offerors, the contracting officer should consider publicizing the Government's interest in meeting with potential offerors on a one-on-one basis as part of the agency's market research.

(e) There is no requirement that the meetings include all possible offerors, nor is there a prohibition on one-on-one meetings. Government ethics rules and Competition in Contracting Act, (10 U.S.C. § 2304), prohibit preferential treatment of one vendor over another. Any information that is shared in a meeting that could directly affect proposal preparation must be shared in a timely manner with all potential offerors to avoid providing any offeror with an unfair advantage. Where vendor interaction is expected to include contract terms and conditions, any one-on-one meetings should include, or at a minimum be coordinated with, the contracting officer.

(f) Industry involvement in pre-solicitation discussions should not lead to exclusion resulting from organizational conflict of interest (OCI) concerns. While a vendor who, as part of contract performance, drafts the specification for a future procurement will almost certainly be barred by OCI rules from competing for that future procurement, pre-solicitation communications are generally less structured, less binding, and much less problematic. In the presolicitation context, the government is not looking for impartial advice from one source but is instead looking for a variety of options from a variety of sources, each one understandably, and reasonably, attempting to demonstrate the value of its own approach. These marketing efforts, in themselves, do not raise OCI concerns.

(g) Agency personnel have a responsibility to protect any information that is received in confidence from a potential offeror. While the protections of the Procurement Integrity Act do not apply prior to source selection, other protections remain. In many cases, the Trade Secrets Act (18 U.S.C.§1905) will prohibit Federal employees from divulging protected information, including confidential commercial or financial data, trade secrets, operations, processes, or style of work. Also, the Freedom of Information Act (FOIA) allows agencies to protect commercial or financial information that is privileged or confidential. In cases where a vendor is concerned that existing protections are insufficient and engaging in pre-solicitation communication will be beneficial, agencies should consider the use of appropriate non-disclosure agreements (NDAs) to ensure that proprietary information will be kept from potential competitors.

(h) Disclosure is an important tool that ensures public trust in our contracting process, but it should not be an impediment to meeting with contractors and is not required in every circumstance. In the case of meetings where registered lobbyists are employed, contractors are required to track the costs and activities of their lobbying activities, as required by FAR Part 31, but that obligation places the disclosure burden on the contractor and does not require the

government to take any steps. Where registered lobbyists are not involved, additional communication with contractors will not involve an additional disclosure burden, though conduct of all communications should be consistent with the principles of fairness and accountability.

(i) After issuance of the solicitation, the contracting officer shall be the focal point for exchanges with offerors or potential offerors. See FAR 15.201

(j) After receipt of proposals, the contracting officer shall be the focal point for exchanges with offerors. See FAR 15.306

FAR Part 15 – Contracting by Negotiation

Subpart 15.2 – Solicitation and Receipt of Proposals and Information

15.200 – Scope of Subpart

This subpart prescribes policies and procedures for –

(a) Exchanging information with industry ~~prior to receipt of proposals~~ after issuance of a solicitation;
(b) Preparing and issuing requests for proposals (RFPs) and requests for information (RFI); and
(c) Receiving proposals and information.

15.201 -- Exchanges with Industry ~~before receipt of proposals~~ after Issuance of the Solicitation

~~(a) Exchanges of information among all interested parties, from the earliest identification of a requirement through issuance of the solicitation receipt of proposals, are encouraged. Any exchange of information must be consistent with procurement integrity requirements (see 3.104). Interested parties include potential offerors, end users, Government acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.~~

~~(b) The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements, and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.~~

~~(c) Agencies are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the program manager, contracting officer, and other participants in the acquisition process can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Some techniques to promote early exchanges of information are—~~

~~(1) Industry or small business conferences;~~

~~(2) Public hearings;~~

~~(3) Market research, as described in Part 10;~~

~~(4) One-on-one meetings with potential offerors (any that are substantially involved with potential contract terms and conditions should include the contracting officer; also see paragraph (f) of this section regarding restrictions on disclosure of information);~~

~~(5) Presolicitation notices;~~

~~(6) Draft RFPs;~~

~~(7) RFIs;~~

~~(8) Presolicitation or preproposal conferences; and~~

~~(9) Site visits.~~

~~(d) The special notices of procurement matters at 5.205(c), or electronic notices, may be used to publicize the Government's requirement or solicit information from industry.~~

~~(e) RFIs may be used when the Government does not presently intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted by the Government to form a binding contract. There is no required format for RFIs.~~

~~(f) General information about agency mission needs and future requirements may be disclosed at any time.~~ (a) After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors. When ~~specific~~ information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable~~, but no later than the next general release of information,~~ in order to avoid creating an unfair

competitive advantage. Information provided to a potential offeror in response to its request must not be disclosed to others if doing so would reveal the potential offeror's confidential business strategy, and is protected under 3.104 or Subpart 24.2. When conducting a ~~presolicitation or~~ preproposal conference, material distributed at the conference should be made available to all potential offerors, upon request.

(b) See FAR 10.1 regarding exchanges with industry during market research. See FAR 15.306 regarding exchanges with offerors after receipt of proposals.

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Section 9
Acquisition Data

Acquisition and financial data transparency can improve efficiency and bring about better governance, but the right solution to effective tradeoffs will be a matter for Congress, DoD, and the rest of the executive branch to address at senior levels.

RECOMMENDATIONS

Rec. 88: Use existing defense business system open-data requirements to improve strategic decision making on acquisition and workforce issues.

Rec. 89: Direct DoD to consolidate or eliminate competing data architectures within the defense acquisition and financial system.

INTRODUCTION

For several decades, DoD has worked to more effectively use enterprise acquisition and financial data in forming decisions. This process involves enormous technical complexity and requires institutional improvements to accompany any IT upgrades.

Lacking data is not the main problem with DoD's data ecosystem. DoD spends billions of dollars collecting and reporting a broad array of data on its own business operations. Rather, two major problems undermine the utility of DoD's already-existing acquisition and financial management data:

- DoD personnel in many cases lack the ability to use information systems to access data. The problem can be corrected via a mix of improved access, more widely disseminated knowledge, and greater expertise.
- A lack of standardized data architectures requires the inclusion of various data translation mechanisms throughout DoD's business environment. These translators can take the form of people—specialists who understand two different data systems enough to interpret data between them. Translators can also take the form of machines—software to interpret data between two different systems. Human translators are generally highly-paid and few in number. Machine translators generally consist of expensive custom-built computer code, which must be maintained and may lock DoD into paying unknown costs for years to come.

To address the problem of insufficient ability to use data, the DoD Chief Management Officer (CMO) should encourage use of existing defense business system open-data requirements to improve strategic decision making. This should include the following:

- Compliance with open-data mandates in recent legislation.
- Provision of a single-window interface through which acquisition and finance professionals may access each other's data.
- Improving the level of familiarity with key datasets among senior decision makers.
- Using existing hiring and scholarship authorities to bolster the data analytics workforce.

To address the problem of nonstandardized data architectures, the DoD CMO should expand efforts to identify conflicting or redundant data architectures within the defense acquisition and financial system, merging or eliminating them when possible.

These recommendations do not directly address the tradeoffs between data transparency and data security, which will be an important part of the policy debate in coming decades. If DoD were to restrict acquisition and financial data to classified networks, for example, it could inhibit organizational efficiency. Too little transparency could also undermine the quality of congressional and public oversight. If DoD were to place on the public Internet a detailed, real-time accounting of contracts and financial transactions, it could pose unacceptable operational security risks. Acquisition and financial data transparency can improve efficiency and bring about better governance, but competing security

objectives exist. The right solution to these difficult tradeoffs will be a matter for Congress, DoD, and the rest of the executive branch to address at senior levels.

RECOMMENDATIONS

Recommendation 88: Use existing defense business system open-data requirements to improve strategic decision making on acquisition and workforce issues.

Problem

In recent decades, DoD and the rest of the U.S. government have spent tens of billions of dollars on software development, data architectures, and business processes to enable collection of vast amounts of acquisition and financial data. There has not been a similarly scoped effort to build up DoD's data analytics capabilities or use those capabilities for strategic decision making. DoD currently has access to a vast amount of acquisition and financial data, but in too many cases lacks the ability to do anything useful with the data.

Background

The U.S. government manages many systems for collecting and reporting information related to defense acquisition. Defense business systems contain enterprise data on regulations and laws, acquisition requirements, budgeting and appropriations, program management, contract solicitations, contract awards, contract vendors, and other parts of the broader acquisition process.[1]

When these datasets are viewed at an aggregate level, analysts can perceive patterns and policy makers can form conclusions that might not be possible by looking at individual data points at the working level. Many stakeholders, however, have noted that DoD has limited abilities to engage in this type of aggregate information analysis. Inadequate data science training and recruitment is part of the reason for this problem.[2] Information siloes and the resulting unavailability of data across DoD are also key factors.[3]

This data silo phenomenon can lead to situations in which one office collects data that is highly applicable to the work of another office but unavailable to them. In some cases, the problem is that key personnel lack access to the data in question. In other cases, the problem is simply that personnel are unaware the data exist.

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[1] *Defense business systems* (DBSs) are defined in statute under 10 U.S.C. § 2222 and in DoD policy under DoDI 5000.75. For detailed recommendations on process improvements to DBS acquisition, see Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3,* 103-148 (2018).

[2] See, for example, the 2018 National Defense Strategy, which states that DoD will "emphasize new skills and complement our current workforce with information experts [and] data scientists" who are able "to use information, not simply manage it." From Department of Defense, *Summary of the 2018 National Defense Strategy,* 8, accessed May 21, 2018, https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf.

[3] See, for example, a statement from the DoD CIO in 2017: "The current approach of unique systems with stove-piped data sources is a high risk, high cost approach. It ensures long developmental lead times and fragile solutions that cannot be transferred to other operations." "DoD's Mission Partner Environment – Information System (MPE-IS)," DoD Chief Information Officer, accessed May 21, 2018, http://dodcio.defense.gov/In-the-News/MPE.

What is Data Analytics?

Terms such as *data science*, *data analysis*, and *data analytics* are frequently used interchangeably in informal conversation. For the purposes of this paper, *data science* is considered a more narrowly defined and rigorous field, which combines formal methods from academic disciplines such as statistics, computer science, and mathematics.

Data analysis and *data analytics* are used interchangeably here to describe a broader skill set that does not necessarily involve formal academic methods. Data analysts may work in an academic setting, but in DoD they are more likely to work in a policy setting, providing information as needed to support decision makers.

Data architecture is another term frequently used to refer to the way information is organized. The first section of this paper focuses on the role of data analytics in DoD's strategic decision making, and does not address the issue of data architecture.

Open Data Requirement Within DoD

Both DoD leadership and Congress have in recent years encouraged DoD to improve its ability to analyze and use its own acquisition data.[4] In Section 911 of the FY 2018 NDAA, Congress mandated an open data policy within DoD, requiring that "except as otherwise provided by law or regulation," DoD business enterprise data "shall be made readily available" to military departments, combatant commands, and "all other offices, agencies, activities, and commands of the Department of Defense."[5]

Section 912 of the FY 2018 NDAA codified the requirements for departmentwide transparency in enterprise-level datasets.[6] The section also specified the DoD CMO as the owner of "primary decision-making authority with respect to the development of common enterprise data."[7] The section required the CMO to set up "a data analytics capability" in support of "enhanced oversight and management" and launch pilot programs "to develop data integration strategies… to address high-priority management challenges."[8]

As of mid-2018, the DoD CMO's office had begun work to implement the FY 2018 provisions, establishing information sharing systems such as the CMO Connect Portal website. The site is intended as a "resource and collaboration tool for DoD service members, civilian employees and contractors."[9]

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[4] The Joint Staff, for example, publishes a guide to best practices on knowledge and information management, which advocates for "flat, transparent networks to share and retain information" instead of an "exclusive, stove-piped approach to information sharing and decision-making." See J7 Deputy Director for Joint Training, *Insights and Best Practices Focus Paper on Knowledge and Information Management,* May 2018, 13, accessed May 21, 2018, http://www.jcs.mil/Portals/36/Documents/Doctrine/fp/knowledge_and_info_fp.pdf.

[5] Section 911 of FY 2018 NDAA, Pub. L. No. 115-91 (2017).

[6] Section 911 of FY 2018 NDAA, Pub. L. No. 115-91 codified the transparency requirements under 10 U.S.C. § 2222 (with conforming amendments to other sections of U.S. Code under Title 10).

[7] Section 911 of FY 2018 NDAA, Pub. L. No. 115-91 (2017).

[8] Ibid.

[9] "Chief Management Officer," DoD, accessed July 27, 2018, https://cmo.defense.gov. As of July 2018, little departmentwide acquisition data had been made accessible via the site.

Data as a Tool for Strategic Decision Making

Stakeholders within Congress and DoD have long pushed for greater use of existing data in strategic decision making. The Congressional Research Service has noted that DoD agencies "lag behind the private sector in effectively incorporating data analyses into decisionmaking."[10] The Government Accountability Office (GAO) has reported that in some cases, despite being required by statute, DoD management data analysis "did not assess the reliability of the data used, define key terms, clearly state criteria used for analysis, or make recommendations."[11] The GAO also publishes a best practices guide to support improved data-driven decision making in federal agencies.[12]

Section 913 of the FY 2018 NDAA mandated that DoD "establish a set of activities that use data analysis, measurement, and other evaluation-related methods to improve the acquisition outcomes."[13] Congress gave DoD broad discretion over what exactly these activities should entail.

The DoD Chief Information Officer (CIO) serves as a key maintainer of the IT systems in which much of DoD's business data are housed. Once such systems have been built, it is critical to have an entity dedicated to maintenance, cybersecurity, and related software issues. The CIO serves in this role, and can also provide expertise on development of needed application program interfaces to provide departmentwide access to DoD management data.

Hiring and Financial Assistance Authorities

The difficulty of recruiting and training qualified talent is a key impediment to improving data analytics in DoD. The CMO's 2018 report on DoD business operations specifically cited the need for "the skills and knowledge to analyze results and suggest improvements as needed" as a key focus area for using data to drive decisions.[14]

To enable DoD to bring in skilled technical ability, Congress has enacted many special hiring authorities targeting personnel with skills in science, engineering, management, and related disciplines. Many of these authorities are pilot programs; others are permanent.[15] Several of the authorities may be applicable to recruitment and training of data science professionals.

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[10] Moshe Schwartz, *Using Data to Improve Defense Acquisitions: Background, Analysis, and Questions for Congress,* Congressional Research Service, January 5, 2016, accessed November 7, 2018, https://fas.org/sgp/crs/natsec/R44329.pdf.
[11] GAO, *Defense Management: DOD Needs to Address Inefficiencies and Implement Reform across Its Defense Agencies and DOD Field Activities, GAO-18-592,* September 2018,10, accessed September 13, 2018, https://www.gao.gov/assets/700/694333.pdf.
[12] "Data-Driven Decision Making," GAO, accessed July 27, 2018, https://www.gao.gov/key_issues/data-driven_decision_making.
[13] Section 913 of FY 2018 NDAA, Pub. L. No. 115-91 (2017).
[14] DoD Chief Management Officer, *FY 2018 – FY 2022 National Defense Business Operations Plan,* 36, accessed November 7, 2018, https://cmo.defense.gov/Portals/47/Documents/Publications/NBDOP/TAB%20B%20FY18-22%20NDBOP%20Appendices.pdf?ver=2018-05-25-131454-683.
[15] See Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 2 of 3,* 61-100 (2018) for analysis and lists of special hiring authorities available to DoD. Also see Appendix C of this *Volume 3 Report* for hiring and financial assistance authorities that may apply to data scientists.

Automation and Artificial Intelligence

Business process automation can greatly reduce the time and labor required to conduct data analysis. Increasing use of automated analytical tools, sometimes referred to under the umbrella label of *artificial intelligence* (AI), promises to increase the efficiency of DoD's business data analysis in coming years.

Discussion

DoD has spent tens of billions of dollars in recent decades building up its data collection capabilities in the form of IT infrastructure, custom-built software, and policy documents to establish business processes. Thanks to massive investment of time and money, DoD now has access to a wealth of acquisition and financial data. Some policy and decision-making offices, however, lack the ability to properly use the data that DoD collects.

In the FY 2018 NDAA, Congress instructed DoD to embrace an open-data philosophy, providing defense business system data to analysts throughout the organization. This effort is a positive first step toward building a more effective data analytics culture within DoD. It will fall to the CMO and related offices to ensure open availability of data across DoD, and it will fall to individual offices to fully use those datasets in their day-to-day decision making.

In addition to congressional and DoD efforts to improve data analytics, the Office of Management and Budget (OMB) and related executive agencies promote a Federal Data Strategy.[16] The strategy is intended to provide a broad, long-term framework for improving agencies' data stewardship and leveraging data to create value. A late-2018 draft of the strategy includes 47 goals (practices), many of which overlap with the goals of data management provisions in the FY 2018 NDAA.

Table 9-1. Selected Federal Data Strategy Draft Practices[17]

Draft Practice	OMB Description
2: Inventory Data Assets	Maintain an inventory of data assets with sufficient completeness, quality, and metadata to facilitate planning, discovery, access, and use.
3: Identify High-Value and Authoritative Data Assets	Assign value and cost to data assets based on usefulness, applicable law, regulation, policy, and operational guidance to appropriately prioritize and document stewardship and resource decisions.
4: Align Resources to Value and Authority	Periodically review alignment of resources to the value and authority of datasets to promote consistency and fairness.
5: Manage High-Value and Authoritative Data Assets	Periodically review high-value and authoritative data assets to identify and document opportunities to improve data management systems and procedures and ensure quality and integrity.

[16] The Office of Management and Budget, Office of Science and Technology Policy, Department of Commerce, Small Business Administration, and General Services Administration were all involved in the development of the Federal Data Strategy as of late 2018. See Federal Data Strategy introduction at: https://strategy.data.gov.
[17] From Office of Management and Budget, "Federal Data Strategy: The Draft Practices," https://strategy.data.gov/practices.

Draft Practice	OMB Description
13: Diversify Data Access Methods	Invest in the creation and usability of multiple tiers of access to federal data by committing federal resources to making data as open and accessible as possible while protecting confidentiality.
14: Innovate to Enable Safe Use	Explore and periodically review methods and technologies that enable tiered access to safeguard data and promote accessibility to relevant stakeholders.
19: Prepare to Share	Provide encouragement and incentives for agencies to develop a culture in which they are predisposed to share data within and across federal agencies, as well as with external partners, with proper protections and where relevant and appropriate.
20: Share Data Across Agencies	Facilitate data sharing across federal agencies to efficiently generate more comprehensive data for improved decision making.
34: Promote a Culture that Values Data as an Asset	Conduct routine assessments of current organizational practices to identify opportunities to improve the agency's ability to acquire, use, and disseminate data for program, statistical, and mission-support purposes to improve data use and value.
36: Incorporate Data into Decision-Making	As part of budget, operational, policy, and management processes, identify opportunities to effectively and routinely use data for decision making and to create a bridge between evaluation, performance, and other activities within agencies.
37: Communicate Insights from Data	Adopt a range of innovative communication tools and techniques to effectively transmit insights from data to a broad set of consumers, both internal and external to the agency.
38: Connect Federal Spending to Outcomes	Analyze spending data to align resources with strategic priorities and desired outcomes to enable the public to understand the results of federal investments and to support informed decision making regarding future investments.
39: Focus on End Uses of Data	Design new data collections with the end uses in mind to ensure that the data collected will be of appropriately high quality and meet internal and external stakeholder expectations and needs.
40: Assess the Needs of Stakeholders	Routinely engage both internal and external stakeholders throughout the data lifecycle to assess the needs of data consumers.

Conclusions

One of the impediments to DoD data analysis is the fact that many information systems are siloed off from senior decision makers. Even within DoD acquisition and financial circles, many of these systems are not widely understood and lack enough proficient users to provide useful analysis at the policy level. Congress has helped to correct this problem by enacting the open data requirements of the FY 2018 NDAA, but implementing it will likely be a long and technically challenging process.

The CMO should take the lead in this effort, in part by reminding DoD of the requirement and providing portals through which personnel can access defense business data collected by entities elsewhere in DoD.

The CMO should also take steps to ensure that Defense Agency leaders and data analysts are aware of what data exist outside of their offices. Senior leaders and analysts should be encouraged to think creatively about the ways they might use data from outside their areas of functional expertise.

The CMO should also encourage Defense Agencies to recruit more data science professionals and train current personnel in data analytics. Existing special hiring and education financial assistance authorities may, in some cases, be used for these purposes.

An Executive-Legislative Grand Bargain?

If DoD offices fully opened up their business system data to scrutiny by the rest of DoD and Congress, it could allow for side benefits in the form of a grand bargain on acquisition and financial data as used by the oversight community. Open access to data systems would provide much deeper insight into individual transactions. With such insight, congressional committees might show greater confidence that effective oversight could be conducted reactively rather than proactively, on a case-by-case basis.

With that confidence, Congress might show a greater willingness to substantially reduce the degree of prescriptivism in acquisition law. This shift would allow Executive Branch personnel greater leeway to make decisions based on what makes sense at the moment, rather than basing decisions on preestablished policies written without transaction-specific context.

To promote confidence among congressional stakeholders, DoD would also need to empower working-level people, trust them to do good work, and provide for real consequences if they failed to do good work. Improved data analytics capabilities, in both DoD and Congress, would be a necessary but insufficient condition for this type of a grand bargain to be realized.

If DoD intends to improve its data analytics capabilities, it should (a) comply with congressional open-data requirements, (b) ensure defense agencies are aware of the data that is available, and (c) improve the quality of its data analytics workforce. The CMO is the logical entity to direct these changes, but ultimately, they will have to be carried out at the lower levels.

Implementation

Legislative Branch

- There are no statutory changes required for this recommendation.

Executive Branch

- Issue a memorandum implementing Sections 911–913 of the FY 2018 NDAA open-data mandate.
- Use existing hiring and scholarship authorities to bolster DoD agencies' data analytics workforce (see Appendix C).

Note: A draft memorandum can be found in the Implementation Details subsection at the end of Section 9.

Implications for Other Agencies

- If DoD's efforts to improve strategic data analytics are successful, they may serve as a template for similar future efforts by other agencies.

Recommendation 89: Direct DoD to consolidate or eliminate competing data architectures within the defense acquisition and financial system.

Problem

The proliferation of different data architectures throughout the acquisition and financial system leads to countless marginal inefficiencies in DoD and the rest of government. Collectively, these inefficiencies lead to poor interoffice communication, entrenchment of institutional siloes, lower adaptability of labor, and damaged workforce morale. One senior acquisition leader characterized the large number of data architectures as a Tower of Babel preventing communication across the organization.[18]

Virtually all stakeholders in the defense acquisition system—requirements developers, program managers, congressional committees, contracting personnel, financial managers—use different financial data architectures, many of which are incompatible with one another. Data architecture proliferation is an extremely challenging problem, with both technological and political aspects. Too many preexisting stakeholders are wedded to their own ways of doing business and unwilling to change their approaches to accommodate other stakeholders.

Background

Recent decades have seen a proliferation of data systems in federal acquisition. These data systems contain information on requirements development, appropriations requests, budget allocations, program management, contracting, contract audits, disbursement of funds, and many other functional areas that are core parts of the acquisition process. With the proliferation of data systems, a proliferation of data architectures has also occurred.[19] Even within individual organizational jurisdictions or functional communities, multiple data architectures cause confusion in many cases.

These different architectures effectively constitute different languages, inhibiting both comparative data analysis and data tracking from one transaction to another. Because of these different languages, useful data analysis requires a large number of human and machine translators throughout the process. Many of the machine translators are aging systems to which few people pay attention until they break or produce obvious errors. Such errors lead to unnecessary dysfunction, added maintenance costs, and small data errors that can persist for years unnoticed by analysts. Many of the human translators serve as the sole providers of niche expertise in their workplaces. This situation leads to inefficiency in the form of work backlogs, long wait times, and potential labor market distortions.

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[18] Retired Air Force general officer, discussions with Section 809 Panel, July 2018.

[19] A 2017 study of 21 acquisition and financial data systems found that one of the overarching problems was inconsistency of technical terminology and data formats across systems: "The same term can have different meanings in different acquisition systems, which makes analyses across systems particularly challenging." See Megan McKernan et al., *Issues with Access to Acquisition Data and Information in the Department of Defense: Doing Data Right in Weapon System Acquisition,* RAND Corporation, 2017, 41, accessed July 21, 2018, https://www.rand.org/pubs/research_reports/RR1534.html.

Misallocation of Skilled Labor

Each year, DoD employees and support contractors spend an enormous amount of time performing the work required to interpret nonstandardized data across different functional communities. It is impossible to calculate an exact number of annual labor hours associated with this type of work, but it is likely in the millions.

Many of these people are among the most highly-skilled data science professionals working for DoD. If acquisition and financial activities were to adopt more uniform data architectures, it would free up a large volume of skilled labor for more substantive tasks, such as data analysis and strategic planning.

Data Analytics Versus Data Architecture

In recent years, many proposals in the Legislative and Executive Branches have focused on improving the quality of data analytics in DoD.[20] These are commendable initiatives, as the quality of governmentwide financial data analytics clearly needs improvement.[21]

Improving the quality of data analytics in DoD is mostly about personnel, not policy. Academic studies and senior-level meetings will not build these capabilities. The most important part of improving DoD data analytics is ensuring that creative and competent data science professionals choose to work for the organization. Policy changes may be able to affect workforce recruitment and retention somewhat, but workforce quality will improve substantially in the long run only if capable people are given the leeway to innovate and are committed to DoD's mission. Poor data analysis is a personnel issue; there are no miracle cures for such problems.

What is Data Architecture?

In its broadest sense, the term data architecture refers to the way information is organized. The term *data architecture* often refers to the organization of formally structured relational databases with data elements that are standardized throughout the database. A defense acquisition example would be the contract-writing systems run by the Military Services, which track and report data on contract and related actions using standardized formats.

The term data architecture could also be used to refer to unstructured datasets such as large repositories of documents written in free-form prose. A defense acquisition example would be the Acquisition Information Repository (AIR), a web-based system allowing access to a large number of program management documents.[22]

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[20] As examples, see Section 913 in the FY 2018 defense authorization, "Establishment of set of activities that use data analysis, measurement, and other evaluation-related methods to improve acquisition program outcomes." FY 2018 NDAA, Pub. L. No. 115-91 (2017). Also see U.S. Department of the Army, *Enterprise Data Analytics Strategy for Army Business 2018-2022,* accessed July 10, 2018, https://www.army.mil/e2/downloads/rv7/professional/enterprise_analytics_strategy.pdf.

[21] GAO, *Contracting Data Analysis: Assessment of Government-wide Trends, GAO-17-244SP,* March 2017, accessed July 10, 2018, https://www.gao.gov/assets/690/683273.pdf.

[22] AIR provides access to program management documents such as Acquisition Strategies, Test and Evaluation Master Plans, and Analyses of Alternatives. It is designed in part to help program managers write required acquisition documents by using documents from other successful programs as templates.

In the context of this recommendation, data architecture refers to the structure of information that DoD and other stakeholders use to categorize different parts of the acquisition system. These parts include, but are not limited to, the following.

- The requirements development community categorizes capabilities based on the needs of current and future missions.
- The programming community compiles lists of programs that are needed to meet required capabilities.[23]
- The budgeting community compiles lists of line items that will require congressional appropriations to fund required programs.
- Congress enacts appropriations bills into law using a much more aggregated version of the budgeting community's data architecture. It also publishes clarifying reports using the same data architecture as the budgeting community.
- The financial management community releases funds to the program management community, using additional data architectures meant to translate between appropriations accounts and the program-level perspective.
- The program management community uses a variety of data architectures to manage funds based on appropriation availability.
- The contracting community uses several different data architectures to manage contract solicitations and awards. Organizations such as the General Services Administration (GSA) and Small Business Administration use their own data architectures for tracking certain aspects of DoD contracting.
- The accounting and contract close-out communities use their own data architectures to track contract finances. The Department of the Treasury is also involved in final disbursement of funds and has data architectures to track that process.

Each of these broadly defined data architectures contains a variety of data elements. For example, the top-level data architecture used for public reporting of contract awards has roughly 200 data elements in 14 subcategories. These elements include unique transaction identification numbers, dates of contract signing, dollar obligations, agencies, legislative mandates, and many other data elements.[24]

To some extent, mismatches between different architectures may be inevitable. When translating mission requirements into programs, for example, changing technologies and external dynamics may require that individual program subcategories be reorganized; however, minimizing the frequency and

[23] The term *programming community* in this context refers to the resource managers and other personnel who specialize in translating technical warfighting requirements into specific acquisition programs.
[24] "FPDS-NG Data Dictionary" (Federal Procurement Data System—Next Generation documentation), GSA, accessed July 18, 2018, https://fpds.gov/wiki/index.php/V1.5_FPDS-NG_Data_Dictionary.

scope of these reorganizations is important to ensure that communication across different functional communities does not require an excessive amount of translator middlemen.

History

The data architectures of the modern acquisition system date back at least to the mid-1900s. In many cases they evolved in iterative, organic ways that make it difficult to pin their development to specific years.

Much of the modern budgeting data architecture can be traced to the National Security Act of 1947 and subsequent amendments. It empowered the Secretary of Defense to,

> *Supervise and coordinate the preparation of the budget estimates of the departments and agencies comprising the National Military Establishment; formulate and determine the budget estimates for submittal to the Bureau of the Budget; and supervise the budget programs of such departments and agencies under the applicable appropriation Act.*[25]

An amending law in 1949 established the office of the DoD Comptroller and directed the individual holding this position to "establish uniform terminologies, classifications, and procedures" in matters related to "budgetary and fiscal functions as may be required to carry out the powers conferred upon the Secretary of Defense."[26]

The data architecture that underpins the defense budget was highly unstructured for most of U.S. history. In appropriations laws from the early 1900s, congressional appropriations were enacted at regular intervals throughout the year as needed. Funding categories were nonstandardized and ad hoc, introduced based largely on congressional interest.[27] In many cases, individual laws were enacted to provide funding for specific projects, pensions, or people.[28]

After the 1949 legislation, however, budget estimates began to adopt a format roughly identical to that used today. The FY 1953 defense appropriations act laid out a now-familiar data architecture for appropriations accounts. To use the Army accounts as an example, accounts included

- Military Personnel, Army;
- Maintenance and Operations, Army;

[25] Section 202(a)(4) of the National Security Act of 1947, Pub. L. No. 80-253 (1947). The Bureau of the Budget was the predecessor to the modern-day Office of Management and Budget.
[26] Section 11 of the National Security Act Amendments of 1949, Pub. L. No. 81-216 (1949).
[27] For example, see An Act Making appropriations to supply urgent deficiencies in appropriations for the fiscal year nineteen hundred and ten, and for other purposes, Pub. L. No. 61-62 (1910). The law included three Navy appropriations: $300,000 for dredging an entrance channel at Pearl Harbor, HI; $48,136.46 for repair of the Mare Island, CA, shipwright's shop; and $10,000 for heating and lighting the men's band quarters at the U.S. Naval Academy.
[28] Virtually all legislation enacted today takes the form of public law, but Congress used to enact dozens or even hundreds of private laws per year. These frequently took the form of "An Act For the relief of" or "An Act Granting a pension to" individuals. As an example, a U.S. government mail carrier allegedly stole $208.44 out of a letter intended for Mr. Jacob Pickens of Neosho, Missouri. Congress enacted a law in 1906 reimbursing Mr. Pickens via funding from the Treasury. See Private Law 59-1526 (Chap. 1628, "An Act For the relief of Jacob Pickens"), enacted April 14, 1906.

- Procurement and Production, Army; and
- Research and Development, Army.[29]

Within each of these accounts are more detailed budget line items that lay out in detail the intended expenditures for each account.

The data architecture behind contract awards dates back at least to the mid-1970s, when the Federal Procurement Data System Committee laid out a standardized set of data elements applicable to DoD and major civilian agencies.[30] The data architecture the committee built was used as the basis for the Federal Procurement Data System (FPDS), evolved over the course of subsequent decades, and continues to be used and modified in FPDS's successor IT system as of 2018.

The modern data architecture behind DoD's contract accounting systems can be traced back at least as far as the 1950s, when the Mechanization of Contract Administration Services system was developed. The system was still in use as of 2018, supporting the business processes for about $1.6 trillion in contract obligations and entitlements.[31] These are some of the most prominent and well-known data architectures that form the backbone of acquisition and financial data collection for executive agencies. Many other data architectures have gradually developed in response to various organizational needs.[32]

These data architectures largely evolved organically over time, independent of one another. They have been modified over the course of multiple generations by executive agency officials, business process managers, and IT system developers. Laws and regulations are sometimes written with a policy objective in mind but without substantial consideration for the reorganization of data architectures required for implementation. Private-sector companies rarely build commercial off-the-shelf enterprise resource planning software to comply with U.S. executive agency rules, meaning that customized systems must frequently be built to convert commercial data architectures into federal government-compliant architectures. The end result is a system in which relatively few data architectures are purpose-built to be compatible with each other.

Below are several examples of specific data architectures that are used in the DoD acquisition system, as well as examples of incompatibilities.

Requirements

Joint Capability Areas (JCAs) are one of the predominant data architectures used by the requirements community in DoD. JCAs are laid out in the Joint Capabilities Integration and Development System

[29] From Department of Defense Appropriations Act, 1953, Pub. L. No. 82-488 (1952). For comparison with earlier appropriations law data architecture, see Fourth Supplemental Appropriation Act, 1951, Pub. L. No. 81-43 (1951).
[30] GAO, *The Federal Procurement Data System—Making It Work Better,* April 18, 1980, accessed July 16, 2018, https://www.gao.gov/assets/130/129310.pdf. Also see Section 6(d)(5) of the Office of Federal Procurement Policy Act, Pub. L. No. 93-400 (1974).
[31] Discussion between Chairman Jason Chaffetz and DoD CIO Terry Halvorsen during testimony before House Committee on Oversight and Government Reform, *Federal Agencies' Reliance on Outdated and Unsupported Information Technology: A Ticking Time Bomb,* May 25, 2016, 83, accessed July 16, 2018, https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg23644/pdf/CHRG-114hhrg23644.pdf.
[32] See, for instance, the Product and Service Code (PSC) system, which is used for policy purposes to determine whether an acquisition is a *product* or *service*. The PSC data architecture is jointly built by DoD, GSA, and the NSF. Also see the North American Industry Classification System (NAICS) codes and SBA Small Business Size Standards, which are used to determine whether a potential vendor is or is not a small business. NAICS codes are built by NAFTA member country agencies.

manual, which provides examples of each category.[33] They are described as collections of attributes and include categories such as force support attributes, battlespace awareness attributes, and force application attributes.[34] These categories of attributes do not match the data architectures used among the offices that develop budget requests to send to Congress. Indeed, the attributes used by the requirements development community do not match any data architectures used by any community for the vast majority of the acquisition process. Arguably, the only matching data architectures are those used to categorize solutions available to warfighters when carrying out missions.

Budget Requests

When DoD and other agencies submit budgets to Congress each year, they must convert the data architecture of requirements into the data architecture of the President's Budget Request (PBR). The PBR's data architecture is largely mapped to the architectures of congressional regular appropriations bills.[35] PBR documents for DoD contain a top-level data architecture with individual line items representing appropriations accounts. Within these accounts are data elements called budget activities. Within the budget activity data elements are further subelements called budget subactivities, with additional layers of lower-level data elements.[36] These data layers largely map to those presented in defense authorization bills and regular appropriations bill conference report joint explanatory statements. They do not directly map to most of the data architecture used by the requirements community to define what the military needs to accomplish its missions.

Appropriations

Appropriations data architecture consists of several accounts that appear in roughly the same format for each annual bill. These accounts contain dollar amounts that agencies are to spend, as well as constraints on how they are to spend them. The amounts defined in appropriations accounts legally bind agencies to spend the amounts indicated, with some exceptions for flexibility.[37] Within each of the top-level appropriations accounts are lower-level data elements that appear in appropriations bill conference report joint explanatory statements. These lower-level data elements describe how much agencies are expected to spend on each line item indicated. They are not legally binding to the same degree as appropriations accounts.

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[33] DoD, *Manual for the Operation of the Joint Capabilities Integration and Development System (JCIDS),* Appendix A: JCA Specific Examples, modified December 18, 2015, accessed November 8, 2018, http://www.acqnotes.com/wp-content/uploads/2014/09/Manual-for-the-Operationsof-the-Joint-Capabilities-Integration-and-Development-System-JCIDS-18-Dec-2015.pdf.

[34] "Joint Capability Area (JCA)," Defense Acquisition Glossary, accessed January 29, 2018, https://www.dau.mil/glossary/pages/2104.aspx.

[35] *Regular appropriation* is a term of art in fiscal law, referring to 12 specific bills per year that overlap with appropriations subcommittee jurisdiction. The defense appropriations bill is one of these 12. Regular appropriations bills are distinct from other types of congressional appropriations laws, such as continuing resolutions and supplemental appropriations. Unlike regular appropriations bills, these bills do not always have a uniform, standardized, recurring data architecture.

[36] For example, see FY 2019 DoD budget request for the Procurement appropriations accounts. Within the Aircraft Procurement, Army appropriations account are the budget activities Aircraft, Modification of Aircraft, Support Equipment and Facilities, and Undistributed. Within the Aircraft budget activity are budget subactivities Rotary and Fixed Wing. Within the Rotary budget subactivity are additional data element layers indicating type of aircraft and funding approach.

[37] For example, DoD reprogramming under the general transfer authority and DoD 7000.14-R Financial Management Regulation, Volume 3, Chapter 6.

Budget Allocations and Allotments

Once Congress approves funding, the data architectures used by agency comptrollers closely resemble those used by the budget request and appropriations communities. Distribution of funding throughout DoD is based on appropriations accounts at the congressional level, apportionment at the OMB level, allocation at the DoD Comptroller level, suballocation at the Military Service comptroller level, allotment at the major commands level, and suballotment at the program management level.[38] These data architectures do not precisely map to those used by congressional appropriators. Data elements within a Military Service's budget structure originate in accounts from multiple regular appropriations bills.[39]

Program Management

The data structure of acquisition program management does not conform to those of budgeting and appropriations. A program manager reports to a program executive officer, who ultimately reports to a service acquisition executive and the Office of the Secretary of Defense. Virtually all of these tiers of command must commit funds from multiple appropriations accounts to do their job. There is substantial data architecture misalignment between the budgeting community and the program management community.

Contract Awards

Several unstructured data architectures are used to describe various phases of the contracting process prior to award. For example, the contract solicitations posted to Federal Business Opportunities (FBO) generally consist of a few standardized data elements and several text documents or spreadsheets describing solicitation requirements. The financial data architecture of government contracts is largely based on contract line-item numbers (CLINs). CLINs describe what is being purchased as well as the appropriations identity and fiscal year.[40] It is common for individual contracts to use CLINs from multiple appropriations accounts to meet multiple technical requirements. There is data architecture misalignment between the contracting and requirements communities, as well as between the contracting and budgeting communities.

When a contract award is made, there is a standardized data architecture in place for reporting the award. Agencies collect data related to the award, and some 200 of these standardized data elements are in most cases reported publicly.[41] This standardized data structure is largely built based on legal and regulatory requirements, and bears little resemblance to data architectures used by the requirements community, budgeting and appropriations community, or program management chains of command.

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[38] As they apply to defense acquisition, these processes are laid out in DoD 7000.14-R Financial Management Regulation, Volume 14, Chapter 1. For a simplified overview of these processes, see William Fast, "Budget Execution 101," presentation at Defense Acquisition University, June 3, 2010.

[39] Congress enacts about 12 regular appropriations bills each year. The majority of military department budgets come from the *Department of Defense* appropriations bill. Some also comes from the *Military Construction, Veterans Affairs, and Related Agencies* bill.

[40] See FAR Subpart 4.10 for detailed CLIN requirements.

[41] Contract award data publicly available via Federal Procurement Data System or USA Spending.

Data Architecture Mismatch Effects

When data architectures are not aligned across functional communities, those functional communities find it much more difficult to communicate with one another. This situation is partly because of the lack of a shared lexicon. It is also partly because more complicated data architectures necessitate involving more stakeholders in decision making. This leads to deep inefficiencies in the acquisition process. As an example, a military department might determine that instead of a hardware IT solution, a mission would be more effectively accomplished via a services contract solution accompanied by changes to internal business processes. If the hardware solution is already a program of record in the budget, this transition process will take years. The Military Service would have to reorganize its budget request, wait for Congress to appropriate funding, reorganize or close down the program office, and get the contracting community to obligate the funding on a new contract. If data architectures throughout the acquisition system were uniformly aligned to missions, the department would simply be able to reallocate the already-appropriated funding from the hardware solution to a service and business process solution. It would eliminate the need for much of the waiting that occurs throughout this process.

Mismatched data architectures also impede oversight by limiting transparency. When different communities speak different data languages, it can be difficult for even a willing executive agency to provide understandable information to an inspector general, auditor, or congressional committee. For example, data on contract transactions is collected and reported in a way that is out of sync with both the needs being met and the budgeting process. Determining the appropriations account that funded a given transaction is challenging at best.

It can also be extremely difficult, using standardized contract transaction data, to determine what problem a contract was intended to solve. This situation is largely because the data architecture of product, service, or industry codes does not provide meaningful detail.[42] This situation also limits agencies' ability to engage in strategic acquisition planning.

In addition to misalignment across functional communities, data architecture misalignment across jurisdictions can reduce efficiency. GAO noted in 2018 that "DFAS, DLA, and WHS differ in how they measure and report their performance data, which results in inconsistent information and limits customers' ability to make informed choices about selecting a human resources service provider to meet their needs."[43] These and many other architectural issues prevent oversight officials and strategic planners from understanding of the inner workings of acquisition and financial data.

Problems with Data System Consolidation

Consolidating different data systems may be part of a solution, because it can force people to adopt uniform data architectures across different datasets. In too many cases, however, data system consolidation appears to simply take the form of new, more aesthetically pleasing interfaces between

[42] The data architecture used for identifying contract product and service categories is the Product and Service Code (PSC) system. For some areas PSCs can be fairly detailed, such as PSC Q501, "medical services – anesthesiology." For other PSCs, the lack of detail makes them effectively meaningless for understanding why something is being purchased. For example, PSC 7030, "information technology – software," can encompass anything from logistics to human resources to health care.

[43] GAO, *Defense Management: DOD Needs to Address Inefficiencies and Implement Reform across Its Defense Agencies and DOD Field Activities, GAO-18-592*, September 2018, 19, accessed September 13, 2018, https://www.gao.gov/assets/700/694333.pdf.

existing systems. This approach generally leads to a more uniform top-level data architecture. The original data architectures, however, continue to exist and require maintenance and updates. Maintaining these architectures is made more difficult because the popularity of top-level architecture means there are fewer people who understand the underlying architectures well enough to manage the software systems in which the architectures live. In a best-case scenario, this situation may lock DoD into paying economic rents to system integrators for decades to come. In a worst-case scenario, it may increase cybersecurity risks due to the limited number of in-house personnel who are knowledgeable enough to address problems as they arise.

Other Issues: Data Architecture Ownership

Ownership is an important issue in acquisition and financial data management. In the past, robust debates have centered around whether data architectures should be government-owned or privately-owned. Common complaints about government-owned architectures involve costs associated with maintenance and documentation, as well as the need to keep systems updated to reflect the real world they are meant to represent.

Adopting privately owned data architectures and incorporating them into government systems may in some cases provide better-quality processes in the short term. This approach, however, can effectively lock the government into an arrangement under which it must pay in perpetuity for continued access to a monopoly translator service between two data systems. When sufficiently integrated into government processes, such a translation service can be difficult to replace with a government-controlled alternative.

Case Study:
Government Ownership of Company Identifier Data Architecture

Around 1960, DoD began using a data architecture called the H4/H8 system for tracking the corporate identities of contractors in North Atlantic Treaty Organization countries.[44] Essentially, the system allowed people to connect the data on a contract with data indicating a company's identity and ownership.

In 1975, a congressionally established committee identified several problems with the H4/H8 system. Among them was the need for the government to publish data manuals and maintain up-to-date records of corporate name changes, mergers, and acquisitions.[45]

The committee noted that a private company might be better able to provide high-quality, up-to-date information on these changes to corporate identity. It expressed concerns about "whether it is appropriate to have a sole source contract" and "what happens if the contractor goes out of business."[46] The committee and DoD stakeholders at the time also noted higher costs associated with a private sector solution. GAO analysts assessed that potential improvements to analytical capabilities did not justify transferring from a government-controlled to a privately-owned data architecture for tracking corporate identifiers.[47]

[44] Based on GAO statement that in 1975, DoD "had been using its own system for 16 years." GAO, *The Federal Procurement Data System—Making It Work Better,* April 18, 1980, 17, accessed November 8, 2018, https://www.gao.gov/assets/130/129310.pdf.
[45] GAO, *The Federal Procurement Data System—Making It Work Better,* April 18, 1980, 16, accessed November 8, 2018, https://www.gao.gov/assets/130/129310.pdf.
[46] Ibid.
[47] Ibid, iii.

Case Study:
Government Ownership of Company Identifier Data Architecture

Despite these concerns, the committee recommended in 1975 that the government adopt the proprietary data architecture.[48] In the late 1990s, the proprietary system was formally incorporated into the Federal Acquisition Regulation.

In 2012, GAO published another report on the issue of corporate identifier data architecture. The report noted that in the span of a decade, contract costs had increased roughly 1,800 percent.[49] GAO attributed this increase in part to an "effective monopoly" that "contributed to higher costs."[50] Switching to a government-owned system would resolve this issue, but for technical reasons, this was not an option in the near term. By the time of GAO's report, the privately-owned data architecture had "become an integral component in how government data systems operate."[51]

Other Issues: Black Box Data Elements

In recent years, a cottage industry has arisen wherein analytics companies sell their analyses of government data to the government. There is nothing inherently wrong with this model. In many cases, analytics firms may provide insights, recommendations, or dashboard visualizations that add value to government operations.

In at least some cases, however, these companies' products essentially constitute new data architectures in their own right. Several firms perform automated analyses of existing data elements in federal contract award and related data. Through proprietary computer code—an opaque black box—these companies create new, proprietary data elements.

These new data elements may, in some cases, serve as highly accurate and helpful tools to guide senior leaders' decision making. In other cases, they may be inaccurate and highly misleading. Despite being built from constituent government data, there is rarely any transparent mechanism to determine which is the case. To provide such a mechanism would be to illustrate to the government how the data elements are built, eliminating the need to keep paying the contractor.

These proprietary data elements may ingrain themselves into an office's processes to the extent that the office becomes dependent on the contractor. In these cases, a de facto monopoly arrangement can arise because the contractor is the only company with access to the computer code used to make new data elements out of the government data.

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[48] Ibid, 16.
[49] GAO, *Government Is Analyzing Alternatives for Contractor Identification Numbers,* June 12, 2012, accessed July 16, 2018, https://www.gao.gov/assets/600/591551.pdf. The GAO reported that contract costs increased from $1 million per year in 2002 to $19 million per year in 2012.
[50] Ibid, 4.
[51] Ibid.

Case Study:
Black-Box Data Elements

In recent years, AI has become a prominent buzzword in Washington, DC, policy circles, leading to increased interest in DoD expenditures on AI-related services and solutions. There is no AI description in the product, service, or industry coding systems used by the government for tracking contract award data. Some policymakers have expressed a desire in recent years for data on government procurement spending that might be considered AI-related.

At least one company provides an answer to this question. The company runs automated analysis on data from FPDS and other sources to determine whether individual transactions are likely to be AI-related or not. This analysis produces aggregate numbers for the whole U.S. government, which are displayed in a dashboard interface that can be filtered and customized by the user.[52]

The resulting data may or may not accurately convey whether a transaction is AI-related, but one problem is that there is no way to know for sure. The data are essentially generated via guesswork. The guesswork is performed via computer code written by well informed people, but it is guesswork nonetheless.

Possible inaccuracy is only one problem involved in this process. The other is that due to the lack of methodological transparency, DoD has no way to generate the new data elements on its own. If senior leaders begin to expect the regular reporting of those data elements, DoD will be dependent on a monopoly vendor to provide it.

There is a way to address both the accuracy problem and the monopoly problem: Have people at the working-level collect and report the desired data elements. It would cost additional time and money, and in some cases, it may require involving non-DoD stakeholders—for instance, GSA agreeing to add new functions to existing IT systems. Some data collection efforts would likely be cost-prohibitive. For this reason, policymakers would need to be willing to engage in honest, good-faith discussions about which types of data collection fail to produce a sufficiently high return on investment.

None of these issues suggest that data analytics firms do not add value to DoD acquisition efficiency and oversight. There is an enormous difference, however, between analyzing data and maintaining key parts of a system's data architecture. A firm that adds value by analyzing data can presumably be replaced with another, more competitive vendor. A firm that owns the sole means of creating certain data elements is effectively a monopoly.

Discussion

The ecosystem of federal acquisition data is enormous, but it suffers from an endemic lack of standardization. This situation leads to inefficient government operations, poor communication, and less effective acquisition systems. There are two ways to address this problem—one easier and shorter-term, the other more difficult but ultimately better in the long run. Recognizing that the best solution may be too expensive and would take too long at this time, a middle approach to improve the sharing of data would offer near-term benefits.

The easy solution is to add translators as needed to convert the data architecture from one IT system into the architecture of another IT system. This approach is currently embraced by DoD and the rest of the federal government. A prominent example is USA Spending, a Treasury-run website that converts several nonstandardized data architectures into a common architecture.

[52] Data analytics firm, presentation to Section 809 Panel, mid-2018.

The upside of this approach is that problems can be addressed on an ad hoc basis, and problem-solvers can build solutions without first obtaining buy-in from senior decision-makers and data system owners. The downside is that it essentially involves plastering additional interfaces on top of legacy systems. This approach adds a new layer of data, but does not actually streamline the underlying architectures of data collection systems. For this reason, it retains the added costs and inefficiencies associated with having too many translators involved in the process.

The more difficult solution would involve consolidating existing data architectures into a single common architecture and getting all stakeholders to agree to its adoption. There would be substantial technical, bureaucratic, and political challenges.

- **Technical difficulties:** No single person knows enough about the governmentwide acquisition and financial data to singlehandedly redesign the entire architecture. A high-quality architectural redesign would have to involve working-level people with data science expertise in requirements, budget planning, appropriations, resource management, contracting, and other fields. To maximize interoperability across functional communities, it would be preferable to adopt existing commercial standards to the maximum extent practicable.

- **Bureaucratic difficulties:** Involving so many stakeholders would create a danger of stagnant committee decision making, universal veto authority, and scope creep. There might also be a danger of *not invented here* syndrome impeding adoption of already-existing data architectures—for instance, those borrowed from National Institute of Standards and Technology, industry organizations, multilateral institutions, and the open-source developer and data science community.

- **Political difficulties:** In many organizations that would be affected by a redesign of defense acquisition data architecture—for instance, congressional committees, OMB, GSA, and private companies—no one reports to the Secretary of Defense. For this reason, it would be critical to obtain advance buy-in from these stakeholders if modifying data architectures with jurisdictional overlap.

Costs and Benefits

Reorganizing portions of DoD's acquisition data architecture would cost substantial time, effort, and money. There are also substantial costs associated with the status quo. A notional breakdown of the major costs associated with the status quo approach would include the following:

- Continued inefficiencies in DoD operations at the working level.

- Poor communication across functional communities due to widespread misunderstandings of the way other offices do business.

- Labor immobility leading to both inflated salaries and a frequent lack of the right type of highly specialized data science expertise.

- Continued investment in software maintenance to ensure continued accuracy of data translation.

Maintenance of legacy IT systems would be one of the most expensive costs associated with maintaining the status quo. Software systems used in acquisition and finance frequently must communicate with one or many other software systems. If the data structure used in one system is modified, other systems must be modified to accommodate the change. Changing one piece of software or business process can in some cases require dozens of changes to other systems—building new translators to allow for intersystem communication. This can generate enormous costs.

It is not possible to calculate with certainty the percentage of IT upgrades dedicated to building new data translation functions into existing systems. GAO analyses suggest the total amount invested annually in IT modernization is close to $75 billion.[53] If only one-tenth of this money went toward building data translation features, costs would stretch into the tens of billions of dollars over just a few years.

Major costs associated with the reorganization of data architectures would include the following:

- The direct dollar costs of staffing and researching the modifications to be made.
- Efficiency and implementation costs of business process reengineering.
- Costs associated with redesigning existing IT systems to be compliant with new standards.

Ideally, uniform data architectures would use existing commercial standards. They would be designed in such a way that preexisting, customized, business software could be replaced with simple software based largely on code in the public domain. If a data standardization effort were to abide by these principles, the costs of such an effort could in many cases be much lower than the costs of maintaining the status quo.

Short-Term Solutions Using Proprietary Interfaces

Many companies now offer services wherein they download bulk federal government data, add customized data elements to it, and sell visualizations using those data elements back to the government. This practice may be an acceptable short-term approach in some cases. If policymakers come to rely on visualization tools that simply collect from preexisting systems, there is a danger that it will gradually degrade the political incentives to reform the underlying data architecture. Without this kind of reform, functional communities will continue to lack architectural alignment and institutional inefficiencies will keep increasing.

Conclusions

If acquisition financial data architecture were to be comprehensively reformed, senior U.S. government leaders would need to collectively commit to standardizing and consolidating existing architectures. The data architectures used by the many functional communities would need to be aligned to portfolios of mission capabilities.

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[53] Based on GAO's FY 2018 governmentwide IT spending estimate of $96 billion and analysis that the federal government spends "more than 75 percent" of IT investment on operation and maintenance. GAO, *Information Technology: Federal Agencies Need to Address Aging Legacy Systems, GAO-16-696T,* May 25, 2016, accessed August 17, 2018, https://www.gao.gov/assets/680/677454.pdf. GAO, *Information Technology: Further Implementation of Recommendations Is Needed to Better Manage Acquisitions and Operations, GAO-18-460T,* March 14, 2018, accessed August 17, 2018, https://www.gao.gov/assets/700/690655.pdf.

This process would be technically challenging and politically contentious. It would affect the way business is done in congressional committees, OMB, GSA, and other organizations where no one reports to the Secretary of Defense.

Regardless of the challenges, such a reform would have to occur eventually to allow for meaningful comparison of acquisition and financial data analysis across functional communities. Without common architectures, a data analyst from the contracting community will not be able to reliably trace a program back to the budgeting data from which it was funded, let alone the requirements data from which the program originated.

One option is to continue spending billions of dollars building interfaces to translate between IT systems, or providing additional education and training to data analysts. Continuing to speak several different data *languages* across communities, however, will mean data analysis continues to be untrustworthy and inefficient because of the need to include various human and machine translators in the process. Many of the machine translators are obscure IT systems to which virtually no one pays attention until they break or produce obvious errors. This approach leads to unnecessary delay, dysfunction, and maintenance costs. Many of the human translators are the only individuals in their workplaces with certain skill sets, meaning inefficiency in the form of backlogs, wait times, and potential labor market distortions.

A long-term way to address these problems would be for senior-level stakeholders to appoint experts; assign these experts to build a uniform, top-level data architecture; and commit in advance to implementing that new architecture throughout the government's acquisition and financial system, which would likely take decades.

Case Study:
Trade Data Standardization[54]

In the mid-1800s, governments used a patchwork of different categorization systems to apply tariffs and collect statistics on goods being traded internationally. A trader importing American wheat into France, for instance, might have his product defined and assessed using a completely different framework from that applied to the same wheat being imported into Spain. This lack of standardization across jurisdictions led to confusion, excess complexity, and higher transaction costs in the international trade community.

These problems were acute enough that beginning in 1853, a global community of statisticians and economists began to meet regularly to develop a uniform tariff data architecture. Despite holding congresses on the matter every few years, it took decades before participants made even small headway on real-world implementation. Early efforts to create a standardized tariff data architecture included the Austria–Hungary Tariff of 1882 and the 33-country Brussels Nomenclature of 1913.

[54] Historical details on 1882 Austria-Hungary tariff, 1913 Brussels Nomenclature, and 1931 League of Nations tariff data architecture from Howard L. Friedenberg, *The Development of a Uniform International Tariff Nomenclature,* published by U.S. International Trade Commission (then U.S. Tariff Commission), April 1968, accessed September 7, 2018, https://www.usitc.gov/publications/tariff_affairs/pub237.pdf. Other historical information from World Customs Organization, *The Harmonized System: A Universal Language for International Trade,* 2018, accessed September 7, 2018, http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/activities-and-programmes/30-years-hs/hs-compendium-2018_v4_june-2018.pdf.

Case Study:
Trade Data Standardization[54]

In 1931, under the League of Nations, the first widely-accepted tariff data architecture was published. The vast majority of countries today, including the United States, continue to apply tariffs and negotiate trade agreements using a data architecture largely based on that of 1931. Between initial conceptual development and initial implementation, it took nearly a century for the reformed data architecture to come into effect.

The chief lesson of this historical case study is that data architecture standardization can take a very long time. In the case of tariff data, it took decades to reach agreement across jurisdictional communities.

A uniform acquisition financial data architecture would not only stretch across jurisdictional communities; it would also stretch across functional communities—requirements, budgeting, program management, contracting, and others. Both these factors—jurisdiction and functional area—would increase the total time, complexity, and political capital that would be necessary for such an effort to be successful.

In the short term, a more feasible alternative to comprehensively redesigning data architectures would be to iteratively improve DoD data management by improving business processes and eliminating IT interfaces. The CMO would be the obvious authority to lead such an effort. Implementation of DoD data management practices would be largely a technical endeavor, not a policy one. The CMO should be tasked with identifying redundant business processes, process nodes, and IT systems for elimination.

Implementation

Legislative Branch

- Direct DoD to identify and consolidate or eliminate competing data architectures within the defense acquisition and financial systems.

Executive Branch

- There are no regulatory changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 9.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

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Section 9
Acquisition Data

Implementation Details

Recommendation 88

RECOMMENDED REGULATORY REVISIONS

FY 2018 NDAA CMO Implementation Memorandum

The following draft memorandum serves as a suggested template for implementing Section 809 Panel Volume 3, Recommendation 88 on using existing defense business system open-data requirements to improve strategic decision making on acquisition and workforce issues.

This draft document may be out of date by the time DoD begins the process of official memorandum issuance, and working level personnel may determine that some details are not practicable. For these reasons, the DoD CMO or other issuing authority is encouraged to modify the text as needed.

[DATE]

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEFS OF THE MILITARY SERVICES
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
DIRECTOR OF NET ASSESSMENT
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Guidance on Defense Management Data Transparency Provisions under Public Law 115-91, National Defense Authorization Act for Fiscal Year 2018

REFERENCES: See Enclosure 1 (Key Sources of Defense Management Data)

Section 911, Section 912, and Section 913 of Public Law (P.L.) 115-91, the National Defense Authorization Act (NDAA) for Fiscal Year 2018, were enacted into law December 12, 2017. These NDAA sections require the establishment of data policy on defense business systems; require increased transparency of defense management data; and require the establishment of additional data analysis activities in support of improved acquisition program outcomes.

Defense management data greatly enhances our ability to efficiently allocate resources and plan appropriately for future challenges. Too often, however, management data is stovepiped within specific organizations and systems, unavailable to the Department of Defense workforce more broadly.

Organizations that collect large amounts of management data are expected, to the maximum extent practicable, to

(1) Make data available, by default, via application program interfaces (APIs) which may be accessed by personnel throughout the rest of the Department of Defense and the military departments;
(2) Make data available in formats that conform to departmentwide standards; and
(3) Familiarize themselves with the major sources of defense management data, including those data sources that fall outside of their area of functional specialization

(for example, see ENCLOSURE 1 for a list of key defense acquisition and financial management data sources).

These data sources should be used for strategic decision-making, including in the areas of both acquisition and workforce management. For the purpose of improving strategic data analytics capabilities, agencies are encouraged to make use of congressionally approved statutory authorities that allow for more streamlined hiring of data science professionals. These authorities may include those under 10 U.S.C. §1599h, 10 U.S.C. §1701 (see notes), and 10 U.S.C. Chapter 81 (see front matter).

In implementing this open-data requirement, individual organizations that manage IT systems are responsible for building standardized APIs through which outside organizations may access their data. In consultation with the CIO and CMO, organizations are also responsible for ensuring that data formats meet common standards defined at the OSD level.

This guidance is effective immediately. Further guidance may be issued as necessary. The point of contact (POC) for the Chief Management Officer is **[CONTACT PERSON]** at **[CONTACT PHONE NUMBER]**.

ENCLOSURE 1—Key Sources of Defense Acquisition Management Data

[DATE OF LAST UPDATE]

Data Source	Availability	Link	Broad Data Description
Federal Business Opportunities (FBO)	Public	https://www.fbo.gov	Largely unstructured data on contract solicitations
Federal Procurement Data System—Next Generation (FPDS-NG)	Public	https://www.fpds.gov	Contract award data available by individual contract action
Defense Acquisition Management Information Retrieval (DAMIR)	Restricted	https://ebiz.acq.osd.mil/damir	Acquisition program baselines, selected acquisition reports for major acquisition programs
Acquisition Information Repository (AIR)	Restricted	https://www.dodtechipedia.mil/AIR	Final approved acquisition documents in a centralized searchable repository
System for Award Management (SAM)	Public	http://sam.gov	Data on companies that are registered to do business with the federal government
USA Spending	Public	https://www.usaspending.gov	Data aggregation and visualization tool with governmentwide (including DoD) budget and contract award data
Federal Funding Accountability and Transparency Act (FFATA) Subaward Reporting System (FSRS)	Public	https://www.fsrs.gov	Contractor spending with subcontractors
Electronic Subcontracting Reporting System (eSRS)	Public	https://www.esrs.gov	Contractor subcontracting dollar allocations
OUSD(C) Budget Materials	Public	https://comptroller.defense.gov/Budget-Materials	Appropriated funding data by budget line item/program element
OUSD(C) Budget Execution	Public	https://comptroller.defense.gov/Budget-Execution	Data on approved reprogramming actions, including DD 1416 below-threshold reprogramming actions and related topics
Cost Assessment Data Enterprise (CADE)	Restricted	http://cade.osd.mil	Acquisition program cost data
Procurement Business Intelligence Service (PBIS)	Restricted	https://reports-osd.altess.army.mil/analytics	Acquisition data warehouse with dashboard functions

Earned Value Management Central Repository (EVM-CR)	Restricted	http://cade.osd.mil/tools/evm-tools	PARCA acquisition data on earned value management and related topics
Knowledge Management/Decision Support System (KM/DS)	Restricted		JCS data on acquisition program requirements, capabilities, and related topics
Unified Research and Engineering Database (URED)	Restricted		Data on R&D efforts
Defense Automated Cost Information Management System (DACIMS)	Restricted	https://www.cape.osd.mil	Acquisition program cost and schedule data
(DRDW)	Restricted	https://www.cape.osd.mil	Future Years Defense Program (FYDP) and Program Objective Memoranda (POM) data
(MOCAS)	Restricted		DFAS and DCMA data on contract funding and related topics
(DDRS)	Restricted		DFAS financial and accounting data
[LIST ADDITIONAL KEY DATA SOURCES AS NEEDED]			

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Recommendation 89

RECOMMENDED REPORT LANGUAGE

SEC.___. IMPLEMENTATION OF RECOMMENDATIONS OF THE SECTION 809 PANEL RELATING TO DATA ARCHITECTURE CONSOLIDATION.

This section would require the implementation of the data architecture consolidation recommendations provided by the advisory panel established under section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92). Under this section, the Department of Defense Chief Management Officer and other key stakeholders would be directed to consolidate or eliminate the following: (A) information technology systems that serve primarily to convert data from one format into another; (B) offices that serve primarily to move information from one office to a different office; and (C) personnel functions that primarily involve converting information from one format to another or moving it from one location to another.

The committee recognizes that the Department may in some cases need to incorporate mutually incompatible data architectures into one another. In these cases, the committee expects that the data architectures that predominate would be those that are already most widely-used in commercial industry, unless a compelling reason exists for using non-commercial standards.

The committee notes that the primary purpose of this section is intended to limit the proliferation of different data architectures throughout the Department's financial and acquisition systems. The committee is aware that these different data architectures have led to a number of inefficiencies in Department of Defense business operations. The committee notes that, collectively, these inefficiencies contribute to poor inter-office communication, entrenchment of institutional siloes, lower adaptability of labor, and damaged workforce morale.

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This paper's recommendations relating to data architecture will be important to improving the defense acquisition process, and they should therefore be implemented as a matter of law. An implementation requirement with the force of law will be important for driving the timely implementation of these recommendations within the Department of Defense.

Attempting to write into statute the precise recommendations would entail a level of technical detail not typically seen in statute. This would carry the attendant risk of both inadvertent error and of inflexibility in addressing unforeseen future issues.

In section 868 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), Congress required the Secretary of Defense to implement the recommendations of the final report of the Defense Science Board task force on the design and acquisition of software for defense systems. This is an appropriate model for Congress to use in directing implementation of data architecture recommendations as well. Draft legislative language is provided accordingly.

———

**(Based on Section 868 of the FY2019 NDAA,
P. L. 115-232, enacted Aug 13, 2018)**

SEC. __. IMPLEMENTATION OF RECOMMENDATIONS OF THE SECTION 809 PANEL RELATING TO DATA ARCHITECTURE CONSOLIDATION.

(a) IMPLEMENTATION REQUIRED.—

(1) IN GENERAL.—The Secretary of Defense shall, except as provided in subsection (b), implement the data architecture consolidation recommendation made as part of the report of the Section 809 Panel described in paragraph (2). This implementation process shall be undertaken with the intent of consolidating or eliminating—

(A) information technology systems that serve primarily to convert data from one format into another;

(B) offices that serve primarily to move information from one office to a different office; and

(C) personnel functions that primarily involve converting information from one format to another or moving it from one location to another.

(2) COVERED RECOMMENDATIONS.—The recommendation referred to in paragraph (1) is the recommendation designated as Recommendation No. 89 in Volume 3 of the Report of the Section 809 Panel, dated January 15, 2019.

(b) EXCEPTIONS.—

(1) NONIMPLEMENTATION.—With respect to individual systems, offices, or personnel functions, the Secretary may opt not to implement the recommendation specified in subsection (a) if the Secretary submits to the congressional defense committees a report—

(A) identifying the systems, offices, or personnel functions for which the Secretary has opted not to implement the recommendation; and

(B) providing the reasons for the decision not to implement the recommendation.

(c) IMPLEMENTATION PLANS.—Not later than two years after the date of the enactment of this Act, the Secretary shall submit to the congressional defense committees a report providing—

(1) a summary of systems, offices, or personnel functions for which the recommendation has been implemented; and

(2) a schedule, with specific planned months and years, for future implementation of the recommendation in additional systems, offices, or personnel functions.

(d) SECTION 809 PANEL.—In this section, the term "Section 809 Panel" means the panel established by the Secretary of Defense pursuant to section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), as amended by section 863(d) of

the National Defense Authorization Act for Fiscal Year 2017 (P. L. 114-328) and sections 803(c) and 883 of the National Defense Authorization Act for Fiscal Year 2018 (P. L. 115-91).

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The tools that support the defense acquisition system need to be simple and effective, not burdensome and confusing. Reorganizing Title 10 would help restore agility and simplicity to defense acquisition.

RECOMMENDATION

Rec. 90: Reorganize Title 10 of the U.S. Code to place all of the acquisition provisions in a single part, and update and move acquisition-related note sections into the reorganized acquisition part of Title 10.

Recommendation 90: Reorganize Title 10 of the U.S. Code to place all of the acquisition provisions in a single part, and update and move acquisition-related note sections into the reorganized acquisition part of Title 10.

Problem

Congress, in establishing the Section 809 Panel, directed it to "make any recommendations for the amendment or repeal of such regulations that the panel considers necessary" to streamline defense acquisition. As the panel began its research, it became apparent that restricting its purview to defense acquisition regulations was too narrow. Regulatory implementation is often directed by statutes. Amending, or in some cases repealing, certain defense acquisition statutes is necessary to effectively streamline defense acquisition and provide greater transparency in its processes. Congress acknowledged this situation in subsequent amendments to the Section 809 Panel mandate.

Defense acquisition statutes are codified in Title 10 of the U.S. Code; however, over the years, those statutes have become increasingly disorganized, making it difficult for even the most experienced user to sort through the Code. Acquisition reform has become a perennially popular legislative effort, with Congress enacting no less than 265 acquisition-related provisions in the past three NDAAs. Few people know how to sort through the cluttered Code to find those legislative provisions that often end up as notes within the Code.

The acquisition-related statutes that apply to the rest of the federal government were recently organized and codified in Title 41. No similar effort has been made with regard to Title 10, where the organization of the acquisition-related statutes has become problematic. The work of the Section 809 Panel provides an opportunity to bring those defense acquisition statutes into a cohesive organized structure for the long-term benefit of the acquisition community and those companies doing business with DoD or are seeking to enter the DoD marketplace.

Background

When Title 10 was codified in 1956, the drafters did not anticipate where the growth would take place. Part IV of Subtitle A, Service, Supply, and Procurement, houses most of the acquisition statutes – the house is now full and in disarray. As the Packard Commission noted in 1986:

> *… the legal regime for defense acquisition is today impossibly cumbersome. . . .At operating levels within DOD, it is now virtually impossible to assimilate new legislative or regulatory refinements promptly or effectively. For these reasons we recommend that Congress work with the Administration to recodify Federal laws governing procurement into a single consistent and greatly simplified procurement statute.*[1]

The Section 800 Panel (established pursuant to the National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510) made a similar finding and recommendation in its January 1993 report to Congress, Streamlining Defense Acquisition Laws. Nothing has changed since those findings and recommendations were made. Lasting positive effects of ongoing reform efforts, like those the Section

[1] A Quest for Excellence: Final Report by the President's Commission on Defense Management 55 (June 1986)

809 Panel is recommending throughout its reports, will be limited without a coherent, organized, and transparent structure in which to integrate the resultant legislative changes.

Discussion

Not since the passage of the Armed Services Procurement Act of 1947 have all the provisions governing DoD acquisition been contained within an organized, logical structure. Over the last 60 years, Congress overloaded Part IV of Subtitle A, adding section after section to the Code. Furthermore, Congress has added myriad *note* sections as it enacted long-term or permanent provisions without amending the Code. A *note* is a provision of law from the annual defense authorization acts or other statutes, which for different reasons are not set forth in the Code as numbered sections. Instead, the editors of the U.S. Code set out the *note* following a Code section.

The number of *note* sections has ballooned over time as Congress authorized short-term pilot programs and reporting requirements that all needed homes somewhere within the Code. Some more permanent provisions of law—enacted through the annual defense authorization acts—have also been buried as *note* sections under existing sections of the law.

A miniscule number of specialized attorneys and policy makers inside and outside of DoD understand what these *notes* mean and where they are located. Few attorneys even recognize that the *notes* are indeed law, just like the section of the Code to which they are appended.

In its *Volume 2 Report*, the Section 809 Panel proposed a rational, statutory structure to replace the confusion and clutter resulting from the Code's buried *note* sections and rambling organization. It also recommended repeal of approximately 100 *note* sections that were either obsolete or expired, as well as three Title 10 provisions. The John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. No. 115–232) adopted a large portion of those repeal recommendations. More significantly, the McCain NDAA recognized the panel's reorganization effort, by creating a new Part V within Subtitle A, *General Military Matters*. To provide room for additional provisions in the new Part V, elements of the Code immediately following the current Part IV will be renumbered.

Redesignation is necessary because there is no more room in Subtitle A, evidenced by the proliferation of *note* sections and the invention of a baroque numbering system (e.g., 2366a, 2371b, 2374a, and even 2410s). As discussed in *Volume 2* of the panel's report, *note* sections that should remain on the books will be codified as new Title 10 sections under a logical and intuitive revised chapter structure. The redesignation will provide additional room for Congress to reorganize or consolidate statutes related to other topics of general military application.

The task of restructuring these statutes requires a substantial effort. Though the intent of this project is not to make any substantive changes to the legislative language, it will include breaking up some long sections of the Code into more manageable sections and making technical updates. Another feature of the restructuring is to work toward a final product that, where practicable, will restore much of the parallelism with Title 41, the acquisition statutes applicable to nondefense agencies that existed before Title 41 was codified.

The Section 809 Panel began the restructuring task, and drafted a number of proposed chapters for inclusion in the newly created Part V in Subtitle A of Title 10. These proposed chapters are being

transmitted periodically to the Senate and House Armed Services Committees as well as to DoD. A table of the completed draft chapters (as of December 31, 2018) is included in in the Implementation Details for this section. This table identifies the new proposed section number as well as the original section number for each Title 10 section, and for the note sections, the Title 10 section under which the note originally was located (as well as the public law number). This table is intended to facilitate tracking of the defense acquisition provisions across the old and the new structures. Once the entire project is completed, via enactment in a single or multiple NDAAs, Congress should publish a comprehensive table that identifies the original section numbers and corresponding new section numbers in the new Part V of Title 10. A similar table was published following the reorganization and codification of Title 41 statutes.

In the future, companies that already do business with other federal agencies will encounter a more readable statutory framework when they seek to do business with DoD. More importantly, greater transparency into the laws that govern transacting business with DoD may reduce a barrier into the defense market for innovative small businesses and nontraditional companies.

The mission of the acquisition system is complex, and the stakes are high. DoD must be able to deliver lethality to the warfighter inside the turn of our near peer competitors and nonstate actors. Too often, the practice of defense acquisition and federal procurement is perceived as more complex than its mission, obscured by onerous requirements and shrouded in secrecy. The current lack of organization and structure in the laws governing acquisition seems to confirm this perception.

Conclusions

The tools that support the defense acquisition system need to be simple and effective, not burdensome and confusing. Reorganizing Title 10 would help restore agility and simplicity to defense acquisition. Simplifying the governing body of law is key to creating a system that is more transparent and accessible—and thus better able to meet DoD's mission.

Implementation

Legislative Branch

- Reorganize all acquisition provisions into a new Part V at the end of Subtitle A of Title 10, U.S. Code.
- Update and move acquisition related *note* sections into the new acquisition structure within Part V of Title 10, U.S. Code.

Executive Branch

- There are no regulatory changes required for this recommendation.

Note: A table of completed draft chapters identifying the old versus new location of each defense acquisition section (and notes) within the new Part V of Title 10, U.S. Code can be found in the Implementation Details subsection at the end of Section 10.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

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Section 10
Title 10 Reorganization

Implementation Details

Recommendation 90

Proposed Chapters for New Part V of Subtitle A of Title 10, United States Code, that have been submitted as of December 31, 2018

Proposed Chapters for New Part V of Subtitle A of title 10, United States Code
That Have Been Submitted as of December 31, 2018

	A	B	C	D	E	F	G	H
1	**PART V—ACQUISITION**							
2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
3								
4	**SUBPART A—GENERAL [FAR Subch A]**							
5	**201**		**Definitions**				**Pending**	
6								
7	**203**		**General Matters**				**Pending**	
8								
9	**205**		**Defense Acquisition System**				**Pending**	
10								
11	**207**		**Budgeting & Approps Matters**				**Pending**	
12								
13	**209**		**Operational Contract Support**				**Chapter submitted on 12/10/2018**	
14	**Sub I**		**Joint policies on requirements definition, contingency pgm mgt, & contingency contracting**	137	2333			
15		3151	Joint policies required	137	2333(a)			
16		3152	Joint policy for requirements definition	137	2333(b)			
17		3153	Joint policy for contingency program management	137	2333(c)			
18		3154	Joint policy for contingency contracting	137	2333(d)			
19		3155	Training of military personnel outside acquisition workforce	137	2333(e)(1),(2)			
20		3156	Mission readiness exercises	137	2333(e)(3)			

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	A	B	C	D	E	F	G	H
2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
21		3157	Definitions	137	2333(f)			
22	**Sub II**		**Other Provisions Relating to Operational Contract Support**					
23		3171	Competition and Review of Contracts For Property or Services in Support of a Contingency Operation	137	2302 note	FY12 NDAA Pub. L. 112–81, §844(a), (b)		
24		3172	Responsibility Within Department of Defense for Operational Contract Support	137	2302 note	FY13 NDAA Pub. L. 112–239, §843		
25								
26	**SUBPART B—ACQUISITION PLANNING**							
27	**221**		**Planning and Solicitation Generally**				**Pending**	
28								
29	**223**		**Planning and Solicitation Relating to Particular Items or Services**				**Pending**	
30								
31	**SUBPART C—CONTRACTING METHODS AND CONTRACT TYPES**							
32	**241**		**Awarding of Contracts**				**Pending**	
34	**243**		**Specific Types of Contracts**				**Pending**	
35								
36	**245**		**Task and Delivery Order Contracts (Multiple Award Contracts)**				**Chapter submitted on 11/07/2018**	**See Ch41**
37		3401	Task & delivery order contracts: definitions	137	2304d			4101

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	A	B	C	D	E	F	G	H
2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
38		3402	Authorities or responsibilities not affected	137	2304a note			4102
39		3403	Task & delivery order contracts: general authority	137	2304a			4103
40		3404	Guidance on use of task and delivery order contracts		new			4104
41		3405	Task order contracts: advisory and assistance services	137	2304b			4105
42		3406	Task & delivery order contracts: orders	137	2304c			4106
43	**247**		**Acquisition of Commercial ~~Items~~ *Products and Commercial Services***					
44								
45	**249**		**Multiyear Contracts**				**Chapter submitted on 12/10/2018**	
46	**Sub I**		**Multiyear contracts for acquisition of property**	**137**				3903
47		3501	Multiyear contracts for acquisition of property: authority; definitions	137	2306b(a), (k)		10 USC 2306b divided into 11 sections	
48		3502	Multiyear contracts for acquisition of property: regulations	137	2306b(b)			
49		3503	Multiyear contracts for acquisition of property: contract cancellation or terminationy	137	2306b(c), (f), (g)			
50		3504	Multiyear contracts for acquisition of property: participation by subcontractors, vendors, and suppliers	137	2306b(d)			

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
51		3505	Multiyear contracts for acquisition of property: protection of existing authority	137	2306b(e)			
52		3506	Department of Defense contracts: acquisition of weapon systems	137	2306b(h)			
53		3507	Department of Defense contracts: defense acquisitions specifically authorized by law	137	2306b(i)			
54		3508	Department of Defense contracts: notice to congressional committees before taking certain actions	137	2306b(l)(1) (6),& (8)			
55		3509	Department of Defense contracts: multiyear contracts with value in excess of $500,000,000	137	2306b(l)(3) (4), (5), (8) & (9)			
56		3510	Department of Defense contracts: additional matters with respect to multiyear defense contracts	137	2306b(j), (l)(2), (7) & (8)			
57		3511	Increased funding and reprogramming requests	137	2306b(m)			
58	**Sub II**		**Multiyear contracts for acquisition of services**	**137**				3903
59		3531	Multiyear contracts for acquisition of services: authority; definitions	137	2306c(a), (b), (f), (h)		10 USC 2306c divided into 5 sections	
60		3532	Multiyear contracts for acquisition of services: applicable principles	137	2306c(c)			
61		3533	Multiyear contracts for acquisition of services: contract cancellation or termination	137	2306c(e), (d)(4), (5)			
62		3534	Multiyear contracts for acquisition of services: contracts with value above $500,000,000 to be specifically authorized by law	137	2306c(d)(2)			

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
63		3535	Multiyear contracts for acquisition of services: notice to congressional committees before taking certain actions	137	2306c(d)(1) & (3)			
64	**Sub III**		**Other Authorities Relating to Multiyear Contracts**	**137**				
65		3551	Multiyear procurement authority: purchase of dinitrogen tetroxide, hydrazine, and hydrazine-related products	141	2410o			
66		3552	Multiple Program Multiyear Contract Demonstration Program	137	2306b note	FY17 NDAA, P.L. 114-328, sec 853, Dec 23, 2016, Dec. 23, 2016		
67		[none]	Multiyear contracts: purchase of electricity from renewable energy sources	141	2410q		Transfer from ch. 141 to subch II of ch. 173 as new 2922i	
68		[none]	Pilot program for longer term multiyear service contracts	137	2306c note	FY18 NDAA, Pub. L. 115-91, §854, Dec. 12, 2017	Will not be codified -- will remain as a note.	
69		[none]	Multiyear procurement contracts	137	2306b note	FY98 DOD APPROP Pub. L. 105–56, §8008, and following FYs.	Will not be codified -- will remain as a note.	
70								
71	**251**		**Simplified and Streamlined Acquisition Procedures**				**Pending**	
72								
73	**253**		**Emergency and Rapid Acquisition**				**Pending**	
74								
75	**255**		**Contracting With or Through Other Agencies**				**Chapter submitted on 12/13/2018**	
76		3651	Defense Procurements Made Through Contracts Of Other Agencies	137	2304 note	FY05 NDAA Pub. L. 108–375, §854		

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
77		3652	Treatment of Interagency And State And Local Purchases When DoD Acts as Contract Intermediary for GSA	148	2500 note	FY16 NDAA Pub. L. 114–92, §897, Nov. 25, 2015		
78		3653	Procurement Of Alternative Fueled And Hybrid Light Duty Trucks	137	2302 note	FY02 NDAA Pub. L. 107–107, §318, Dec. 28, 2001		
79		3654	Authority to Procure Services From Government Publishing Office	8	195 note	FY98 NDAA, P.L. 105-85, §387(c), Nov. 18, 1997		
80								
81	**SUBPART D—GENERAL CONTRACTING REQUIREMENTS**							
82	**271**		**Truthful Cost or Pricing Data**				**Chapter submitted on 11/07/2018**	
83	**Sub I**		**Truthful Cost or Pricing Data (Truth in Negotiations)**				From 2306a	See Ch35
84		3701	Definitions	137	2306a(h)			3501
85		3702	Required cost or pricing data; certification	137	2306a(a)			3502
86		3703	Exceptions	137	2306a(b)			3503
87		3703(d)(4)	(b) Definition of Commercial Item (c) Regulations (d) Rule of Construction	137	2306a note	FY16 NDAA P.L. 114-92, §851(c)-(e), Nov 25, 2015		
88		3704	Cost or pricing data on below-threshold contracts	137	2306a(c)			3504
89		3705	Submission of other information	137	2306a(d)			3505
90		3706	Price reductions for defective cost or pricing data	137	2306a(e)			3506
91		3707	Interest and penalties for certain overpayments	137	2306a(f)			3507

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
92		3708	Right to examine contractor records	137	2306a(g)			3508
93	**Sub II**		**Other Provisions Relating to Cost or Pricing Data**					
94		3721	Guidance And Training Related To Evaluating Reasonableness of Price	137	2306a note	FY13 NDAA Pub. L. 112–239, §831, Jan. 2, 2013		
95		3722	Grants Of Exceptions To Cost Or Pricing Data Certification Requirements And Waivers Of Cost Accounting Standards	137	2306a note	FY03 NDAA Pub. L. 107–314, §817, Dec. 2, 2002		
96		3723	Pilot Program for Streamlining Awards For Innovative Technology Projects	137	2306a note	FY16 NDAA Pub. L. 114–92, §873(a)–(d), Nov. 25, 2015		
97		3724	Pilot Program Regarding Risk-Based Contracting for Smaller Contract Actions Under the Truth in Negotiations Act	137	2306a note	FY16 NDAA Pub. L. 114–92, §899		
98	**273**		**Allowable Costs**				**Chapter submitted on 12/10/2018**	
99	**Sub I**		**General**				2324 divided into 10 secs	Ch43
100		3741	Definitions	137	2324(l)			4301
101		3742	Adjustment of threshold amount of covered contract	137	2324(l)(1)(B)			4302
102		3743	Effect of submission of unallowable costs	137	2324(a)-(d)			4303
103		3744	Specific costs not allowable	137	2324(e)			4304
104		3745	Required regulations	137	2324(f)			4305
105		3746	Applicability of regulations to subcontractors	137	2324(g)			4306
106		3747	Contractor certification	137	2324(h)			4307

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
107		3748	Penalties for submission of cost known to be unallowable	137	2324(i)			4308
108		3749	Burden of proof on contractor	137	2324(j)			4309
109		3750	Proceeding costs not allowable	137	2324(k)			4310
110	**Sub II**		**Other Allowable Cost Provisions**					
111		3761	Restructuring costs	137	2325			
112		3762	Independent research and development costs	139	2372			
113		3763	Bid and proposal costs	139	2372a			
114		3764	Excessive pass-through charges	137	2324 note	FY07 NDAA Pub. L. 109–364, §852(b), Oct. 17, 2006		4710
115		3765	Reimbursement of indirect costs of institutions of higher education under DoD contracts	137	2324 note	FY94 NDAA Pub. L. 103–160, §841, Nov. 30, 1993		4708
116	**275**		**Proprietary Contractor Data and Rights in Technical Data**				**Chapter submitted on 11/07/2018**	
117	**Sub I**		**Rights in Technical Data**				From 10 USC 2320	2302
118		3771	Rights in technical data	137	2320(a)			2302(a)-(d)
119		3772	Provisions required in contracts	137	2320(b), (c)			2302(e)
120		3773	Domestic business concerns: programs for replenishment or spare parts	137	2320(d)			
121		3774(a) (b), (d)	Major weapons systems and subsystems: long-term technical data needs	137	2320(e), (f)			
122		3774(c)	Guidance Relating to Rights in Technical Data	137	2320 note	FY11 NDAA, P.L. 111–383, §824(a), Jan. 17, 2011		

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
123		3775	Definitions	137	2320(g), (h)			
124	**Sub II**		**Validation Of Propriety Data Restrictions**				From 10 USC 2321	4703
125		3781	Technical data: contractor justification for restrictions; review	137	2321(a)-(c)			4703(a)
126		3782	Technical data: challenges to contractor restrictions	137	2321(d)			4703(b)
127		3783	Time for contractors to submit justifications	137	2321(e)			4703(c), (d)
128		3784	Technical data under contracts for commercial items: presumption of development exclusively at private expense	137	2321(f)			
129		3785	Technical data: decision by contracting officer; claims	137	2321(g),(h)			4703(e), (f)
130		3786(a)(1), (b), (c)	Technical data: final disposition of challenge	137	2321(i)			4703(g)
131		3786(a)(2),(3)	Implementation thru DFARS; Applicability	137	2321 note	FY19 NDAA, Pub. L. 115-232, §866(b),(c), Aug. 13, 2018		
132		3787	Use or release restriction: definition	137	2321(j)			
133	**Sub III**		**Other Provisions Relating To Proprietary Contractor Data & Tech Data Rights**					
134		3791	Management of intellectual property matters within the Department of Defense	137	2322(a)			
135		3792	Technical Data Rights: Non-FAR Agreements	137	2320 note	FY09 NDAA Pub. L. 110–417, §822, Oct. 14, 2008		
136		3793	Technical data rights: noncommercial software	137	2321 note	FY19 NDAA, Pub. L. 115-232, §866(d), Aug. 13, 2018		

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
137		3794	Copyrights, patents, designs, etc.; acquisition	141	2386			
138		3795	Release of technical data under Freedom of Information Act: recovery of costs	137	2328			
139	**277**		**Contract Financing**				**Chapter submitted on 10/29/2018**	**See Ch45**
140		3800	Definitions					
141		3801	Authority of agency	137	2307(a)			4501
142		3802	Payment	137	2307(b), (c)			4502
143		3803	Security for advance payments	137	2307(d)			4503
144		3804	Conditions for progress payments	137	2307(e)			4504
145		3805	Payments for commercial items	137	2307(f)			4505
146		3806	Action in case of fraud	137	2307(i)			4506
147		3807	Vesting of title in the United States	137	2307(h)			none
148		[-]	Certain Navy contracts	137	2307(g)		2307(g) to go to subtitle C, Navy	none
149	**279**		**Contractor Audits and Accounting**				**Chapter submitted on 10/29/2018**	
150		3841	Examination of facilities and records of contractor	137	2313			3905, 4706
151		3842	Performance of incurred cost audits	137	2313b			

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
152		3843	Contractor internal audit reports: Dept of Defense access to, use of, & safeguards & protections for	137	2313 note	FY13 NDAA Pub. L. 112–239, §832, Jan. 2, 2013		
153		3844	Contractor business systems	137	2302 note	FY11 NDAA Pub. L. 111–383, §893(a)-(g)		
154		3845	Contractor inventory accounting systems: standards	141	2410b			
155		3846	Defense Contract Audit Agency: legal resources and expertise	137	2302 note	FY11 NDAA Pub. L. 111–383, §893(h)		
156		3847	Defense Contract Audit Agency: annual report	137	2313a			
157		3848	Defense audit agencies: Small Business Ombudsmen	8	204			
158		3849	Defense Cost Accounting Standards Board	7	190			1501, 1502
159								
160	**281**		**Claims and Disputes**				**Chapter submitted on 12/10/2018**	
161		3861	Research and development contracts: indemnification provisions	139	2354			
162		3862	Requests for equitable adjustment or other relief: certification	141	2410			
163		3863	Retention of amounts collected from contractor during the pendency of contract dispute	141	2410m			
164		3864	Bid protests denied by Government Accountability Office: pilot program for requiring contractor reimbursement of Department of Defense for costs incurred	137	2304 note	FY18 NDAA, Pub. L. 115-91, §827, Dec. 12, 2017		

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
165	**283**		**Foreign Acquisitions**				**Chapter submitted on 12/13/2018**	
166	**Sub I**		**General**					
167		3881	Contracts: consideration of national security objectives	137	2327			
168		3882	Products and services produced in Africa in support of certain activities	137	2302 note	FY17 NDAA Pub. L. 114–328, §899A(a)–(e)		
169		3883	Procurements from Communist Chinese military companies: prohibition	137	2302 note	FY06 NDAA Pub. L. 109–163, §1211, Jan. 6, 2006		
170		3884	Reliance on China and Russia for space-based weather data: prohibition	137	before 2381 note	FY16 NDAA Pub. L. 114–92, §1614, Nov. 25, 2015		
171	**Sub II**		**Prohibition on Contracting with the Enemy**				From secs. 841-843 of P.L. 113-291	
172		3891	Prohibition on providing funds to the enemy	137	2302 note	FY15 NDAA Pub. L. 113–291, §841; amended by FY19 NDAA, sec 872		
173		3892	Additional access to records	137	2302 note	FY15 NDAA Pub. L. 113–291, §842		
174		3893	Definitions	137	2302 note	FY15 NDAA Pub. L. 113–291, §843		
175								
176	**285**		**Defense Small Business Programs**				**Pending**	
177								
178	**287**		**Socioeconomic Programs**				**Pending**	
179								
180	**SUBPART E— RESEARCH AND ENGINEERING**							

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Proposed Chapters for New Part V of Subtitle A of title 10, United States Code
That Have Been Submitted as of December 31, 2018

	A	B	C	D	E	F	G	H
2	New Ch #	New Sec #	Title	Old Ch #	Old Sec #	Citation for T10 "Note" Sections [1]	Notes & Comments	T41 Sec # [2]
181	**301**		**Research & Engineering Generally**				**Chapter submitted on 12/21/2018**	
182		4001	Research and development projects	139	2358			
183		4002	Research projects: transactions other than contracts and grants	139	2371			1904
184		4003	Authority of the Department of Defense to carry out certain prototype projects	139	2371b			
185		4004	Procurement for experimental purposes	139	2373			
186		4005	Preference for use of other transactions and experimental authority	139	2371 note	FY18 NDAA, Pub. L. 115-91, §867, Dec. 12, 2017		
187		4006	Data, policy, and reporting on the use of other transactions	139	2371 note	FY19 NDAA, Pub. L. 115-232, §873, Aug 13, 2018		
188		4007	Science & technology pgms to be conducted so as to foster the transition of science & technology to higher levels of [RDT&E]	139	2359			
189		4008	Merit-based award of grants for research and development	139	2374			3105
190		4009	Technology Protection Features Activities	139	2357			
191		4010	Inclusion of Women and Minorities in Clinical Research Projects	139	2358 note	FY94 NDAA Pub. L. 103–160, §252, Nov. 30, 1993		
192		4011	Program for Research, Development, and Deployment of Advanced Ground Vehicles, Ground Vehicle Systems, and Components	139	2358 note	FY11 NDAA Pub. L. 111–383, §214, Jan. 7, 2011,		
193		4012	Human factors modeling and simulation activities	139	2358 note	FY19 NDAA, Pub. L. 115-232, §227, Aug 13, 2018		

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
194		4013	Defense quantum information science and technology research and development program	139	2358 note	FY19 NDAA, Pub. L. 115-232, §234, Aug 13, 2018		
195		4014	Coordination and communication of defense research activities and technology domain awareness	139	2364(a)			
196		4015	Award of grants and contracts to colleges and universities: requirement of competition	139	2361			
197		4016	University Research Initiative Support Program	139	2358 note	FY94 NDAA Pub. L. 103–160, §802, Nov. 30, 1993		
198		4017	Defense Established Program to Stimulate Competitive Research [DEPSCoR]	139	2358 note	FY95 NDAA Pub. L. 103–337, §257, Oct. 5, 1994		
199		4018	Mechanisms for expedited access to technical talent and expertise at academic institutions to support Department of Defense missions	139	2358 note	FY18 NDAA P.L. 115–91, §217, Dec. 13 2017		
200		4019	Initiative to support protection of national security academic researchers from undue influence and other security threats	139	2358 note	FY19 NDAA, Pub. L. 115-232, §1286, Aug 13, 2018		
201		[-]	Advanced Rotorcraft Flight Research And Development	139	2358 note	FY12 NDAA Pub. L. 112–81, §222, Dec. 31, 2011	Army-specific discretionay pgm Will be codified in subtitle B as new 7545 [4545].	
202								
203	**303**		**Innovation**				**Chapter submitted on 12/21/2018**	
204		4061	Defense Research and Development Rapid Innovation Program	139	2359a			
205		4062	Defense Acquisition Challenge Program	139	2359b			

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
206		4063	Support for national security innovation and entrepreneurial education	139	2359 note	FY18 NDAA, Pub. L. 115-91, §225, Dec. 12, 2017		
207		4064	Prizes for advanced technology achievements	139	2374a			
208		4065	Program to Increase Business Innovation in Defense Acquisition Programs	137	2302 note	FY00 NDAA Pub. L. 106–65, §812(a)–(c), (e), Oct. 5, 1999		
209		4066	Pilot program on enhanced interaction between DARPA and the Service Academies	139	2358 note	FY17 NDAA Pub. L. 114–328, §236		
210		4067	Regional Advanced Technology Clusters	139	2358 note	FY13 NDAA Pub. L. 112–239, §252, Jan. 2, 2013		
211		4068	Global Research Watch Program	139	2365			
212		4069	Hypersonics development	139	2358 note	FY07 NDAA, P.L. 109–364, §218, Oct. 17, 2006		
213		4070	Science & technology investment strategy to defeat or counter improvised explosive devices	139	2358 note	FY09 NDAA Pub. L. 110–417, §1504		
214		4071	Collaborative Program for Research And Development Of Vacuum Electronics Technologies	139	2358 note	FY05 NDAA Pub. L. 108–375, §212, Oct. 28, 2004		
215		4072	Department of Defense Program to Expand High-Speed High-Bandwidth Capabilities for Network-Centric Operations	139	2358 note	FY04 NDAA Pub. L. 108–136, §234, Nov. 24, 2003		
216		4073	Research and Development Of Defense Biomedical Countermeasures	139	2358 note	1. FY04 NDAA Pub. L. 108–136, §1601, Nov. 24, 2003; 2. FY02 NDAA Pub. L. 107–107, §1044(a), Dec. 28, 2001		
217		4074	Vehicle Fuel Cell Program	139	2358 note	FY03 NDAA Pub. L. 107–314, §245, Dec. 2, 2002		

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	A	B	C	D	E	F	G	H
2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
218		4075	Defense Nanotechnology Research and Development Program	139	2358 note	FY03 NDAA Pub. L. 107–314, §246, Dec. 2, 2002		
219		4076	Innovators information repository	139	2364 note	FY19 NDAA Pub. L. 115–232, §220, Aug. 13, 2018		
220		4077	Joint artificial intelligence research, development, and transition activities	139	2358 note	FY19 NDAA Pub. L. 115–232, §238, Aug. 13, 2018		
221		4078	National security innovation activities	139	2358 note	FY19 NDAA Pub. L. 115–232, §230, Aug. 13, 2018		
222								
223	**305**		**DoD Laboratories**				**Chapter submitted on 12/21/2018**	
224	**Sub ch I**		**General Matters**					
225		4101	Laboratory Quality Enhancement Program	139	2358 note	FY17 NDAA Pub. L. 114–328, §211, Dec. 23, 2016		
226		4102	Defense Laboratory Modernization Pilot Program	139	2358 note	FY16 NDAA Pub. L. 114–92, §2803		
227		4103	Mechanisms to provide funds for defense laboratories for research and development of technologies for military missions	139	2363			
228		4104	Collaboration between defense laboratories, industry, and academia; open campus program	139	2364 note	FY19 NDAA Pub. L. 115–232, §222, Aug 13, 2018		
229	**Sub ch II**		**Personnel-Related Matters**					
230		4111	Authorities for certain positions at science and technology reinvention laboratories	139	2358a			

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
231		4112	Pilot Program on Enhanced Pay Authority For Certain Research and Technology Positions in the Science And Technology Reinvention Laboratories of the Department of Defense	139	2358 note	FY17 NDAA Pub. L. 114–328, §1124		
232		4113	Pilot Program on Dynamic Shaping of the Workforce To Improve the Technical Skills and Expertise at Certain Department Of Defense Laboratories	139	2358 note	FY16 NDAA Pub. L. 114–92, §1109		
233		4114	Pilot Program on Assignment to DARPA of Private Sector Personnel With Critical Research And Development Expertise	139	2358 note	FY15 NDAA Pub. L. 113–291, §232, Dec. 19, 2014		
234		4115	Defense Laboratories Personnel Demonstration Projects	139	2358 note	FY10 NDAA Pub. L. 111–84, §1105, Oct. 28, 2009; FY08 NDAA Pub. L. 110–181, §1107, Jan. 28, 2008; FY95 NDAA Pub. L. 103–337, §342(b)		
235		4116	Research and development laboratories: contracts for services of university students	139	2360			
236								
237	**307**		**Research & Development Centers and Facilities**				**Chapter submitted on 12/21/2018**	
238		4141	Contracts: acquisition, construction, or furnishing of test facilities and equipment	139	2353			
239		4142	Coordination and communication of defense research activities and technology domain awareness.	139	2364(b)			
240		4143	Cooperative research and development agreements under Stevenson-Wydler Technology Innovation Act of 1980	139	2371a			

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	A	B	C	D	E	F	G	H
2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
241		4144	Use of test and evaluation installations by commercial entities	159	2681			
242		4145	Cooperative agreements for reciprocal use of test facilities: foreign countries and international organizations	138	2350l			
243		4146	Centers for Science, Technology, and Engineering Partnership.	139	2368			
244		4147	Use of federally funded research and development centers	139	2367			
245		4148	Coordination of High-Temperature Superconductivity Research and Development	139	2364 note	FY88 NDAA Pub. L. 100–180, §218(b)(2), Dec. 4, 1987		
246		4149	Pilot Program on Disclosure of Certain Sensitive Information to Federally Funded Research and Development Centers	139	2367 note	FY17 NDAA Pub. L. 114–328, §235, Dec. 23, 2016		
247		4150	Pilot Program for the Enhancement of the Research, Development, Test, & Evaluation Centers of DoD	139	2358 note	FY17 NDAA Pub. L. 114–328, §233		
248								
249	**309**		**Test and Evaluation**				**Chapter submitted on 12/21/2018**	
250		4171	Operational test and evaluation of defense acquisition programs	141	2399			
251		4172	Major systems and munitions programs: survivability testing and lethality testing required before full-scale production	139	2366			
252		4173	DoD Test Resource Management Center	8	196			
253		4174	Additional test and evaluation duties of military department secretaries and defense agency heads	141	2399 note	FY18 NDAA, Pub. L. 115-91, §839(a), Dec. 12, 2017		

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2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
254		4175	Requirements for collection of cost data on test and evaluation	141	2399 note	FY18 NDAA, Pub. L. 115-91, §839(b), Dec. 12, 2017		
255		4176	Access by developmental and operational testing activities to data regarding modeling and simulation activity	4	139 note	FY19 NDAA, P.L. 115-232, §887(b), Aug 13, 2018		
256								
257	**SUBPART F—MAJOR DEFENSE ACQUISITION PROGRAMS AND MAJOR SYSTEMS**							
258	**321**		**Weapon Systems Development & Related Matters**	**144B**			**Pending**	
259								
260	**323**		**Major Defense Acquisition Programs**				**Pending**	
261								
262	**325**		**Other Matters Relating to Major Systems**				**Pending**	
263								
264	**SUBPART G—OTHER CATEGORIES OF CONTRACTING**							
265	~~**341**~~		~~**Contracting for Perf of Civ Commercial or Industrial Type Functions**~~	~~**146**~~			**Removed from reorganization project and to be left as is in Part IV**	
266								
267	**343**		**Acquisition of Services**				**Pending**	
268								

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Proposed Chapters for New Part V of Subtitle A of title 10, United States Code
That Have Been Submitted as of December 31, 2018

	A	B	C	D	E	F	G	H
2	New Ch #	New Sec #	Title	Old Ch #	Old Sec #	Citation for T10 "Note" Sections [1]	Notes & Comments	T41 Sec # [2]
269	**345**		**Acquisition of Information Technology**				**Chapter submitted on 12/13/2018**	
270		4571	Information technology acquisition: planning and oversight processes	131	2223a			
271		4572	Guidance on Acquisition of Business Systems	131	2223a note	FY16 NDAA, Pub. L. 114–92, §883(e)		
272		4573	Guidance on use of anti-competitive specifications in information technology acquisitions	137	2305 note	FY17 NDAA Pub. L. 114–328, §888(b), Dec 23, 2016		
273		4574	Designation of MilDep Entity Responsible for Acq of Critical Cyber Capabilities	131	2223a note	FY16 NDAA, Pub. L. 114–92, §1645(a)		
274		4575	Supervision of the Acquisition of Cloud Computing Capabilities	131	2223a note	FY14 NDAA, P.L. 113-66, §938, Dec 26, 2013		
275		4576	Requirement for consideration of certain matters during acquisition of noncommercial computer software	137	2322a			
276		4577	Improvement of software acquisition processes	137	2302 note	FY03 NDAA Pub. L. 107–314, §804		
277		4578	Open source software: pilot program	131	2223 note	FY18 NDAA, Pub. L. 115-91, §875, Dec. 12, 2017		
278		4579	Data servers and centers	131	2223a note	FY12 NDAA, P.L. 112-81, §2867, Dec 31, 2011		
279		4580	Clearinghouse for Rapid Identification & Dissemination of Commercial Info Technologies	137	2223a note	FY08 NDAA, P.L. 110-181, §881, Jan 28, 2008		
280		4581	Demonstration & pilot projects on cybersecurity	137	2223a note	FY11 NDAA, P.L. 111-383, §215, Jan 7, 2011		
281								

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	A	B	C	D	E	F	G	H
2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
282	**SUBPART G—CONTRACT MANAGEMENT**							
283	**361**		**Contract Administration**				**Chapter submitted on 12/13/2018**	
284		4601	Electronic submission and processing of claims for contract payments	131	2227			
285		4602	Contracted property and services: prompt payment of vouchers	131	2226			
286		4603	Payment protections for subcontractors and suppliers	137	2302 note	FY92 NDAA Pub. L. 102–190, §806(a), (b) & (g), Dec. 5, 1991		
287		4604	Advance notification of contract performance outside the United States	141	2410g			
288		4605	Consideration of Potential Program Cost Increases and Schedule Delays Resulting from Oversight of Defense Acquisition Programs	137	2302 note	FY16 NDAA, P.L. 114–92, §881, Nov 25, 2015		
289		4606(a), (b)	Linking of Award and Incentive Fees to Acquisition Outcomes	137	2302 note	FY07 NDAA P. L. 109–364, §814, Oct. 17, 2006		4711
290		4606(c)	Linking of Award and Incentive Fees to Acquisition Outcomes	137	2302 note	FY09 DoD APPROP P. L. 110–329, div. C, §8105, Sept 30, 2008		
291		4607	Authority for Secretary of Defense to reduce or deny award fees to companies found to jeopardize health or safety of Government personnel	137	2302 note	FY10 NDAA P. L. 111–84, §823		
292		4608	Contract closeout authority	137	2302 note	FY17 NDAA Pub. L. 114–328, §836, Dec. 23, 2016		
293		4609	Motor Carrier Fuel Surcharges	137	2302 note	FY09 NDAA Pub. L. 110–417, §884, Oct. 14, 2008		
294								

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Proposed Chapters for New Part V of Subtitle A of title 10, United States Code
That Have Been Submitted as of December 31, 2018

	A	B	C	D	E	F	G	H
2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
295	**363**		**Prohibitions and Penalties**				**Chapter submitted on 10/29/2018**	
296		4651	Expenditure of appropriations: limitation with respect to impermissible contractor gratuities; remedies of the United States against the contractor	131	2207			
297		4652	Prohibition on use of funds for documenting economic or employment impact of certain acquisition programs	134	2249			
298		4653	Prohibition on use of funds to relieve economic dislocations.	141	2392			
299		4654	Prohibition on use of funds for contracts with persons convicted of unlawful manufacture or sale of Congressional Medal of Honor	134	2241 note	FY99 APPROP ACT, Pub. L. 105–262, §8118, Oct. 17, 1998		
300		4655	Prohibition on doing business with certain offerors or contractors.	141	2393			
301		4656	Prohibition on persons convicted of defense-contract related felonies and related criminal penalty on defense contractors	141	2408			
302		4657	Debarment of persons convicted of fraudulent use of "Made in America" labels	141	2410f			
303		4658	Prohibition on contracting with entities that comply with the secondary Arab boycott of Israel	141	2410i			
304		4659	Prohibition on collection of political information.	137	2335			
305		4660	Prohibition of contractors limiting subcontractor sales directly to the United States	141	2402			4704
306	**365**		**Contractor Workforce**				**Chapter submitted on 12/10/2018**	

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	A	B	C	D	E	F	G	H
2	**New Ch #**	**New Sec #**	**Title**	**Old Ch #**	**Old Sec #**	**Citation for T10 "Note" Sections [1]**	**Notes & Comments**	**T41 Sec # [2]**
307		4701	Contractor employees: protection from reprisal for disclosure of certain information	141	2409			4705, 4712
308		4701(d)(2)	Information for DoD Contractor Employees On Their Whistleblower Rights	141	2409 note	FY09 NDAA Pub. L. 110–417, §842, Oct. 14, 2008		
309		4701(h)	Construction [of section and amdts as not providing right to disclose classified info]	137	2324 note	FY13 NDAA Pub. L. 112–239, §827(h), Jan. 2, 2013		4712(h)
310		4702	Displaced contractor employees: assistance to obtain certification and employment as teachers or employment as teachers' aides	141	2410j			
311		4703	Defense contractors: listing of suitable employment openings with local employment service office	141	2410k			
312		4704	Employment of State Residents In States Having Unemployment Rate In Excess Of National Average	137	2304 note	FY07 DoD APPROP Act, Pub. L. 109–289, §8048		
313								
314	**367**		**Other Administrative and Misc. Provisions**				**Pending**	
315								
316	**SUBPART H—DEFENSE INDUSTRIAL BASE**							
317	**381**		**Defense Industrial Base Generally**	148			**Pending**	
318								
319	**383**		**Loan Guarantee Programs**				**Pending**	
320								
321	**385**		**Procurement Tech Assistance Coop Ageement Program**	142			**Pending**	

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Section 11
FAR Reference Document

An electronic FAR and DFARS with hyperlinked references that establish the basis for regulatory language and requirements will support efforts to enhance the knowledge and capability of the acquisition workforce, establish appropriate buyer and seller relationships, and improve functioning of the acquisition system.

RECOMMENDATION

Rec. 91: Require the Administrator of General Services and the Secretary of Defense to maintain the FAR and DFARS respectively, as electronic documents with references to the related statutes, Executive Orders, regulations, and policies, and with hyperlinks to Federal Register Notices.

Recommendation 91: Require the Administrator of General Services and the Secretary of Defense to maintain the FAR and DFARS respectively, as electronic documents with references to the related statutes, Executive Orders, regulations, and policies, and with hyperlinks to Federal Register Notices.

Problem

The FAR, codified at Title 48 Code of Federal Regulations, provides the primary regulatory framework by which the federal government contracts for supplies and services and implements statutes, Executive Orders (EOs), regulations, policies, and Federal Register Notices (FRNs), established by organizations across the Federal government. DoD supplements the FAR as needed to accommodate DoD-specific statutes, policies, EOs, and FRNs in the DFARS. The FAR system, and consequently the FAR and DFARS documents, are necessarily complex because of the depth, breadth and intricacy of the acquisition policies and statues implemented and the guidance needed to accommodate the diverse agencies and missions across federal government.

This complexity renders the FAR and DFARS challenging to navigate and understand by many of the government and industry personnel who are part of the acquisition team described in Section 1.102 of the FAR and are responsible for the requirements and acquisition processes that facilitate getting supplies and services to warfighters and support other federal missions. This situation has led to criticism by both public- and private-sector leaders and stakeholders that the structure and content of the FAR and DFARS impede both government and industry acquisition personnel and organizations from adequately understanding the complexity of acquisition and transactional processes. These commenters also contend that the inability to effectively navigate and understand the regulations prevents acquisition personnel from leveraging the flexibilities, methods, and authorities available to increase the speed of the acquisition process and encourage innovation, competition, and investment by the private sector.

Background

One of the two enumerated duties of the Section 809 Panel established in Section 809 of the FY 2016 NDAA was to

> *"review the acquisition regulations applicable to the Department of Defense with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage."*

Each of the Section 809 Panel report volumes contains recommended changes to statutory and regulatory language in the FAR and DFARS. These recommended changes, as required by the FY 2016 NDAA, are based on thorough research and analyses of applicable existing FAR and DFARS language and related statutory requirements and language.

As part of its review of acquisition regulations, the Section 809 Panel developed a FAR and DFARS reference document that provides data on changes to the FAR and DFARS that have been implemented since the FAR was initially published as an FRN on September 19, 1983. This research approach resulted in a document with comments to each FAR and DFARS part and subpart that trace back to

and provide information on the FRNs that specify the changes made to the FAR and DFARS since September 1983.

As stated in FAR 1.102 (d), "The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs." FAR 1.102 (c) states, "The Acquisition Team consists of all participants in government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services." Members of the acquisition team need to understand the regulatory requirements stipulated in the FAR and DFARS, which requires more than simply reading the FAR and DFARS. It also requires knowledge of the history and requirements of the statutes, policies, EOs, and FRNs that form the basis of FAR and DFARS regulatory requirements.

In their current forms, the FAR and DFARS do not provide substantial detail on most FAR and DFARS requirements. This shortcoming contributes to challenges experienced by the acquisition workforce in navigating and understanding the FAR and DFARS. The research and reference document developed by the Section 809 Panel provides detailed reference information that makes it possible for someone—a contracting specialist or contracts administrator in government or industry, a policy analyst in government or industry, a new member of the acquisition workforce, or a student at the Defense Acquisition University—to quickly identify where regulatory and statutory changes have been made since 1983. With the comments in this reference document as a base source, users of the document can then access from the Internet copies of the FRNs that contain details on the origin of statutory or policy changes, the proposed and final rule language, and the public comments.

Discussion

The reference document produced by the Section 809 Panel will help government and industry acquisition team members better understand the FAR and DFARS, including the origins and basis for language and requirements, resulting in a better informed acquisition workforce. Having a more knowledgeable workforce will facilitate better communications between government and industry with fewer misunderstandings of FAR and DFARS requirements. In turn, both parties will be more likely to understand and appreciate each other's concerns and incentives, which could result in more productive fact finding and negotiations, a faster contracting process, and reduced acquisition lead time. In addition to providing a tool that will contribute to a more knowledgeable workforce, this FAR/DFARS reference document can serve as a training resource for classroom, on-the-job, job-specific, and just-in-time training. It could also help demystify the FAR rulemaking process.

Both government and industry are striving to recruit and retain well educated, qualified, and motivated acquisition personnel. Incoming members of the acquisition workforce are likely familiar and comfortable with using Internet-based research and reference tools. They expect to have tools that provide quick access to information. Providing relevant and readily available tools that will contribute to their learning, professional development, and work performance can and should be resourced and leveraged to expeditiously increase their knowledge, maintain their interest, and successfully motivate their performance.

The current FAR and DFARS maintained by the FAR and DARS staffs do not include versions that provide information on the FRN origins of the FAR and DFARS language like the research document developed by the Section 809 Panel. Establishing and maintaining a FAR and a DFARS that provide references to the statutes, EOs, regulations, and policies, and hyperlinks to FRNs should be planned for, programed, and funded by the Secretary of Defense and the Administrator of General Services.

The hyperlinked capability noted in this recommendation is based on current technology. It is possible that future technology could provide other, better means of accomplishing the intent of this recommendation. The Administrator of General Services and the Secretary of Defense should employ whatever technology best accomplishes the goal of providing the FAR and DFARS as described above.

Conclusions

The complexity of the FAR system has resulted in FAR and DFARS documents that are challenging to navigate and understand for most government and industry acquisition team members involved in the requirements and acquisition processes. This situation has led to criticism by senior government and industry leaders that the system and the regulations themselves are impeding innovation and timely acquisition of critical supplies and services. This frustration has also led to increased use of other contractual arrangements that are not governed by the FAR and DFARS.

As part of the statutory requirement to review acquisition regulations applicable to DoD, the Section 809 Panel developed a research and reference document that provides information about the sources and basis for FAR and DFARS content since the FAR's issuance in 1983. This tool provides summary information on the FRNs that contain the background and rationale for FAR and DFARS content. This tool can be used by both government and industry acquisition workforce members to improve knowledge of the FAR/DFARS and consequently functioning of the acquisition system.

The Administrator of General Services should plan for and resource development and implementation of a FAR that includes references to the statutes, EOs, regulations, and policies, and hyperlinks to FRNs that establish the basis for the regulatory language and requirements included in the FAR. The Secretary of Defense should plan for and resource development and implementation of a DFARS that includes references to the statutes, EOs, regulations, and policies, and hyperlinks to FRNs that establish the basis for the regulatory language and requirements included in the DFARS. Deployment of such capabilities will support efforts to enhance the knowledge and capability of the acquisition workforce, establish appropriate buyer and seller relationships, and improve functioning of the acquisition system.

Implementation

Legislative Branch

- Require the Secretary of Defense to post and make available to the public the reference document for the FAR and DFARS compiled by the Section 809 Panel.
- Require the Secretary to develop and maintain a DFARS that includes references to the statutes, EOs, regulations, and policies, and hyperlinks to FRNs that establish the basis for the regulatory language and requirements included in the DFARS.

- Require the Administrator of General Services to develop and maintain a FAR, in a form consistent with the DFARS developed and employed by DoD, which includes references to the statutes, EOs, regulations, and policies, and hyperlinks to FRNs that establish the basis for the regulatory language and requirements included in the FAR.

Executive Branch

- There are no regulatory changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 11.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

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Section 11
FAR Reference Document

Implementation Details

Recommendation 91

RECOMMENDED REPORT LANGUAGE

SEC._____. ENHANCEMENT OF CONTENT FUNCTIONALITY OF THE FAR AND THE DFARS.

This section would require the Secretary of Defense and the Administrator of General Services to maintain the Defense Federal Acquisition Regulations (DFARS) and the Federal Acquisition Regulations (FAR) and respectively, as electronic documents with references to the statutes, Executive Orders, regulations, and policies and with internet accessible links to Federal Register Notices.

The committee is aware that the FAR and DFARS currently do not contain references and internet accessible links to the relevant underlying documents that form the basis of the FAR and DFARS. The committee notes that this lack of basic information has led to criticism by the acquisition community in both Government and industry that the FAR and DFARS structure and content impedes an adequate understanding of the complexity of the acquisition processes. This often hinders acquisition personnel from leveraging the flexibilities, methods, and authorities available to increase the speed of the acquisition process and encourage innovation, competition and investment by the private sector.

This section would create a tool to be used by the government and industry acquisition workforce to enhance their knowledge of the FAR and DFARS. It is intended to further improve the functioning of the federal acquisition system.

This section also would require that the reference document compiled by the acquisition advisory panel, established under section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), be made available through a publicly accessible website of the Department of Defense.

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SEC. ___. ENHANCEMENT OF CONTENT FUNCTIONALITY OF THE FEDERAL ACQUISITION REGULATION AND THE DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT.

(a) POSTING OF 809 PANEL FAR/DFARS REFERENCE DOCUMENT ON DOD WEBSITE.—

(1) POSTING ON PUBLIC WEBSITE.—The Secretary of Defense shall make available to the public, through a website of the Department of Defense that is accessible to the public, the research and reference document compiled by the Section 809 Panel that is described in paragraph (2).

(2) DOCUMENT.—The research and reference document referred to in paragraph (1) is the reference document compiled by the Section 809 Panel that provides information on changes to the Federal Acquisition Regulation (in this section referred to as the "FAR") and the Defense Federal Acquisition Regulation Supplement (in this section referred to as the "DFARS") that have been implemented since the FAR was issued in 1983.

(3) 809 PANEL.—In this section, the term "Section 809 Panel" means the panel established by the Secretary of Defense pursuant to section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), as amended by section 863(d) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328) and sections 803(c) and 883 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91).

(b) MAINTENANCE OF DFARS BY DEPARTMENT OF DEFENSE WITH REFERENCES TO SOURCE DOCUMENTS.—

(1) IN GENERAL.—Chapter 141 of title 10, United States Code, is amended by inserting after section 2381 the following new section:

"§ 2382. Defense Federal Acquisition Regulation Supplement: maintenance with references to source documents and references with internet links to Federal Register notices

"(a) IN GENERAL.—The Secretary of Defense shall maintain the Defense Federal Acquisition Regulation Supplement (in this section referred to as the 'DFARS') in a form that includes references to the statutes, executive orders, regulations, and policies, and references with internet accessible links to the Federal Register notices, that establish the basis for the regulatory language and requirements included in the DFARS.

"(b) PUBLIC AVAILABILITY.—The Secretary of Defense shall make available to the public, through a website of the Department of Defense that is accessible to the public, the DFARS as maintained pursuant to subsection (a).

"(c) TIMEFRAME FOR DEVELOPMENT.—The Secretary of Defense shall fully implement subsection (a) not later than the end of the 2-year period beginning on the date of the enactment of this section.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2381 the following new item:

"2382. Defense Federal Acquisition Regulation Supplement: maintenance with references to source documents and references with internet links to Federal Register notices.".

(c) MAINTENANCE OF FAR BY GSA WITH REFERENCES TO SOURCE DOCUMENTS.—Section 1303 of title 41, United States Code, is amended by adding at the end the following new subsection:

"(e) FEDERAL ACQUISITION REGULATION WITH REFERENCES TO SOURCE DOCUMENTS AND REFERENCES WITH INTERNET LINKS TO FEDERAL REGISTER NOTICES.—

"(1) IN GENERAL.—The Administrator of General Services shall maintain the Federal Acquisition Regulation in a form that includes references to the statutes, executive orders, regulations, and policies, and references with internet accessible links to the Federal Register notices, that establish the basis for the regulatory language and requirements included in the Federal Acquisition Regulation.

"(2) CONSISTENCY WITH DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT.—The Administrator shall maintain the Federal Acquisition Regulation as required by paragraph (1) in a form that is consistent with the Defense Federal Acquisition Regulation Supplement as maintained by the Secretary of Defense under section 2382 of title 10.

"(3) PUBLIC AVAILABILITY.—The Administrator shall make available to the public, through a website of the General Services Administration that is accessible to the public, the Federal Acquisition Regulation as maintained pursuant to paragraph (1).

"(4) TIMEFRAME FOR DEVELOPMENT.—The Administrator shall fully implement paragraph (1) not later than the end of the 2-year period beginning on the date of the enactment of this subsection.".

The section of title 41, United States Code, amended by subsection (c) above is below. Note subsection (d) in particular:

Title 41, United States Code

§1303. Functions and authority

(a) FUNCTIONS.—

(1) ISSUE AND MAINTAIN FEDERAL ACQUISITION REGULATION.—Subject to sections 1121, 1122(a) to (c)(1), 1125, 1126, 1130, 1131, and 2305 of this title, the Administrator

of General Services, the Secretary of Defense, and the Administrator of National Aeronautics and Space, pursuant to their respective authorities under division C of this subtitle, chapters 4 and 137 of title 10, and the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451 et seq.),1 shall jointly issue and maintain in accordance with subsection (d) a single Government-wide procurement regulation, to be known as the Federal Acquisition Regulation.

(2) LIMITATION ON OTHER REGULATIONS.—Other regulations relating to procurement issued by an executive agency shall be limited to—

(A) regulations essential to implement Government-wide policies and procedures within the agency; and

(B) additional policies and procedures required to satisfy the specific and unique needs of the agency.

(3) ENSURE CONSISTENT REGULATIONS.—The Administrator, in consultation with the Council, shall ensure that procurement regulations prescribed by executive agencies are consistent with the Federal Acquisition Regulation and in accordance with the policies prescribed pursuant to section 1121(b) of this title.

(4) REQUEST TO REVIEW REGULATION.—

(A) BASIS FOR REQUEST.—Under procedures the Administrator establishes, a person may request the Administrator to review a regulation relating to procurement on the basis that the regulation is inconsistent with the Federal Acquisition Regulation.

(B) PERIOD OF REVIEW.—Unless the request is frivolous or does not, on its face, state a valid basis for the review, the Administrator shall complete the review not later than 60 days after receiving the request. The time for completion of the review may be extended if the Administrator determines that an additional period of review is required. The Administrator shall advise the requester of the reasons for the extension and the date by which the review will be completed.

(5) WHEN REGULATION IS INCONSISTENT OR NEEDS TO BE IMPROVED.—If the Administrator determines that a regulation relating to procurement is inconsistent with the Federal Acquisition Regulation or that the regulation otherwise should be revised to remove an inconsistency with the policies prescribed under section 1121(b) of this title, the Administrator shall rescind or deny the promulgation of the regulation or take other action authorized under sections 1121, 1122(a) to (c)(1), 1125, 1126, 1130, 1131, and 2305 of this title as may be necessary to remove the inconsistency. If the Administrator determines that the regulation, although not inconsistent with the Federal Acquisition Regulation or those policies, should be revised to improve compliance with the Regulation or policies, the Administrator shall take action authorized under sections 1121, 1122(a) to (c)(1), 1125, 1126, 1130, 1131, and 2305 as may be necessary and appropriate.

(6) DECISIONS TO BE IN WRITING AND PUBLICLY AVAILABLE.—The decisions of the Administrator shall be in writing and made publicly available.

(b) ADDITIONAL RESPONSIBILITIES OF MEMBERSHIP.—

(1) IN GENERAL.—Subject to the authority, direction, and control of the head of the agency concerned, each official who represents an agency on the Council pursuant to section 1302(b) of this title shall—

(A) approve or disapprove all regulations relating to procurement that are proposed for public comment, prescribed in final form, or otherwise made effective by that agency before the regulation may be prescribed in final form, or otherwise made effective, except that the official may grant an interim approval, without review, for not more than 60 days for a procurement regulation in urgent and compelling circumstances;

(B) carry out the responsibilities of that agency set forth in chapter 35 of title 44 for each information collection request that relates to procurement rules or regulations; and

(C) eliminate or reduce—

(i) any redundant or unnecessary levels of review and approval in the procurement system of that agency; and

(ii) redundant or unnecessary procurement regulations which are unique to that agency.

(2) LIMITATION ON DELEGATION.—The authority to review and approve or disapprove regulations under paragraph (1)(A) may not be delegated to an individual outside the office of the official who represents the agency on the Council pursuant to section 1302(b) of this title.

(c) GOVERNING POLICIES.—All actions of the Council and of members of the Council shall be in accordance with and furtherance of the policies prescribed under section 1121(b) of this title.

(d) GENERAL AUTHORITY WITH RESPECT TO FEDERAL ACQUISITION REGULATION.—Subject to section 1121(d) of this title, the Council shall manage, coordinate, control, and monitor the maintenance of, issuance of, and changes in, the Federal Acquisition Regulation.

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Section 12
Minimize Flowdown of Government-Unique Terms in Commercial Buying

Congress has expressed frustration with the proliferation of contract clauses applicable to the procurement of commercial products and services and should act aggressively to minimize the number of government-unique statutes applicable to commercial buying.

RECOMMENDATION

Rec. 92: Minimize the flowdown of government-unique terms in commercial buying by implementing the Section 809 Panel's Recommendation 2.

Recommendation 92: Minimize the flowdown of government-unique terms in commercial buying by implementing the Section 809 Panel's Recommendation 2.

Problem

In its meetings with companies of various sizes over the past 2 years, and in particular commercial companies doing or considering doing business with DoD, the Section 809 Panel heard about the numerous barriers they experience when trying to enter the defense marketplace. A consistent theme in discussions with these stakeholders is the extensive number of terms and conditions unique to government business. Companies fear what they see as the hidden compliance traps in these terms and the administrative and overhead cost of establishing and maintaining compliance mechanisms that are not readily measurable. This barrier is not new: It was an important reason for the commercial buying reforms enacted in the Federal Acquisition Streamlining Act (FASA) of 1994.

In its *Volume 1*, Recommendation 2, Minimize government-unique terms applicable to commercial buying, the Section 809 Panel applauded Congress for establishing in FASA a unique statutory mechanism in 41 U.S.C. § 1906 for limiting the government-unique clauses applicable to commercial buying, but pointed out an important weakness in the mechanism that prevents it from fully achieving its intended goal. The panel made a bold recommendation to fix the weakness and truly minimize the government-unique terms applicable to commercial buying at the prime and subcontract tiers. Recent Congressional action has caused the panel some concern that the importance of adopting this recommendation is not fully appreciated.

Background

As discussed in *Volume 1* in more detail, Congress took comprehensive steps to reduce the government-unique terms applicable to commercial buying. First, FASA addressed the procurement-related laws applicable to commercial buying already in place as of October 1, 1994 by making a number of them inapplicable or partially inapplicable to commercial buying. Second, FASA established a unique statutory mechanism prescribing that going forward, no new procurement-related statute would be applicable to commercial buying unless the statute references 41 U.S.C. § 1906 and specifically states that notwithstanding § 1906, the statute would be applicable to commercial buying. This rather strict limitation on applying statutes to commercial buying was mitigated somewhat by another provision that allowed the Federal Acquisition Regulatory Council (FAR Council) to make a determination that it was in the best interests of the government to apply a procurement-related statute to commercial buying even though Congress had chosen not to make it applicable. Although not specifically applicable to DoD, this same determination process was generally followed by the Defense Acquisition Regulations Council (DAR Council) for DoD-unique procurement-related statutes, Executive Orders (EOs), and regulations. Section 874 of the FY 2017 National Defense Authorization Act (NDAA) formally established a similar mechanism for DoD.

When FASA was implemented in October 1995, there were a total of 57 Federal Acquisition Regulation (FAR) and Defense FAR Supplement (DFARS) clauses based on statutes applicable to commercial buying. Today, there are a total of 122 FAR and DFARS clauses based on statute applicable to commercial buying, with another 20 based on EOs and 23 based on DoD policy, and the numbers continue to grow. Of these 122 clauses, only six are genuinely applicable under the extant statutory

framework because Congress used the mechanism it established in FASA, citing 41 U.S.C. § 1906, and specifically made the underlying statutes applicable to commercial buying. The other 116 clauses are applicable because the FAR Council or DAR Council made a determination that it was in the best interests of the government to do so, or because no determination was made, but the clause was made applicable nonetheless.

The proliferation of clauses applicable to commercial buying at the prime contract level directly affects the flow down of government-unique clauses to subcontractors offering commercial products and services. In 1995, there were four clauses that flowed down to subcontractors offering commercial products or services; today there are 22.

On several occasions Congress expressed concern about the rapid growth in the government-unique clauses applicable to commercial buying. In an attempt to address the problem, Section 821 of the FY 2008 NDAA required the Office of the Secretary of Defense (OSD) to

> *develop and implement a plan to minimize the number of government-unique contract clauses used in commercial contracts by restricting the clauses to the following: (1) Government-unique clauses authorized by law or regulation, and (2) Any additional clauses that are relevant and necessary to a specific contract.*

The Section 809 Panel was unable to identify any specific action taken to minimize these clauses as a result of Section 821.

Section 854 of the FY 2016 NDAA did not direct any change in policy, criteria, or process for determining which procurement-related statutes should be made applicable to commercial buying but did require a report to Congress on defense-unique laws applicable to the procurement of commercial and commercially available off-the-shelf items. That report was issued in June 2016. The Section 809 Panel is not aware of any specific action taken as a result of this report.

The structure envisioned in FASA to minimize the applicability of government-unique terms and conditions to commercial buying is not working as planned.

Discussion

Section 849 of the FY 2018 NDAA and Section 839 of the FY 2019 NDAA directed the FAR and DAR Councils to reconsider their determinations from the past 23 years that resulted in 122 procurement-related statutes and 23 regulations not otherwise applicable to commercial buying being made applicable. The statutes then require the councils to propose revisions to the FAR and DFARS that would provide an exemption from each law for commercial buying unless they *determine* there is a specific reason not to provide the exemption.

Although these two reviews are well intentioned, they are unlikely to address the problem of having 122 clauses and 23 regulations currently applicable to commercial buying or to the application of future procurement-related statutes to commercial buying. As noted above, this approach was used in 2008 with little to show for the work. Essentially, the councils have again been tasked to review their own work since 1995 that resulted in the applicability of this large number of statutes and regulations. The councils have been given no criteria for these reviews but have been given the same authority to make

a *determination* that a statute should apply to commercial buying even though Congress chose not to make it applicable. Asking the same entity to conduct a review of the same statutes using the same criteria is likely to have the same result.

Conclusions

The Section 809 Panel's *Volume 1* Recommendation 2 would leave with Congress the sole authority to determine that a procurement-related statute was so important that it should be applied to what would otherwise be a commercial transaction between the Federal Government and a commercial supplier. The Panel recommended in *Volume 1* that Congress rescind the authority granted in FASA for the FAR and DAR Councils to make a determination that a procurement-related statute, EO, or regulation should apply to commercial buying.

Congress has on many occasions expressed frustration with the proliferation of contract clauses applicable to the procurement of commercial products and services. Consequently, Congress should take the lead in minimizing the government-unique statutes applicable to commercial buying.

Implementation

Legislative Branch

- Rescind Section 849 of the FY 2018 NDAA.
- Rescind Section 839 of the FY 2019 NDAA.
- Implement Section 809 Panel *Volume 1*, Recommendation 2, Minimize government-unique terms applicable to commercial buying.

Executive Branch

- There are no regulatory changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 12.

Implications for Other Agencies

- The panel recommends that Congress expand this recommendation to apply to all agencies subject to the FAR.

Section 12
Minimize Flowdown of Government-Unique Terms in Commercial Buying

Implementation Details

Recommendation 92

RECOMMENDED REPORT LANGUAGE

SEC. ___. REPEAL OF TWO REQUIREMENTS FOR EXECUTIVE BRANCH REVIEW OF CERTAIN REGULATIONS RELATING TO COMMERCIAL ITEMS.

This section would rescind section 849 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91) and section 839 of the National Defense Authorization Act for Fiscal Year 2019 (Public.Law115-232). These two sections require the Department of Defense (DoD) and the Federal Acquisition Regulation (FAR) Council to review their previous determinations under sections 1906 and 1907, title 41, United States Code, and section 2375, title 10, United States Code, that led to the applicability of 122 procurement-related statutes and 23 regulations to contracts for commercial products and services. These two NDAA sections were the most recent attempts to address the proliferation of government-unique contract clauses being made applicable to contracts for commercial products and services.

This section would implement a recommendation of the acquisition advisory panel established under section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92). The committee notes that the Section 809 panel recommended that Congress serve as the sole authority for determining the applicability of procurement-related statutes to commercial contracts by removing the authority of the FAR Council or DoD to make such determinations under sections 1906, 1907, and 2375. This authority originally was given to the FAR Council and DoD to provide the flexibility to apply a procurement-related statute to contracts for commercial products or services notwithstanding that Congress had chosen not to make it applicable to such contracts. The committee recognizes this has resulted in the growth in statutes applicable to commercial contracts from 57 in 1995 to 122 today, as well as an additional 23 regulations and 20 Executive Orders. The committee concedes that prior attempts to have the FAR Council and DoD review their determinations were not successful and sections 849 and 839 are very likely to have the same result. The committee concurs with the Section 809 Panel that more direct congressional involvement is required if the government's contracting with the commercial market place is to become more commercial-like.

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SEC. ___. REPEAL OF TWO REQUIREMENTS FOR EXECUTIVE BRANCH REVIEW OF CERTAIN REGULATIONS RELATING TO COMMERCIAL ITEMS.

(a) FISCAL YEAR 2018 NDAA.—Section 849 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 131 Stat. 1487) is repealed.

(b) FISCAL YEAR 2019 NDAA.—Section 839 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232; 132 Stat. ----) is repealed.

Changes to Existing Law: This proposal would repeal the following two provisions of law.

Section 849 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91)

SEC. 849. REVIEW OF REGULATIONS ON COMMERCIAL ITEMS.

(a) REVIEW OF DETERMINATIONS NOT TO EXEMPT DEPARTMENT OF DEFENSE CONTRACTS FOR COMMERCIAL ITEMS AND COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEMS FROM CERTAIN LAWS AND REGULATIONS.—Not later than one year after the date of the enactment of this Act [Dec. 12, 2017], the Secretary of Defense shall—

(1) review each determination of the Federal Acquisition Regulatory Council pursuant to section 1906(b)(2), section 1906(c)(3), or section 1907(a)(2) of title 41, United States Code, not to exempt contracts and subcontracts described in subsection (a) of section 2375 of title 10, United States Code, from laws such contracts and subcontracts would otherwise be exempt from under section 1906(d) of title 41, United States Code; and

(2) propose revisions to the Department of Defense Supplement to the Federal Acquisition Regulation to provide an exemption from each law subject to such determination unless the Secretary determines there is a specific reason not to provide the exemption.

(b) REVIEW OF CERTAIN CONTRACT CLAUSE REQUIREMENTS APPLICABLE TO COMMERCIAL ITEM CONTRACTS.—Not later than one year after the date of the enactment of this Act, the Secretary of Defense shall—

(1) review the Department of Defense Supplement to the Federal Acquisition Regulation to assess all regulations that require a specific contract clause for a contract using commercial item acquisition procedures under part 12 of the Federal Acquisition Regulation, except for regulations required by law or Executive order; and

(2) propose revisions to the Department of Defense Supplement to the Federal Acquisition Regulation to eliminate regulations reviewed under paragraph (1) unless the Secretary determines on a case-by-case basis that there is a specific reason not to eliminate the regulation.

(c) ELIMINATION OF CERTAIN CONTRACT CLAUSE REGULATIONS APPLICABLE TO COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEM SUBCONTRACTS.—Not later than one year after the date of the enactment of this Act, the Secretary of Defense shall—

(1) review the Department of Defense Supplement to the Federal Acquisition Regulation to assess all regulations that require a prime contractor to include a specific contract clause in a subcontract for commercially available off-the-shelf items unless the inclusion of such clause is required by law or Executive order; and

(2) propose revisions to the Department of Defense Supplement to the Federal Acquisition Regulation to eliminate regulations reviewed under paragraph (1) unless the Secretary determines on a case-by-case basis that there is a specific reason not to eliminate the regulation.

Section 839 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232)

SEC. 839. REVIEW OF FEDERAL ACQUISITION REGULATIONS ON COMMERCIAL PRODUCTS, COMMERCIAL SERVICES, AND COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEMS.

(a) REVIEW OF DETERMINATIONS NOT TO EXEMPT CONTRACTS FOR COMMERCIAL PRODUCTS, COMMERCIAL SERVICES, AND COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEMS FROM CERTAIN LAWS AND REGULATIONS.—Not later than one year after the date of the enactment of this Act [Aug. 13, 2018], the Federal Acquisition Regulatory Council shall—

(1) review each determination of the Federal Acquisition Regulatory Council pursuant to section 1906(b)(2), section 1906(c)(3), or section 1907(a)(2) of title 41, United States Code, not to exempt contracts or subcontracts from laws which such contracts and subcontracts would otherwise be exempt from under section 1906(d) of title 41, United States Code; and

(2) propose revisions to the Federal Acquisition Regulation to provide an exemption from each law subject to such determination unless the Council determines that there is a specific reason not to provide the exemptions pursuant to section 1906 of such title or the Administrator for Federal Procurement Policy determines there is a specific reason not to provide the exemption pursuant to section 1907 of such title.

(b) REVIEW OF CERTAIN CONTRACT CLAUSE REQUIREMENTS APPLICABLE TO COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES CONTRACTS.—Not later than one year after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall—

(1) review the Federal Acquisition Regulation to assess all regulations that require a specific contract clause for a contract using commercial product or commercial services acquisition procedures under part 12 of the Federal Acquisition Regulation, except for regulations required by law or Executive order; and

(2) propose revisions to the Federal Acquisition Regulation to eliminate regulations reviewed under paragraph (1) unless the Federal Acquisition Regulatory Council determines on a case-by-case basis that there is a specific reason not to eliminate the regulation.

(c) ELIMINATION OF CERTAIN CONTRACT CLAUSE REGULATIONS APPLICABLE TO COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEM SUBCONTRACTS.—Not later than one year after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall—

(1) review the Federal Acquisition Regulation to assess all regulations that require a prime contractor to include a specific contract clause in a subcontract for commercially available off-the-shelf items unless the inclusion of such clause is required by law or Executive order; and

(2) propose revisions to the Federal Acquisition Regulation to eliminate regulations reviewed under paragraph (1) unless the Federal Acquisition Regulatory Council determines on a case-by-case basis that there is a specific reason not to eliminate the regulation.

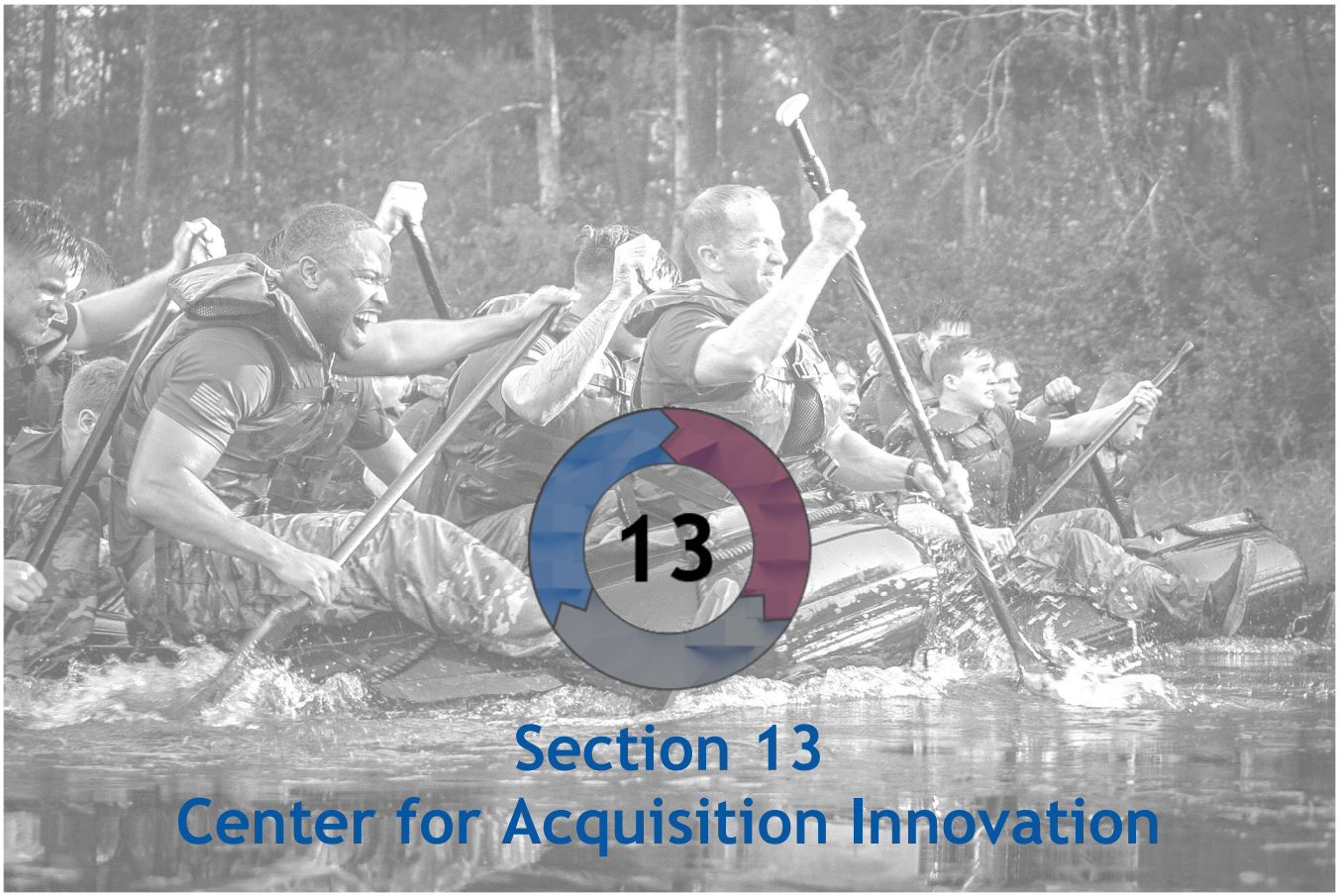
(d) REPORT TO CONGRESS.—

(1) REQUIREMENT.—Not later than one year after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall submit to the committees listed in paragraph (2) a report on the results of the reviews under this section.

(2) COMMITTEES LISTED.—The committees listed in this paragraph are the following:

(A) The Committee on Armed Services and the Committee on Homeland Security and Governmental Affairs of the Senate.

(B) The Committee on Armed Services and the Committee on Oversight and Government Reform of the House of Representatives.



Section 13
Center for Acquisition Innovation

To facilitate future efforts to address challenges associated with defense acquisition, the Section 809 Panel's records must be maintained and a center for policy research established.

RECOMMENDATIONS

Rec. 93: Create a Center for Acquisition Innovation located at the National Defense University, Eisenhower School.

Recommendation 93: Create a Center for Acquisition Innovation located at the National Defense University, Eisenhower School.

Problem

The Section 809 Panel will complete its work and cease to exist pursuant to its Congressional authorization on July 15, 2019. 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. To facilitate future efforts to address challenges associated with defense acquisition, the Section 809 Panel's records must be maintained and a center for policy research established.

Background

The House Armed Services Committee provided guidance in the report accompanying HR 5155, the FY 2019 NDAA, which indicated that the records of the panel should be moved to the Eisenhower School (ES) of the National Defense University (NDU) and that DoD should continue to do research and make policy proposals to Congress on improving DoD's acquisition system. Specifically the language in the report directs DoD that "research and analysis" shall continue, and the "panel's records shall be maintained by the Eisenhower School at the National Defense University."[1]

Discussion

Congress's intent to avoid the need to commission an acquisition reform panel each decade is clear. To establish a driving force for continuous improvement within DoD, the function should be situated in an educational environment where operational, acquisition, and industry personnel, as well as faculty with diverse backgrounds, have sufficient time to research issues, and discuss those issues candidly and without attribution. This academic approach should be conducted with a view to proposing peer reviewed solutions for consideration by both the Secretary of Defense and Congress for potential action.

The following elements are important to accomplishing Congress's intent:

- Act as an academic entity, specializing in strategic acquisition initiatives and innovative processes pursuant to the duties outlined in Table 13-1, *Duties of the Panel and Future Center.*
- Report on and analyze advanced acquisition strategies to continually refine operational support in DoD.
- Prioritize continuous improvement by promoting high standards and sound judgement in the proposal of acquisition policy alternatives, with a specific focus on streamlining acquisition statutes, regulations, policies, and procedures.

The Section 809 Panel discussed alternative strategies to accomplish the congressional intent with both NDU and Defense Acquisition University (DAU), the two DoD facilities potentially capable of fulfilling such a mission. After deliberation, the panel determined that Congress should establish an academically independent center designated as The Center for Acquisition Innovation (CAI) within the

[1] House Report 115-676, Report of the Committee on Armed Services to Accompany H.R. 5515 of the 115th Congress, May 15, 2018, 145.

NDU ES facility to meet the acquisition policy innovation mission articulated in this section. The ES students and faculty are in a unique position, colocated in DoD's only joint professional military education (JPME) phase II senior-level college with a concentrated curriculum for senior acquisition professionals. The ES "prepares military officers and civilians for senior leadership and staff positions throughout the acquisition community."[2] Additionally, the existing curriculum at ES could be leveraged to provide an opportunity for its students and faculty to participate in the center's mission, and subsequent annual deliverable.

A distinctive complement exists between the mission of the ES and the statutory charter of the Section 809 Panel as it is today (see Table 13-1). "The panel is charged with making recommendations that will shape DoD's acquisition system into one that is bold, simple, and effective."[3] The ES mission has a similar future oriented vision, where it integrates academic research and forward-thinking deliverables to meet 21st century demands with a continued practice in commercial sector partnership.

> *Under the guidance of the Chairman, Joint Chiefs of Staff (CJCS), the Eisenhower School Commandant and faculty prepare senior military officers, government civilians, and selected representatives from the private sector and international officers for the national security challenges of the 21st century. The goal is to leverage technological advances, integrate new strategic and operational concepts, identify and adapt to evolving global developments, and channel the vitality and innovation of the Services, the interagency, and allies to achieve a more seamless, coherent effect when confronting new national security challenges and the battlefields of the future.*[4]

Table 13-1 elucidates Section 809 Panel duties established in the pertinent NDAAs, as well as additional duties that the panel recommends CAI assume:

Table 13-1. Duties of the Panel and Future Center

Origin of Duties	Duties
Section 809, FY 2016 NDAA (Pub. L. No. 114-92), as amended by section 863(d) of FY 2017 NDAA (Pub. L. No. 114-328) and sections 803(c) and 883 of FY 2018 NDAA (Pub. L. No. 115-91)	Review the acquisition regulations applicable to the DoD with an objective to streamline and improve efficiency and effectiveness of the defense acquisition process and maintain a defense technology advantage.
Section 809, FY 2016 NDAA (Pub. L. No. 114-92), as amended by section 863(d) of FY 2017 NDAA (Pub. L. No. 114-328) and sections 803(c) and 883 of FY 2018 NDAA (Pub. L. No. 115-91)	Make any recommendations for the amendment or repeal of such regulations that the center considers necessary, as a result of such review, to— 1) establish and administer appropriate buyer seller relationships in the procurement system improve the functioning of the acquisition system; 2) ensure the continuing financial and ethical integrity of defense procurement programs;

[2] "The Eisenhower School for National Security and Resource Strategy," National Defense University, accessed November 14, 2018, https://es.ndu.edu/Programs/Senior-Acquisition/.
[3] "About Us," Section 809 Panel, accessed November 14, 2018, https://section809panel.org/about/.
[4] "About The Eisenhower School for National Security and Resource Strategy," National Defense University, accessed November 14, 2018, https://es.ndu.edu/About/Mission/.

Origin of Duties	Duties
	3) protect the best interests of the Department of Defense; 4) improve the efficiency of the contract auditing process, including through the development of risk-based materiality standards; and 5) eliminate any regulations that are unnecessary.
Report of the Committee on Armed Services, House of Representatives for FY19, in House Report 5515	DoD's acquisition reform efforts will not cease upon the termination of the Advisory Panel on Streamlining and Codifying Acquisition Regulations.
Report of the Committee on Armed Services, House of Representatives for FY19, in House Report 5515	DoD's implementation of recent legislative reforms as well as the Advisory Panel's recommendations on regulations will require continued research and analysis.
Report of the Committee on Armed Services, House of Representatives for FY19, in House Report 5515	Upon termination of the Advisory Panel, the Advisory Panel's records shall be maintained by the Eisenhower School at the National Defense University by no later than August 1, 2019.
Section 809 Panel, Volume 3, Section 13 Recommendation 93	Produce an annual report, in July, using similar methodologies of the current panel's *Volume 3* (i.e., substantiated research and analysis, conclusion, legislative and executive branch recommendations where appropriate, and specific implementation language for statutory changes) delivered to the Secretary of Defense, House Armed Services Committee (HASC), and Senate Armed Service Committee (SASC).
Section 809 Panel, Volume 3, Section 13 Recommendation 93	Act as an academic entity, specializing in strategic acquisition initiatives and innovative processes.
Section 809 Panel, Volume 3, Section 13 Recommendation 93	Use CAI resources to review and track implementation of past recommendations issued under Section 809 and future Center policy alternatives.

Considerations for Successful Implementation

Impartiality and Funding

It is imperative that CAI be academically independent, while having the ability to leverage the acquisition faculty and students at the ES and also at DAU. To ensure such independence, annual policy alternatives delivered by CAI should not be subject to any DoD review or approval before submission to the Secretary of Defense and the HASC and the SASC. Additionally, each fiscal year Congress should authorize and appropriate at least $1.5 million, adjusted annually for inflation, specifically for standing up and then operating CAI. CAI should be exempt from any constraints on full-time equivalents (FTEs) for the ES, subject to annual Congressional authorization and appropriation funding limits.

Strategic Partnerships

It is important for the acquisition cadre to have strategic sponsors throughout DoD, specifically with the Under Secretary of Defense (USD) Acquisition and Sustainment, and USD Research and

Engineering. Strategic sponsors are also needed to include the congressional defense committees; DAU; Director, Acquisition Career Manager offices; the Acquisition Functional Communities; service acquisition executives; component acquisition executives; USD(Comptroller); Joint Chiefs of Staff; and industry. The strategic sponsors should nominate topics for research and analysis and provide access and guidance to develop policy alternatives that support CAI's mission.

There is an obvious connection to the existing ES curriculum's research and analysis capabilities and requirements that should be leveraged to promote faculty and student participation. In particular, the students in the Senior Acquisition Course are encouraged to conduct research on CAI-sponsored topics as part of their academic requirements.

CAI should collaborate with sponsors to develop policy alternatives for the annual deliverable to solve current DoD problems and continuously improve statutes, regulations, policies, and procedures. CAI should seek stakeholder engagement (e.g., industry, Military Services, Defense Agencies,) in order to nominate and review the scope of policy alternatives and the implementation of such solutions provided. Partnerships should be sought to leverage rotational assignments for senior acquisition leaders to participate in CAI's annual deliverable.

Messaging and outreach, such as those established during the Section 809 Panels commission (e.g., podcasts, speaking engagements, open public sessions, a website, newsletters) should be used to establish continued engagement and feedback with stakeholders. CAI also provides an opportunity to further increase the existing collaboration between the ES and DAU.

Implementation Review

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. This recommendation will allow timely public reaction to pressing acquisition issues that cannot be duplicated in a simulated exercise historically delivered in the ES curriculum. Using the resources allocated to CAI, a CAI chair would partner with the ES to accomplish this validation task annually. The volume of recommendations and policy alternatives to track would be managed by the Chair, taking into consideration how to best use the ES students and faculty.

Incentives

CAI would be required to develop incentives to encourage faculty, students, industry partners, and DoD employees outside of NDU to participate in, or collaborate with CAI, in all its efforts to produce the most qualified constituents to analyze, shape, and develop necessary and enduring changes to the acquisition system. This collaboration would not be limited to NDU's preexisting relationships with DoD and commercial publications that feature academic articles. The ES should offer the participants the opportunity to directly engage with DoD senior officials and Congressional staff to develop and implement their proposed policy alternatives. Additionally, the panel recommends CAI use commercial incentives such as cash awards, time off awards, and public recognition, to promote participation with the center for purposes of its annual deliverable.

Records Archiving at the National Defense University Library

The panel's records are entirely digital, maintained on a public website, but the infrastructure and nomenclature may be inconsistent with current information technology standards or other public records requirements. The inconsistencies require resolution as the panel transitions its records management to NDU. The panel's records include the current website, which may either be supported by or transitioned to NDU. NDU needs to determine the scope of this effort and support it out of the annual appropriation for CAI. It is critical the future records owner protect the confidentiality of the digital records for the panel's interviews, as stakeholders agreed to the interviews with an expectation of nonattribution. The four existing panel reports (*Interim, Volume 1, Volume 2,* and *Volume 3*) would need to be housed on a public website (i.e., not in the .edu domain).

Conclusions

The functions expressed by the House of Representatives in a report accompanying the FY 2019 NDAA (i.e., "continued acquisition research and records maintenance") are best accomplished by creating a new center at NDU for acquisition innovation. CAI's mission would provide an opportunity for student and faculty research to propose policy alternatives to the Secretary of Defense and Congress annually on important issues to continuously improve the defense acquisition system.

Implementation

Legislative Branch

- Establish in the FY 2020 NDAA the Center for Acquisition for Innovation to be located at the National Defense University, Eisenhower School.
  - Leverage the Eisenhower School's student body and faculty where practicable.
  - Authorize and appropriate yearly funds sufficient to operate the center in an amount not less than $1.5 million adjusted annually for inflation.
  - Include the following among the CAI duties:
    - Operate as an academic entity specializing in acquisition research.
    - Produce an annual report in July that contains, at a minimum: (a) substantiated research and analysis, (b) a conclusion summarizing the research, (c) legislative and executive branch policy alternatives as appropriate, and (d) specific implementation language for statutory changes delivered to the Secretary of Defense, HASC, and SASC.
    - Track implementation of recommendations issued by the Section 809 Panel and policy alternatives proposed in the future CAI's work.
    - Review the acquisition statutes and regulations applicable to DoD with the objectives of streamlining and improving efficiency and effectiveness of the defense acquisition process and maintaining a defense technology advantage.

  - Prioritize research and analysis with the objective of amending or repealing such statutes or regulations that the center considers necessary to fulfill its mission.

- Require the ES at NDU to maintain the Section 809 Panel's records and reports at the time of the panel's termination.

Executive Branch

- Identify and assign CAI sponsors to support the mission in statute.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 13.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

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Section 13
Center for Acquisition Innovation

Implementation Details

Recommendation 93

RECOMMENDED REPORT LANGUAGE

SEC. ___. ESTABLISHMENT OF CENTER FOR ACQUISITION INNOVATION AT THE EISENHOWER SCHOOL OF THE NATIONAL DEFENSE UNIVERSITY.

This section would amend chapter 108, title 10, United States Code, by inserting a new section 2165 that establishes a Center for Acquisition Innovation at the National Defense University, Dwight D. Eisenhower School for National Security and Resource Strategy, Washington D.C., to continue the research and analysis of defense acquisition statutes, regulations, and policies.

In the committee's report accompanying H.R. 5155, the National Defense Authorization Act for Fiscal Year 2019, the committee provided guidance to the effect that the records of the acquisition advisory panel, established under section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), should be moved to the Eisenhower School of the National Defense University, which would continue to do research and make recommendations to the Congress on improving the Department of Defense's (DoD) acquisition system. The intent of the Center for Acquisition Innovation would be to eliminate the need for commissioning future acquisition reform advisory panels, such as the Section 809 panel and the previous Section 800 panel (established pursuant to the National Defense Authorization Act for Fiscal Year 1991, Public Law 101-510).

The committee notes that the new section 2165 would require the Center to annually propose innovative policy alternatives directly to Congress to address acquisition challenges in order to deliver capabilities to the warfighter inside the turn of our near peer competitors and non-state actors. The committee expects the Center to work with stakeholders within and outside the Department in developing its proposals. In addition, to ensure adequate staffing, this section would exempt the Center from the full time equivalent levels applicable to the Eisenhower School.

In addition, this section would provide for the transfer to and maintenance of the records of the Section 809 Panel at the Eisenhower School. Working papers, records of interview, and any other draft work products generated for any purpose by the Section 809 Panel during its research are covered by the deliberative process privilege exemption under paragraph (5) of section 552(b) of title 5, United States Code, and shall be available solely for academic research, subject to the academic freedom and non-attribution policies of the National Defense University.

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SEC. ___. ESTABLISHMENT OF CENTER FOR ACQUISITION INNOVATION AT THE EISENHOWER SCHOOL OF THE NATIONAL DEFENSE UNIVERSITY.

(a) ESTABLISHMENT OF CENTER.—

(1) IN GENERAL.—Chapter 108 of title 10, United States Code, is amended by inserting after section 2165 the following new section:

"§ 2166. National Defense University: Center for Acquisition Innovation

"(a) ESTABLISHMENT.—There is in the Dwight D. Eisenhower School for National Security and Resource Strategy of the National Defense University a Center for Acquisition Innovation. The Center shall operate as an academic entity within the Eisenhower School specializing in innovation relating to the defense acquisition system.

"(b) DIRECTOR.—The Director of the Center shall be an individual who is a distinguished scholar of proven academic, management, and leadership credentials with a superior record of achievement and publication relating to the defense acquisition system.

"(c) MISSION.—(1) The mission of the Center is to provide to policymakers in the Department of Defense, Congress, and throughout the Government, academic analyses and policy alternatives for innovation in the defense acquisition system. The Center shall accomplish that mission by a variety of means intended to widely disseminate the research findings of the Center.

"(2) In carrying out the mission under paragraph (1), the Center shall, on an ongoing basis, review the statutes and regulations applicable to the defense acquisition system. The objective of such review is to provide policy alternatives for streamlining and improving the

efficiency and effectiveness of the defense acquisition process in order to ensure a defense technology advantage for the United States over potential adversaries.

"(d) IMPLEMENTATION REVIEW OF SECTION 809 PANEL RECOMMENDATIONS AND CENTER POLICY ALTERNATIVES.—(1) The Center shall, on an ongoing basis, review implementation of the recommendations of the Section 809 Panel and policy alternatives provided by the Center. As part of such review, the Center shall—

"(A) for recommendations or policy alternatives for the enactment of legislation, identify whether (or to what extent) the recommendations or policy alternatives have been adopted by being enacted into law by Congress;

"(B) for recommendations or policy alternatives for the issuance of regulations, identify whether (or to what extent) the recommendations or policy alternatives have been adopted through issuance of new agency or Government-wide regulations; and

"(C) for recommendations or policy alternatives for revisions to policies and procedures in the executive branch, identify whether (or to what extent) the recommendations or policy alternatives have been adopted through issuance of an appropriate implementing directive or other form of guidance.

"(2) In this subsection, the term "Section 809 Panel" means the panel established by the Secretary of Defense pursuant to section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), as amended by section 863(d) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328) and sections 803(c) and 883 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91).

"(d) FUNDING AND STAFFING.—(1) There shall be available for the Center for any fiscal years not less than the amount of $1,500,000 (in fiscal year 2019 constant dollars), in addition to any other amount available for that fiscal year for the National Defense University.

"(2) Personnel of the Center shall not be counted for purposes of any limitation on the number of full-time equivalent employees applicable to the Dwight D. Eisenhower School for National Security and Resource Strategy.

"(f) ANNUAL REPORT.—(1) Not later than July 31 each year, the Center shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and House of Representatives concurrently a report describing the activities of the Center during the previous year and providing the findings, analysis, and policy alternatives of the Center relating to the defense acquisition system.

"(2) Each such report shall be submitted in accordance with paragraph (1) without further review within the executive branch.

"(3) Each report under paragraph (1) shall include the following:

"(A) Results of academic research and analysis.

"(B) Results of the implementation reviews conducted pursuant to subsection (d).

"(C) Policy alternatives for such legislative and executive branch action as the Center considers warranted.

"(D) Specific implementation language for any statutory changes recommended.

"(g) DEFINITION.—In this section, the term 'defense acquisition system' has the meaning given that term in section 2545(2) of this title.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2165 the following new item:

"2166. National Defense University: Center for Acquisition Innovation.".

(b) STARTUP OF CENTER.—The Secretary of Defense shall establish the Center for Acquisition Innovation under section 2166 of title 10, United States Code, as added by subsection (a), not later than March 1, 2020. The first Director of the Center shall be appointed not later than June 1, 2020, and the Center should be fully operational not later than June 1, 2021.

(c) IMPLEMENTATION REPORT.—(1) Not later than January 1, 2021, the President of the National Defense University shall submit to the Secretary of Defense a report setting forth the President's organizational plan for the Center for Acquisition Innovation, the proposed budget for the Center, and the timetable for initial and full operations of the Center. The President of the National Defense University shall prepare the report in consultation with the Director of the Center and the Director of the Dwight D. Eisenhower School for National Security and Resource Strategy of the University.

(2) The Secretary of Defense shall transmit the report under paragraph (1), together with whatever comments the Secretary considers appropriate, to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives not later than February 1, 2021.

(d) RECORDS OF THE SECTION 809 PANEL.—

(1) TRANSFER AND MAINTENANCE OF RECORDS.—Following termination of the Section 809 Panel, the records of the panel shall be transferred to, and shall be maintained by, the Dwight D. Eisenhower School for National Security and Resource

Strategy of the National Defense University. Such transfer shall be accomplished not later than August 1, 2019.

(2) STATUS OF RECORDS.—Working papers, records of interview, and any other draft work products generated for any purpose by the Section 809 Panel during its research are covered by the deliberative process privilege exemption under paragraph (5) of section 552(b) of title 5, United States Code, and shall be available solely for academic research, subject to academic freedom and non-attribution policies of the National Defense University.

(3) DEFINITION.— In this section, the term "Section 809 Panel" means the panel established by the Secretary of Defense pursuant to section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), as amended by section 863(d) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328) and sections 803(c) and 883 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91).

For reference, the text of the definition referred to in subsection (f) of the draft is as follows:

10 U.S.C. 2545(2):

> (2) The term "defense acquisition system" means the workforce engaged in carrying out the acquisition of property and services for the Department of Defense; the management structure responsible for directing and overseeing the acquisition of property and services for the Department of Defense; and the statutory, regulatory, and policy framework that guides the acquisition of property and services for the Department of Defense.

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Conclusion

From the moment the first commissioners took their oath of office in August 2016 and commenced work, the Section 809 Panel has operated with an understanding that DoD's priority is defending the nation, and the DoD acquisition system's mission is to deliver lethality to warfighters by providing innovative products and services that allow warfighters to obtain and maintain technological superiority over near-peer competitors and nonstate actors. This third and last volume of the *Final Report* brings to a close the panel's efforts to formulate recommendations to improve DoD's acquisition system to achieve that mission.

The Section 809 Panel's enacting legislation required the panel to examine acquisition regulations (and consequently the statutes that serve as the basis of those regulations) leading to recommendations to amend or repeal such regulations to "(A) establish and administer appropriate buyer and seller relationships in the procurement system; (B) improve the functioning of the acquisition system; (C) ensure the continuing financial and ethical integrity of defense procurement programs; (D) protect the best interests of the Department of Defense; (E) improve the efficiency of the contract auditing process, including through the development of risk-based materiality standards; and (F) eliminate any regulations that are unnecessary for the purposes described in…(A) through (E)."[1] Collectively, recommendations contained in *Volume 3*, along with those in the panel's *Interim*, *Volume 1*, and *Volume 2* reports, address all of these mandates set forth by Congress.

[1] FY 2016 NDAA, Pub. L. 114-94, Stat. 1356.

It is important to note that in its research the Section 809 Panel also examined acquisition systems in various countries in the global marketplace. The panel shared its ideas for the recommendations in *Volume 3*, and in its previous work, with procurement professionals in other countries and reviewed their comments in finalizing the reports. Feedback the panel received was in some cases key to understanding barriers to entry for innovative products and services and helped the panel shape recommendations that are consistent with international agreements that shape policy within the DoD acquisition system. Time prevented the panel from providing discussion and comparison of other countries' acquisition systems. Future acquisition reform work should aim to develop better understanding of the acquisition systems in the global marketplace, particularly in regard to U.S. allies and near-peer competitors.

Volume 3 provides the final set of recommendations; however, the Section 809 Panel's work is far from complete. As the recommendation phase of the panel's work waned, work on an additional publication began. This bonus volume, slated for publication by February 15, 2019, will contextualize the entire span of the panel's four reports; provide a complete list of all 98 recommendations (and associated subrecommendations), each coupled with a brief summary of the write-up from the respective volume in which it appeared; and suggest some starting points for future acquisition reform efforts. The Section 809 Panel recommends Congress allow DoD to begin its final review after receiving this final volume.

Publication of *Volume 3* marks the end of the panel's focus on researching and making recommendations and a shift to assisting Congress and the Secretary of Defense in implementing the panel's recommendations. To date, the panel's recommendations have formed the basis for provisions in the FY 2018 and FY 2019 NDAAs. Since the FY 2019 NDAA cycle, the panel has issued 68 additional recommendations via *Volume 2* and *Volume 3*, many of which require statutory solutions to implement the suggested changes. Although the Section 809 Panel has prioritized partnering with Congress, DoD, and industry throughout its tenure, commissioners will be redoubling these efforts in the coming months through meetings and hearings with the House and Senate defense committees, as well as continued discussion with DoD leadership, appearances at industry association events, authoring trade publication articles, and appearing at media opportunities.

If the nation's warfighters are to maintain their technological superiority over near-peer competitors and nonstate actors, the end of the panel's work on July 15, 2019 must not mark the end of acquisition reform efforts. Congress and DoD must be convinced of the need to adopt a war footing sense of urgency in the acquisition of the capabilities that warfighters require to maintain and sustain technological superiority. Access to innovative solutions in the marketplace must be immediate. There is a need for speed coupled with adherence to the principles of competition, integrity, and transparency in the process as applied to marketplace practices of the 21st century. In *Volume 3*, the panel makes recommendations to change how DoD views competition and transparency. The view is focused on maintaining the integrity of the DoD acquisition system, while also removing barriers to entry to nontraditional sellers and providing more competition and transparency than provided under the current system. It will be incumbent on Congress and DoD to implement the panel's recommendations and to build on them to create an environment of continuous improvement.

List of Section 809 Panel Recommendations

INTERIM REPORT – MAY 2017

#	Recommendation	Page	Status
IR-1	Affirm agency mission as the primary goal of DoD acquisition ("Mission First").	2	Sec. 801 of FY 2018 NDAA directed DFARS be revised to include certain statements of purpose. DFARS Case 2018-D005 finalized 5/4/2018
IR-2	Increase contract time for fuel storage from 20 years to 30 years.	5	Enacted as Sec. 881 of the FY 2018 NDAA in the form recommended by the Panel. Statutory change only; operational upon enactment.
IR-3	Eliminate the requirement for contractors to use recycled paper.	10	Recommendation for executive branch action and not addressed in the FY NDAAs.
IR-4	Eliminate FAR section on texting while driving. (FAR Clause 52.223-18)	17	Recommendation for executive branch action and not addressed in the FY NDAAs.
IR-5	Eliminate the requirement to accept and dispense dollar coins at government business operations.	22	Enacted as Sec. 885. FAR Case 2018-009 in process.

VOLUME 1 – JANUARY 2018

#	Recommendations	Page	Status
1	Revise definitions related to commercial buying to simplify their application and eliminate inconsistency.	18	FY 2019 NDAA Section 836; DFARS Case 2018-D066 and FAR Case 2018-018 in process.
2	Minimize government-unique terms applicable to commercial buying.	32	FY 2019 NDAA Section 837, 839; DFARS Case 2018-D066 and FAR Cases 2018-019 and 2018-013 in process.
3	Align and clarify FAR commercial termination language.	44	Implementation status still in flux.
4	Revise DFARS sections related to rights in technical data policy for commercial products.	46	Implementation status still in flux.
5	Align DCAA's mission statement to focus on its primary customer, the contracting officer.	64	Implementation status still in flux.
6	Revise the elements of DCAA's annual report to Congress to incorporate multiple key metrics.	67	Implementation status still in flux.
7	Provide flexibility to contracting officers and auditors to use audit and advisory services when appropriate.	70	Implementation status still in flux.
7a	Prior to requesting field pricing/audit assistance, contracting officers should consider other available internal resources and tailor their request for assistance to the maximum extent possible.	71	Implementation status still in flux.
7b	Define the term *audit*.	72	Implementation status still in flux.
7c	DCAA should use the full range of audit and nonaudit services available.	72	Implementation status still in flux.
7d	Direct a review of the roles of DCAA and DCMA to ensure appropriate alignment and eliminate redundancies.	74	FY 2019 Section 925; Report by March 2020 to Defense Committees.
8	Establish statutory time limits for defense oversight activities.	76	Implementation status still in flux. .
9	Permit DCAA to use IPAs to manage resources to meet time limits.	80	Implementation status still in flux.
10	Replace system criteria from DFARS 252.242-7006, Accounting System Administration, with an internal control audit to assess the adequacy of contractors' accounting systems.	82	Implementation status still in flux. See also Recommendations 72 and 73.
11	Develop a Professional Practice Guide for DoD's oversight of contractor costs and business systems.	87	Implementation status still in flux. See also Recommendations 71 and 73.
12	Require DCAA to obtain peer review from a qualified external organization.	91	Implementation status still in flux.
13	Increase coverage of the effectiveness of contractor internal control audits by leveraging IPAs.	93	Implementation status still in flux.

#	Recommendations	Page	Status
14	Incentivize contractor compliance and manage risk efficiently through robust risk assessment.	95	Implementation status still in flux. See also Recommendations 62 and 63.
15	Clarify and streamline the definition of and requirements for an adequate *incurred cost proposal* to refocus the purpose of DoD's oversight.	100	Implementation status still in flux.
16	Combine authority for requirements, resources, and acquisition in a single, empowered entity to govern DBS portfolios separate from the existing acquisition chain of command.	111	Implementation status still in flux.
17	Eliminate separate requirement for annual IRB certification of DBS investments.	130	Implementation status still in flux.
18	Fund DBSs in a way that allows for commonly accepted software development approaches.	137	Implementation status still in flux.
19	Eliminate the Earned Value Management mandate for software programs using Agile methods.	151	Implementation status still in flux.
20	Clarify the definitions of personal and nonpersonal services and incorporate in the DFARS a description of supervisory responsibilities for service contracts.	159	FY 2019 NDAA Section 820; report in 6 months to defense committees by SECDEF.
21	Refocus DoD's small business policies and programs to prioritize mission and advance warfighting capabilities and capacities.	169	FY 2019 NDAA Section 851; DoD SB Strategy due in February 2019. The OSD Small Business office has been tentatively slated for absorption under the office of Manufacturing and Industrial Policy.
21a	Establish the infrastructure necessary to create and execute a DoD small business strategy, ensuring alignment of DoD's small business programs with the agency's critical needs.	192	FY 2019 NDAA Section 858, 859; statutory change operational upon enactment; DLA briefing required within 6 months to Defense committees.
21b	Build on the successes of the SBIR/STTR and RIF programs.	193	Implementation status still in flux.
21c	Enable innovation in the acquisition system and among industry partners.	194	Implementation status still in flux.
22	Eliminate, or sunset within 5 years, the statutory requirement for certain acquisition-related offices and Secretary of Defense designated officials to increase flexibility and/or reduce redundancy.	199	FY 2019 NDAA Section 811; amendment or repeal of sections of law authorizing various offices – see sub-recommendations below. Requires DoD plan 30 days prior to reorganizing to account for the repeals.
22a	Repeal the statutory requirement for Department of Defense Test Resource Management Center, 10 U.S.C. § 196.	199	Implementation outcome status undetermined as of publication.
22b	Repeal the statutory requirement for Office of Corrosion Policy and Oversight, 10 U.S.C. § 2228.	200	Addressed in Sec. 811 of FY 2019 NDAA.
22c	Repeal the statutory requirement for Director for Performance Assessment and Root Cause Analysis (PARCA), 10 U.S.C. § 2438.	201	Addressed in Sec. 811 of FY 2019 NDAA.
22d	Repeal the statutory requirement for Office of Technology Transition, 10 U.S.C. § 2515.	203	Addressed in Sec. 811 of FY 2019 NDAA.
22e	Repeal the statutory requirement for Office for Foreign Defense Critical Technology Monitoring and Assessment, 10 U.S.C. § 2517.	204	Addressed in Sec. 811 of FY 2019 NDAA.
22f	Repeal the statutory requirement at 10 U.S.C. § 204 for a Small Business Ombudsman within each defense audit agency.	206	Addressed in Sec. 811 of FY 2019 NDAA.
22g	Repeal the statutory requirement for Secretary of Defense to designate a competition advocate for the Defense Logistics Agency, 10 U.S.C. § 2318.	207	Partially addressed in Sec. 811 of FY 2019 NDAA.
22h	Repeal the statutory requirement for the Hypersonics Development section of Joint Technology Office on Hypersonics, Section 218 of the FY 2007 NDAA (Pub. L. No. 109–364, 120 Stat. 2126; 10 U.S.C. § 2358 note).	208	Implementation status still in flux.
22i	Repeal the statutory requirement for Improvement in Defense Research and Procurement Liaison with Israel, Section 1006 of the FY 1989 NDAA (Pub. L. No. 100-456; 10 U.S.C. § 133 note).	210	Addressed in Sec. 811 of FY 2019 NDAA.
22j	Repeal the statutory requirement for Coordination of Human Systems Integration Activities Related to Acquisition Programs, Section 231 of the FY 2008 NDAA (Pub. L. No. 110–181, 10 U.S.C. § 1701 note).	211	Addressed in Sec. 811 of FY 2019 NDAA.
22k	Repeal the statutory requirement for Focus on Urgent Operational Needs and Rapid Acquisition, Section 902 of the FY 2013 NDAA (Pub. L. No. 112–239; 10 U.S.C. § 2302 note).	213	Addressed in Sec. 811 of FY 2019 NDAA.
22l	Repeal the statutory requirement for Senior Official for Dual-Use Science and Technology Projects, Section 203(c) of the FY 1998 NDAA (Pub. L. No. 105–85; 10 U.S.C. § 2511 note).	215	Addressed in Sec. 811 of FY 2019 NDAA.
22m	Repeal the statutory requirement for Executive Agent for Printed Circuit Boards, Section 256 of FY 2009 NDAA (Pub. L. No. 110–417; 10 U.S.C. § 2501 note).	216	Addressed in Sec. 811 of FY 2019 NDAA.
22n	Sunset the statutory requirement for Joint Directed Energy Transition Office (JDETO), 10 U.S.C. § 219 (10 U.S.C. § 2431 note) in FY 2023.	218	Implementation status still in flux.
23	Establish a permanent, automatic 5-year sunset provision for DoD congressional reporting requirements.	227	Version included in Sec. 1048 of FY 2019 Senate NDAA.
24	Repeal, preserve, or maintain various DoD congressional reporting requirements.	229	FY 2019 NDAA Section 813 – see sub-recommendations below; no corresponding regulatory case needed.
24a	Repeal the statutory requirement for the Defense Test Resource Management Center biennial strategic and budget reports, 10 U.S.C. § 196(d) and (e).	234	Implementation status still in flux.
24b	Repeal the statutory requirement for the Ballistic Missile Defense Programs annual budget justification reports, 10 U.S.C. § 223a(a).	235	Implementation status still in flux.
24c	Repeal the statutory requirement for the Programs for Combating Terrorism: Annual budget overview report, 10 U.S.C. § 229.	237	Addressed in Sec. 1049 (a)(1)(A) in FY 2019 Senate NDAA.
24d	Repeal the statutory requirement for the Annual Long-Term Plan for the Procurement of Aircraft for the Navy and the Air annual strategic plan, 10 U.S.C. § 231a.	238	Addressed in Sec. 1049 (a)(2)(B) in FY 2019 Senate NDAA.
24e	Repeal the statutory requirement for the Cyber Mission Forces annual budget overview report, 10 U.S.C. § 238(a).	240	Implementation status still in flux.

#	Recommendations	Page	Status
24f	Repeal the statutory requirement for the Corrosion Control and Prevention annual budget and policy report, 10 U.S.C. § 2228(e).	241	Implementation status still in flux.
24g	Repeal the statutory requirement for the Major Satellite Acquisition Programs annual integration report, 10 U.S.C. § 2275.	243	Addressed in Sec. 813 (a)(3) in FY19 House NDAA
24h	Repeal the statutory requirement for the Commercial Space Activities annual Cooperation with DoD report, 10 U.S.C. § 2276(e).	244	Addressed in Sec. 813 (a)(4) in FY19 House NDAA and Sec. 1049 (3) in FY19 Senate NDAA
24i	Repeal the statutory requirement for the Depot-Level Maintenance overview report, 10 U.S.C. § 2466(d).	246	Implementation status still in flux.
24j	Repeal the statutory requirement for the Covered Naval Vessels Repair Work in Foreign Shipyards annual report, 10 U.S.C. § 7310(c).	247	Addressed in Sec. 1049 (a)(4) in FY19 Senate NDAA
24k	Repeal the statutory requirement for the Reserve Component Equipment annual procurement report, 10 U.S.C. § 10543(a).	249	Addressed in Sec. 813 (a)(5)(A) in FY19 House NDAA
24l	Repeal the statutory requirement for the Reserve Components annual procurement threshold report, 10 U.S.C. § 10543(c).	250	Addressed in Sec. 813 (a)(5)(A) in FY19 House NDAA
24m	Repeal the statutory requirement for the Missile Defense Agency annual overview report, FY 2002 NDAA, 232(h)(3).	252	Implementation status still in flux.
24n	Repeal the statutory requirement for the Ford-Class Aircraft Carrier annual cost estimate report, FY 2007 NDAA, 122(d)(1).	253	Addressed in Sec. 813 (b) of FY19 House NDAA
24o	Repeal the statutory requirement for the Carriage by Vessel annual Repair Work in Foreign Shipyards report, FY 2007 NDAA, 1017(e).	254	Addressed in Sec. 1049 (b) of FY19 Senate NDAA
24p	Repeal the statutory requirement for the Bandwidth Capacity annual overview report, FY 2009 NDAA, 1047(d)(2).	255	Addressed in Sec. 1049 (d) of FY19 Senate NDAA
24q	Repeal the statutory requirement for the Afghanistan Infrastructure Fund annual overview report, FY 2011 NDAA, 1217(i).	257	Addressed in Sec. 1049 (e) of FY19 Senate NDAA
24r	Repeal the statutory requirement for the MDAP Testing and Evaluation annual justification of progress report, FY 2013 NDAA, 904(h)(1) and (2).	258	Addressed in Sec. 813 (g)(2)(A) in FY19 House NDAA
24s	Repeal the statutory requirement for the Ticonderoga-Class Cruisers and Dock Landing Ships annual modernization report, FY 2015 NDAA, 1026(d).	260	Addressed in Sec. 813 (h) in FY19 House NDAA and Sec. 1049 (f) in FY19 Senate NDAA
24t	Repeal the statutory requirement for the Ballistic Missile Defense Systems annual preproduction assessment reports, FY 2015 NDAA, 1662(c)(2) and (d)(2).	261	Implementation status still in flux.
24u	Preserve the statutory requirement for the Director of Operational Test and Evaluation annual overview report, 10 U.S.C. § 139(h).	264	Implementation status still in flux.
24v	Preserve the statutory requirement for Naval Vessel Construction annual strategic plan report, 10 U.S.C. § 231.	265	Addressed in Sec. 1021 in FY 2019 House NDAA
24w	Preserve the statutory requirement for the Director of Operational Test and Evaluation annual program report, 10 U.S.C. § 2399(g).	267	Not addressed in FY 2019 NDAA.
24x	Terminate in 2021 the statutory requirement for the Ballistic Missile Defense Programs annual acquisition baselines report, 10 U.S.C. § 225(c).	268	Not addressed in FY 2019 NDAA.
24y	Terminate in 2021 the statutory requirement for Depot-Level Maintenance biennial capability requirements report, 10 U.S.C. § 2464(d).	269	Not addressed in FY 2019 NDAA.
24z	Terminate in 2021 the statutory requirement for the National Technology and Industrial Base annual policy overview report, 10 U.S.C. § 2504.	271	Not addressed in FY 2019 NDAA.
24aa	Terminate in 2021 the statutory requirement for the Distribution of Chemical and Biological Agents to Non-Federal Entities annual overview report, FY 2008 NDAA, 1034(d).	272	Not addressed in FY 2019 NDAA.
24ab	Terminate in 2021 the statutory requirement for the Research and Development in Defense Laboratories annual funding report, FY 2009 NDAA, 219(c).	274	Not addressed in FY 2019 NDAA.

VOLUME 2 – JUNE 2018

#	Recommendations	Page	Status
25	Streamline and adapt hiring authorities to support the acquisition workforce.	64	Implementation status in flux.
26	Convert the Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) from an indefinite demonstration project to a permanent personnel system.	78	Implementation status in flux.
27	Improve resourcing, allocation, and management of the Defense Acquisition Workforce Development Fund (DAWDF).	87	Implementation status in flux.
28	Simplify the selection of sources for commercial products and services.	102	Implementation status in flux.
29	Revise 41 U.S.C. §§ 1501-1506 to designate the Cost Accounting Standards Board as an independent federal organization within the executive branch.	114	Implementation status in flux.
30	Reshape CAS program requirements to function better in a changed acquisition environment.	122	Implementation status in flux.
31	Eliminate the statutory and regulatory distinction between personal services contracts (PSC) and nonpersonal services (NPS) contracts.	148	Implementation status in flux.
32	Exempt DoD from paying the Federal Retail Excise Tax.	162	Implementation status in flux.
33	Update the Assignment of Claims processes under FAR Part 32.805.	168	Implementation status in flux.
34	Repeal certain Title 10 sections and note sections, create a new Part V under Subtitle A of Title 10, and redesignate sections in Subtitles B–D to make room for Part V to support a more logical organization and greater ease of use.	172	FY 2019 NDAA 801, 806,807, 808, 809 set forth the “china cabinet” structures; Section 812; DFARS Case 2018-D059.

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35	Replace commercial buying and existing simplified acquisition thresholds with readily available and readily available with customization for DoD.	17
36	Transition from a program-centric execution model to a portfolio execution model.	53
37	Implement a defensewide capability portfolio framework that provides an enterprise view of existing and planned capability, to ensure delivery of integrated and innovative solutions to meet strategic objectives.	64
38	Implement best practices for portfolio management.	76
39	Leverage a portfolio structure for requirements.	87
40	Professionalize the requirements management workforce.	98
41	Establish a sustainment program baseline, implement key enablers of sustainment, elevate sustainment to equal standing with development and procurement, and improve the defense materiel enterprise focus on weapon system readiness.	102
42	Reduce budgetary uncertainty, increase funding flexibility, and enhance the ability to effectively execute sustainment plans and address emergent sustainment requirements.	121
43	Revise acquisition regulations to enable more flexible and effective procurement of consumption-based solutions.	136
44	Exempt DoD from Clinger–Cohen Act Provisions in Title 40.	149
45	Create a pilot program for contracting directly with information technology consultants through an online talent marketplace.	162
46	Empower the acquisition community by delegating below threshold reprogramming decision authority to portfolio acquisition executives.	177
47	Restore reprogramming dollar thresholds to match their previous levels relative to inflation and the DoD budget.	186
48	Increase to 50 percent the *lesser of 20 percent* restriction that creates artificially low reprogramming thresholds for smaller programs.	192
49	Provide increased flexibility to the time periods within which contract obligations are permitted to occur.	195
50	Enact regular appropriations bills on time.	230
51	Mitigate the negative effect of continuing resolutions by allowing congressional regular appropriations to remain available for a standardized duration from date of enactment.	232
52	Permit the initiation of all new starts, provided Congress has appropriated sufficient funding.	236
53	Permit the initiation of all production rate increases, provided Congress has appropriated sufficient funding.	239
54	Permit the initiation of multiyear procurements under a CR.	241
55	Raise the Prompt Payment Act threshold.	242
56	Use authority in Section 1077 of the FY 2018 NDAA to establish a revolving fund for information technology modernization projects and explore the feasibility of using revolving funds for other money-saving investments.	250
57	Modify fiscal law to extend the duration of when funds cancel from 5 years to 8 years in expired status to align program acquisitions with funding periods and prevent putting current funds at risk and to support meeting appropriation intent.	256
58	Address the issue of over-age contracts through (a) establishing an end-to-end, integrated, streamlined process, (b) codifying DCMA's Quick Close Out class deviation in the DFARS, and (c) extending DCMA's Low Risk Quick Close Out initiative by 2 years.	263
59	Revise the Defense Acquisition Workforce Improvement Act to focus more on building professional qualifications.	273
60	Implement acquisition career paths that are integrated with an institutionalized competency model tailored to mission needs.	285
61	Create a comprehensive public–private exchange program for DoD's acquisition workforce.	305
62	Update the FAR and DFARS to reduce burdens on DoD's commercial supply chain to decrease cost, prevent delays, remove barriers, and encourage innovation available to the Military Services.	324
63	Create a policy of mitigating supply chain and performance risk through requirements documents.	326
64	Update socioeconomic laws to encourage purchasing from nontraditional 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.	330
65	Increase the acquisition thresholds of the Davis–Bacon Act, the Walsh–Healey Public Contracts Act, and the Services Contract Act to $2 million.	334
66	Establish a purpose statement for bid protests in the procurement system to help guide adjudicative bodies in resolving protests consistent with said purpose and establish a standard by which the effectiveness of protests may be measured.	341
67	Reduce potential bid protest processing time by eliminating the opportunity to file a protest with the COFC after filing at the GAO and require the COFC to issue a decision within 100 days of ordering a procurement be delayed.	345
68	Limit the jurisdiction of GAO and COFC to only those protests of procurements with a value that exceeds, or are expected to exceed, $75,000.	355
69	Provide as part of a debriefing, in all procurements where a debriefing is required, a redacted source selection decision document and the technical evaluation of the vendor receiving the debriefing.	358

Appendices

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APPENDIX A: ENABLING LEGISLATION

Section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), As Amended

(Amended by sec. 863(d) of the NDAA for Fiscal Year 2017 (P. L. 114-328) and secs. 803(c) & 883 of the NDAA for Fiscal Year 2018 (P. L. 115-91))

SEC. 809. ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS.

(a) ESTABLISHMENT.—The Secretary of Defense shall establish an independent advisory panel on streamlining acquisition regulations. The panel shall be supported by the Defense Acquisition University and the National Defense University, including administrative support.

(b) MEMBERSHIP.—The panel shall be composed of at least nine individuals who are recognized experts in acquisition and procurement policy. In making appointments to the advisory panel, the Under Secretary shall ensure that the members of the panel reflect diverse experiences in the public and private sectors.

(c) DUTIES.—The panel shall—

(1) review the acquisition regulations applicable to the Department of Defense with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage; and

(2) make any recommendations for the amendment or repeal of such regulations that the panel considers necessary, as a result of such review, to—

(A) establish and administer appropriate buyer and seller relationships in the procurement system;

(B) improve the functioning of the acquisition system;

(C) ensure the continuing financial and ethical integrity of defense procurement programs;

(D) protect the best interests of the Department of Defense;

(E) improve the efficiency of the contract auditing process, including through the development of risk-based materiality standards; and

(F) eliminate any regulations that are unnecessary for the purposes described in subparagraphs (A) through (E).

(d) ADMINISTRATIVE MATTERS.—

(1) IN GENERAL.—The Secretary of Defense shall provide the advisory panel established pursuant to subsection (a) with timely access to appropriate information, data, resources, analysis, and logistics support so that the advisory panel may conduct a thorough and independent assessment as required under such subsection.

(2) INAPPLICABILITY OF FACA.—The requirements of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the advisory panel established pursuant to subsection (a).

(3) AUTHORITIES.—The panel shall have the authorities provided in section 3161 of title 5, United States Code.

(e) REPORT.—

(1) PANEL REPORT.—Not later than January 15, 2019, the panel shall transmit a final report to the Secretary of Defense and the congressional defense committees.

(2) ELEMENTS.—The final report shall contain a detailed statement of the findings and conclusions of the panel, including—

(A) a history of each current acquisition regulation and a recommendation as to whether the regulation and related law (if applicable) should be retained, modified, or repealed; and

(B) such additional recommendations for legislation as the panel considers appropriate.

(3) INTERIM REPORTS.—(A) Not later than 6 months and 18 months after the date of the enactment of this Act, the Secretary of Defense shall submit a report to or brief the congressional defense committees on the interim findings of the panel with respect to the elements set forth in paragraph (2).

(B) The panel shall provide regular updates to the Secretary of Defense for purposes of providing the interim reports required under this paragraph.

(4) FINAL REPORT.—Not later than 60 days after receiving the final report of the advisory panel, the Secretary of Defense shall transmit such comments as the Secretary determines appropriate~~,~~ to the congressional defense committees.

(f) DEFENSE ACQUISITION WORKFORCE DEVELOPMENT FUND SUPPORT.—The Secretary of Defense may use amounts available in the Department of Defense Acquisition Workforce Development Fund established under section 1705 of title 10, United States Code, to support activities of the advisory panel under this section.

(g) TERMINATION OF PANEL.—The advisory panel shall terminate 180 days after the date on which the final report of the panel is transmitted pursuant to subsection (e)(1).

The joint statement of managers on the conference report on the FY 2018 NDAA (at page 888 of House Report 115-404) provides the following:

The conferees recognize the importance of the work of the Advisory Panel, established by the Congress, which is aimed at streamlining and improving the Department of Defense's acquisition processes to ensure the Department's continued technological advantages. Therefore, the conferees agree that the Advisory Panel's work should be extended. The Advisory Panel shall provide its recommendations to the Committees on Armed Services of the Senate and the House of Representatives using a phased approached. The recommendations shall be delivered in January 2018, June 2018, and January 2019. Each report shall contain a roughly equal number of recommendations to avoid an oversized final deliverable.

The conferees also note that the panel's projected total cost will be nearly $15.0 million for expenses, salaries, and other items given the extension authorized in this provision. Given this expenditure and the importance of acquisition reform, the conferees expect the Panel will make significant efforts to deliver actionable recommendations to both the Congress and Executive Branch, and provide supporting analyses and consultation to inform review and potential implementation of such recommendations.

APPENDIX B: STATUTORY, REGULATORY, AND POLICY INFORMATION CONCERNING THE CLINGER-COHEN ACT

Table B-1. Legal Provenance of 11-Item CCA Checklist from DoDI 5000.02 and DoDI 5000.74

DoDI 5000.02 and DoDI 5000.74 language	CCA P.L. 104-106 language	CCA U.S. Code language
"Make a determination that the acquisition supports core, priority functions of the DoD"	Unclear CCA text contains no instances of the words "core" or "priority"	Exact checklist language does not appear anywhere in U.S. Code
"Establish outcome-based performance measures linked to strategic goals"	Sec. 5123 "Performance and results-based management… where comparable processes and organizations in the public or private sectors exist, quantitatively benchmark agency process performance against such processes in terms of cost, speed, productivity, and quality of outputs and outcomes"	40 U.S.C. 11313 "Performance and results-based management… where comparable processes and organizations in the public or private sectors exist, quantitatively benchmark agency process performance against those processes in terms of cost, speed, productivity, and quality of outputs and outcomes"
"Redesign the processes that the system supports to reduce costs, improve effectiveness and maximize the use of commercial off-the-shelf technology"	Sec. 5113(b)(2)(C) "revise the executive agency's mission-related processes and administrative processes, as appropriate, before making significant investments in information technology"	40 U.S.C. 11303 "revise the executive agency's mission-related processes and administrative processes, as appropriate, before making significant investments in information technology"
"Determine that no private sector or government source can better support the function"	Sec. 5113(b)(2)(B) "determine, before making an investment in a new information system—(i) whether the function to be supported by the system should be performed by the private sector"	40 U.S.C. 11303 "determine, before making an investment in a new information system-(i) whether the function to be supported by the system should be performed by the private sector"

DoDI 5000.02 and DoDI 5000.74 language	CCA P.L. 104-106 language	CCA U.S. Code language
"Conduct an analysis of alternatives"	Sec. 5312(c)(9)(A) "Identification of the most qualified source, and ranking of alternative sources, primarily on the basis of the oral proposals, presentations, and discussions, and written proposals"	40 U.S.C. 11312 "specific quantitative and qualitative criteria for comparing and prioritizing alternative information systems investment projects" 10 U.S.C. 2366a "an analysis of alternatives has been performed consistent with study guidance developed by the Director of Cost Assessment and Program Evaluation"
"Conduct an economic analysis that includes a calculation of the return on investment; or for non-AIS programs, conduct a life-cycle cost estimate"	Sec. 5122(b)(3) "criteria related to the quantitatively expressed projected net, risk-adjusted return on investment"	40 U.S.C. 11312 "criteria related to the quantitatively expressed projected net, risk-adjusted return on investment"
"Develop clearly established measures and accountability for program progress"	Sec. 5113(b)(5)(A) "The Director [of OMB] may take any authorized action that the Director considers appropriate, including an action involving the budgetary process or appropriations management process, to enforce accountability"	40 U.S.C. 11303 "The Director [of OMB] may take any action that the Director considers appropriate, including an action involving the budgetary process or appropriations management process, to enforce accountability"
"Ensure that the acquisition is consistent with the DoD Information Enterprise policies and architecture, to include relevant standards"	Sec. 5125(b)(2) "Chief Information Officer of an executive agency shall be responsible for… developing, maintaining, and facilitating the implementation of a sound and integrated information technology architecture"	40 U.S.C. 11315 "Chief Information Officer of an executive agency is responsible for… developing, maintaining, and facilitating the implementation of a sound, secure, and integrated information technology architecture"

DoDI 5000.02 and DoDI 5000.74 language	CCA P.L. 104-106 language	CCA U.S. Code language
"Ensure that the program has a Cybersecurity Strategy that is consistent with DoD policies, standards and architectures, to include relevant standards"	No mention of cybersecurity in original CCA text, but Section 932 of FY 2011 NDAA (P.L. 111-383) included language requiring a DoD "strategy for assuring the security of software and software-based applications"	10 U.S.C. 2224 note ("Strategy on Computer Software Assurance") "The Secretary of Defense shall develop and implement, by not later than October 1, 2011, a strategy for assuring the security of software and software-based applications for all covered systems"
"Ensure, to the maximum extent practicable, (1) modular contracting has been used, and (2) the program is being implemented in phased, successive increments, each of which meets part of the mission need and delivers measurable benefit, independent of future increment"	Sec. 5202 "To the maximum extent practicable, use modular contracting for an acquisition of a major system of information technology" Sec. 5201 "acquisition of information technology is a simplified, clear, and understandable process that specifically addresses… incremental acquisitions"	41 U.S.C. 2308 "To the maximum extent practicable… use modular contracting for an acquisition of a major system of information technology" 40 U.S.C. 11703 "acquisition of information technology is a simplified, clear, and understandable process that specifically addresses… incremental acquisitions"
"Register Mission-Critical and Mission-Essential systems with the DoD CIO" Implemented as the DoD Information Technology Portfolio Repository (DITPR)	Sec. 5112(c) "Director shall develop, as part of the budget process, a process for analyzing, tracking, and evaluating the risks and results of all major capital investments made by an executive agency for information systems"	40 U.S.C. 11302 "Director shall develop a process for analyzing, tracking, and evaluating the risks, including information security risks, and results of all major capital investments made by an executive agency for information systems"

Table B-2. Redundancies with CCA in IT Acquisition[1]

CCA requirement	Redundant with…	Rationale for rescinding
Make a determination that the acquisition supports core, priority functions of the DoD.	DODD 7045.14 PPBE DoDD 5000.01, DoDI 5000.02, DoDI 5000.74, DoDI 5000.75 JCIDS Problem Statement	PPBE is the annual resource allocation process that prioritizes resources in support of DoD core mission. All acquisition guidance requires identifying prioritized business capabilities.
Establish outcome-based performance measures linked to strategic goals.	10 U.S.C. 2222 DODD 7045.14 PPBE DoDD 5000.01, DoDI 5000.02, DoDI 5000.74, DoDI 5000.75 DBS Investment Management Guidance (DBS IMG) Contract requirements Performance-based Statements of Work	Outcome-based performance measures and linkage to strategic goals are implemented in the capital planning processes outlined in PPBE, DBS IMG, and all acquisition guidance.
Redesign the processes that the system supports to reduce costs, improve effectiveness and maximize the use of commercial off-the-shelf technology.	10 U.S.C. 2222 (a), (d), (g) FY2017 NDAA DODD 7045.14 PPBE DoDI 5000.75 FAR Part 12, Acquisition of Commercial Items FAR Part 7, Acquisition Plans	Many laws, regulations, and guidance explicitly require BPR and maximizing the use of commercial solutions. The FY2017 NDAA gives CMO responsibility for BPR.

[1] Specific requirements associated with CCA are laid out in Enclosure 1, Table 10 of DoD Instruction 5000.02 (page 76), http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/500002_dodi_2015.pdf, accessed June 15, 2018.

CCA requirement	Redundant with…	Rationale for rescinding
Determine that no private sector or government source can better support the function.	Federal Acquisition Regulation (FAR) Part 34, Major System Acquisition FAR Part 7, Acquisition Plans DoDI 5000.02, 5000.74, 5000.75 Service-specific FAR supplements	Development of the acquisition strategy, supported by market research, identifies potential sources and defines the approach to select the most appropriate source.
Conduct an analysis of alternatives.	Weapon Systems Acquisition Reform Act of 2009 (WSARA) JCIDS DoDI 5000.75 DoDI 5000.02 DoDD 7045.14 PPBE DoDI 5000.73 Cost Analysis Guide and Procedures	AoA is part of the solution approach required in DoDI 5000.02 and 5000.75. PPBE requires programs to develop systematic analysis of mission and objectives, as well as alternative methods of accomplishing them.
Conduct an economic analysis that includes a calculation of the return on investment; or for non-AIS programs, conduct a life-cycle cost estimate.	DODD 7045.14 PPBE DoDI 5000.75 DBS Investment Management Guidance DoDI 7041.03, Economic Analysis for Decision-Making	Many guidance documents require calculation of return on investment.
Develop clearly established measures and accountability for program progress.	10 U.S.C. 2223a DoDI 5000.02 (knowledge points, system engineering plan) DoDI 5000.75 JCIDS Key Performance Parameters and Key System Attributes	10 U.S.C. 2223a requires metrics that can be implemented and monitored on a real-time basis. Per the DoDI 5000.02 and 5000.75, the MDA is responsible for this oversight and uses the acquisition program baseline (APB) as the tool to measure cost, performance, and schedule.

CCA requirement	Redundant with…	Rationale for rescinding
Ensure that the acquisition is consistent with the DoD Information Enterprise policies and architecture, to include relevant standards.	10 U.S.C. 2222 (b)(2), (e) 10 U.S.C. 142 DoDD 5144.02 DoD Architecture Framework	10 U.S.C. 2222 requires DBSs to be integrated into a comprehensive business enterprise architecture. 10 U.S.C. 142 and DODD 5144.02 require the DoD CIO to oversee DoD IT architecture and prescribe network, cybersecurity, and other standards.
Ensure that the program has a Cybersecurity Strategy that is consistent with DoD policies, standards and architectures, to include relevant standards.	DoDD 7045.14 PPBE DoDD 5144.02 DoDI 5000.75 DoDI 8500.01 FISMA	DODD 5144.02 requires the DOD CIO to oversee DoD IT architecture and prescribe network, cybersecurity, and other standards. FISMA requires DOD adhere to NIST standards.
Ensure, to the maximum extent practicable, (1) modular contracting has been used, and (2) the program is being implemented in phased, successive increments, each of which meets part of the mission need and delivers measurable benefit, independent of future increment.	10 U.S.C. 2223a DoDI 5000.02, DoDI 5000.75 FITARA OMB Circular A-11, Exhibit 300b FAR Part 39	Per DoD's implementation plan for FITARA, the requirement for incremental development is met by DoDD 5000.01, DoDI 5000.02, and 10 U.S.C. 2223a. FY 2018 NDAA includes pilot for agile and iterative development that can be expanded to all IT.
Register Mission-Critical and Mission-Essential systems with the DoD CIO.	10 U.S.C. 2223 10 U.S.C. 2223a 44 U.S.C 3505 (c) DoDD 5144.02 FISMA reviews information in DITPR, uses this information for reports to OMB and Secretary of Defense.	Multiple laws and directives require DOD CIO to maintain inventory of DOD mission-critical and mission-essential information systems.

APPENDIX C: HIRING AND EDUCATIONAL FINANCIAL ASSISTANCE AUTHORITIES

Several special hiring authorities permit DoD to hire and educate qualified experts in science and technology fields. Depending on the situation, these authorities may be appropriate for recruitment and training of data science and data analytics professionals. The Section 809 Panel's *Volume 2 Report* included a chapter outlining these authorities and recommending that Congress streamline and consolidate them.[2]

Hiring authorities that apply explicitly to data analytics include 10 U.S.C. Chapter 81 front matter, Direct Hire Authority for the Department of Defense for Personnel To Assist in Business Transformation and Management Innovation. This pilot program allows term-appointed hiring of individuals with expertise in "management and organizational change, data analytics, or business process design." The provision expires in 2021.[3]

The following are hiring authorities related to science, technology, business, and other fields related:

- 10 U.S.C. § 1599h, which permits DoD to make appointments of "eminent experts in science or engineering."[4]
- 10 U.S.C. § 2358a, which allows for direct appointment of qualified "scientific, technical, engineering, and mathematics positions, including technicians" in science and technology reinvention laboratories.[5]
- 10 U.S.C. § 1701 note, Pilot Program on Direct Hire Authority for Veteran Technical Experts Into the Defense Acquisition Workforce, pilot veteran hiring program for "scientific, technical, engineering, and mathematics positions, including technicians" in defense acquisition, expiring in 2020.[6]
- 10 U.S.C. § 1701 note, Direct Hire Authority for Technical Experts Into the Defense Acquisition Workforce, pilot hiring program for "scientific and engineering positions within the defense acquisition workforce," expiring in 2020.[7]
- 10 U.S.C. Chapter 81 front matter, Pilot Program on Enhanced Personnel Management System for Cybersecurity and Legal Professionals in the Department of Defense, pilot program for hiring cybersecurity and legal professionals, expiring in 2029.[8]
- 10 U.S.C. Chapter 81 front matter, Temporary Direct Hire Authority for Domestic Defense Industrial Base Facilities, the Major Range and Test Facilities Base, and the Office of the Director of Operational Test and Evaluation, pilot program allowing for appointment of "qualified candidates possessing an advanced degree to scientific and engineering positions," expiring in 2021.[9]

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[2] See Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 2 of 3,* 61-100 (2018).
[3] Section 1101 of FY 2018 NDAA, Pub. L. No. 115-91 (2017).
[4] Section 1121 of FY 2017 NDAA, Pub. L. No. 114-328 (2016).
[5] Ibid.
[6] Section 1112 of Pub. L. No. 114-92, FY 2016 NDAA (2015).
[7] Ibid, Section 1113.
[8] Section 1110 of FY 2018 NDAA, Pub. L. No. 115-91 (2017).
[9] Section 1121 of FY 2017 NDAA, Pub. L. No. 114-328 (2016).

- 10 U.S.C. Chapter 81 front matter, Direct Hire Authority for Financial Management Experts in the Department of Defense Workforce, pilot program for hiring those with expertise in financial management, accounting, auditing, actuarial analysis, cost estimating, operational research, and business and business administration, expiring in 2022.[10]
- 10 U.S.C. Chapter 81 front matter Direct Hire Authority for the Department of Defense for Post-Secondary Students and Recent Graduates (pilot program for hiring "qualified recent graduates" for "professional and administrative occupations," expiring in 2021.[11]

Several legal provisions also allow for educational financial assistance in fields related to science and engineering. These include:

- 10 U.S.C. § 2192a, which authorizes Science, Mathematics, and Research for Transformation (SMART) scholarships and fellowships for development of "science, mathematics, engineering, and technology skills," conditional on DoD or defense-related employment.[12]
- 10 U.S.C. § 2200a, which authorizes financial assistance for individuals pursuing degrees in *cyber disciplines* and, upon completion of their degree programs, directly appoint those individuals to positions within DoD.[13]

[10] Ibid.
[11] Ibid.
[12] Section 1104 of FY 2006 NDAA, Pub. L. No. 109-163 (2006).
[13] Section 922 of FY 2001 NDAA, Pub. L. No. 106-398, Appendix (2000).

APPENDIX D: PANEL ACTIVITIES

Monthly Full-Panel Meetings

September 20-21, 2016	
Identifying the "Big Rocks" to Improving Defense Acquisition and Maintaining Defense Technology Advantage	▪ BG David Ehrhart, USAF (Ret.), Lockheed Martin Corp. ▪ Susan Warshaw Ebner, ABA Public Contract Law
AIA Perspectives	▪ Jason Timm, Aerospace Industries Association
Updating the Regulatory Source Code	▪ Andrew Hunter, Center for Strategic and International Studies
Acquisition Transformation Project, Acquisition of the Future (AOF)	▪ Ann-Marie Johnson, ASI Government ▪ Dina Jeffers, Deputy Secretary of the Army, Procurement ▪ Kymm McCabe, Deloitte Consulting
OFPP Priorities and Category Management	▪ Anne Rung, OFPP, OMB
Perspectives on Acquisition Reform, Lessons Learned from Research	▪ Dan Chenok, IBM Center for Business of Government
Acquisition Reform to Enable Military Effectiveness	▪ Lou Kratz, Lockheed Martin Corp.
Industry Roundtable (cohosted by U.S. Chamber of Commerce and Professional Services Council)	▪ Christian Zur, U.S. Chamber of Commerce ▪ Scott Amey, Project on Government Oversight ▪ Brian Collins and Susan Maybaumwisniewski, Business Executives for National Security (BENS) ▪ Roger Waldron and Mandy Smithberger, Center for Defense Information
November 15-16, 2016	
Expert Presentations to the Panel	▪ Chris Gunderson, U.S. Air Force ▪ Louis Kratz, Lockheed Martin Corp. ▪ Wendy Ginsberg, Congressional Research Service
December 14, 2016	
Expert Presentations to the Panel	▪ Soraya Correa, U.S. Department of Homeland Security ▪ Paul Francis, Government Accountability Office
January 24-25, 2017	
Major Defense Acquisition Programs	▪ Lt Gen Christopher C. Bogdan, F-35 Executive Officer ▪ VADM David Johnson, Principal Military Deputy ▪ Frank Kendall, Former USD(AT&L) ▪ Gary Bliss, OUSD(AT&L)

February 21-22, 2017	
Geopolitical Threat Environment	▪ Heather Conley and Melissa Dalton, Center for Strategic and International Studies (CSIS) ▪ Ben FitzGerald, Center for a New American Security (CNAS) ▪ Lt Gen Anthony Ierardi, Joint Chiefs of Staff, J8
Acquisition of Services in DoD	▪ Ken Brennan, Defense Procurement and Acquisition Policy (DPAP) ▪ James Meade, Naval Air Systems Command (NAVAIR) ▪ Dan Helfrich, Deloitte Consulting LLP
March 21-22, 2017	
Commercial Buying	▪ James Steggall and Joseph Fengler, AIA ▪ Janice Muskopf, AFMC ▪ Jon Etherton. Etherton & Associates ▪ Paul Milenkowic, ACC-NJ, Picatinny Arsenal ▪ Bill McNally, NASA ▪ Tyler Merkeley, HHS, BARDA ▪ Tim Applegate and Scott Ulrey, DARPA
April 25-26, 2017	
Expert Panel: The Effects of Socio-Economic Policies on Defense Acquisitions	▪ James Galvin, PhD, DoD Small Business Programs ▪ Kenneth Dodds, U.S. Small Business Administration ▪ Donna Huneycutt, Wittenberg Weiner Consulting ▪ Burt Ford, Lockheed Martin Corp.
Building a National Security Marketplace for Rapid Technology Discovery and Acquisition	▪ Tim Greeff, NSTXL
Imagining a Post-Barriers World	▪ Meagan Metzger, DCode42
May 23-24, 2017	
Former Navy Secretary Perspective	▪ The Honorable John Lehman, former Secretary of the Navy
SOF AT&L "Pain Points"	▪ James "Hondo" Geurts, SOCOM AT&L
June 20-21, 2017	
SMC's Acquisition Challenges: PM, Contracting, and Budgeting Perspectives	▪ Barbara Baker, SMC/PID, ACE Chief ▪ Col Tom Hoskins, USAF ▪ Mike Wood, SMC
Cyber Acquisition Challenges	▪ John Metzger, IOC PEO C4I, SPAWARSYSCOM
SSC Pacific's Views on Acquisition	▪ Sharon Pritchard and Scott Crellin, SSC-Pacific
Improving the Speed and Impact of Acquisitions	▪ Eric Patten, President/CEO, Ocean Aero
Venture Capital in the Defense Space	▪ James Cross, Vice President, Franklin Equity Group
Access to Emerging Tech and Innovation	▪ VADM Ted Branch, USN (ret), President, Drone Aviator
Workforce Strategy and Tools	▪ Tracy Price, CEO, QMerit
July 18-19, 2017	
Perspectives from Congress	▪ Ben FitzGerald and Arun Seraphin, SASC ▪ Doug Bush and Alexis Lasselle Ross, PhD, HASC

August 22-23, 2017	
Regulatory Updates	▪ Joo Chung, DCMO ▪ Linda Neilson, DPAP
September 12-13, 2017	
Deliberations for Volume 1 Report	▪ Internal Volume 1 Report Discussion and Voting
October 17-18, 2017	
Deliberations for Volume 1 Report	▪ Internal Volume 1 Report Discussion and Voting
November 14-15, 2017	
Deliberations for Volume 1 Report	▪ Internal Volume 1 Report Discussion and Voting
December 12-13, 2017	
Deliberations for Volume 1 Report	▪ Internal Volume 1 Report Discussion and Voting
January 23-24, 2018	
Deliberations for Volume 2 Report	▪ Internal Volume 2 Report Discussion and Voting
Space Related Acquisition	▪ Col Norm Dozier, SMC Comptroller ▪ Michael Wood, Chief of the Financial Analysis Division ▪ Lisa Dybvad, Senior Consultant to FM ▪ Theresa Humphrey, Senior Consultant FM
February 20-21, 2018	
Deliberations for Volume 2 Report	▪ Internal Volume 2 Report Discussion and Voting
Threats Update	▪ The Honorable Robert Work, former Deputy Secretary of Defense
Workforce RSACI	▪ David Miskimens, Professor of Program Management Mission Assurance, Defense Acquisition University
March 20-21, 2018	
Deliberations for Volume 2 Report	▪ Internal Volume 2 Report Discussion and Voting
Lessons from Army Modernization Command Stand-Up	▪ LTG Edward Cardon, Director, Office of Business Transformation
April 17-18, 2018	
Deliberations for Volume 2 Report	▪ Internal Volume 2 Report Discussion and Voting
May 22-23, 2018	
Deliberations for Volume 2 Report	▪ Internal Volume 2 Report Discussion and Voting
Thoughts on DoD Acquisition	▪ David Berteau, former Assistant Secretary of Defense for Logistics and Materiel Readiness
June 19-20, 2018	
Deliberations for Volume 2 Report	▪ Internal Volume 2 Report Discussion and Voting
Deliberations for Volume 3 Report	▪ Internal Volume 3 Report Discussion
July 17-18, 2018	
Deliberations for Volume 3 Report	▪ Internal Volume 3 Report Discussion

August 14-15, 2018	
Deliberations for Volume 3 Report	▪ Internal Volume 3 Report Discussion
September 10-11, 2018	
Deliberations for Volume 3 Report	▪ Internal Volume 3 Report Discussion
October 16-17, 2018	
Deliberations for Volume 3 Report	▪ Internal Volume 3 Report Discussion
November 13-14, 2018	
Deliberations for Volume 3 Report	▪ Internal Volume 3 Report Discussion
December 11-12, 2018	
Deliberations for Volume 3 Report	▪ Internal Volume 3 Report Discussion

Semimonthly Stakeholder Meetings

January 12, 2017	
Thinking Holistically and Broadly About the Panel Mandate	▪ Stan Soloway, Celero Strategies
State of Defense IT Acquisition Reform	▪ John Weiler, IT Acquisition Advisory Council (IT-AAC) ▪ Marvin Langston, Langston Associates, LLC
PSC Research on DoD Task Order Awards Made Under IDIQ Contracts	▪ Alan Chvotkin and Matthew Taylor, Professional Services Council (PSC)
IDIQ Discussion	▪ Jeff Koses, GSA, Office of Government-wide Policy ▪ Roger Waldron, Coalition for Government Procurement
January 26, 2017	
Commercial Subcontract Flowdown; Simplified Acquisition Procedures	▪ Ron Smith, Ronald Smith Contracts
Acquisition Reform and Successful Programs	▪ Jeff Wieringa, Navy International Programs Office (NIPO)
February 23, 2017	
Security Cooperation Reforms and the Impact of FY17 NDAA	▪ VADM Joseph Rixey, Defense Security Cooperation Agency
DoD's Use of Project Structure	▪ Mike Morgan, Charles Mahon, and John Driessnack, Project Management Institute
Successful Acquisition and Fielding of Software in the DoD: Impediments and Improvements	▪ Matt Chandler, Palantir Technologies
Acquisition Workforce Study	▪ Rene Thomas-Rizzo, Human Capital Initiatives, OUSD (AT&L)
March 9, 2017	
Technology: How to Use and Buy More Effectively	▪ Kenneth Allen, Jennifer Napper, and Lou Kerestesy, ACT-IAC
Doing Business with DoD: Small Business Perspective	▪ Bryson Bort, Grimm
Strategies for Contracting Digital Services	▪ David Zvenyach, GSA, 18F
March 23, 2017	
Challenges Related to Government Practices for Commercial Items and Services Acquisitions	▪ Danielle Berti and Stephanie Gilson, Johnson & Johnson
The State of Public Procurement Metrics	▪ Raj Sharma, Public Spend Forum
Organizational Culture and the Panel's Mission	▪ Lou Kerestesy, Gov Innovation
Acquisition of the Future (AOF) Model	▪ Stan Soloway, Celero Strategies ▪ Kymm McCabe, Deloitte
DoD Acquisition	▪ Mike Morgan, Charles Mahon, and John Driessnack, Project Management Institute

April 13, 2017	
Software Concerns in DoD Acquisition: The Opportunity Presented by Agile Development	▪ Eileen Wrubel and Alyssa Le Sage, Software Engineering Institute, CMU
Cloud and IT Acquisition Policy: Recommendations and Next Steps	▪ Richard Beutel, Cyrrus Analytics
Optimizing Acquisition: Procurement Transformation and Category Management	▪ David Shields and Anne Laurent, ASI Government
April 27, 2017	
Regulations and Laws that Add Unnecessary Bureaucratic Obstacles to DoD Acquisitions	▪ Barbara Kinosky, Esq., Centre Law and Consulting
The Highly Regulated Federal Purchasing System: Implications and Alternatives	▪ Richard Dunn, Strategic Institute for Innovation in Government Contracting ▪ David Rothzeid, DIUx
Commercial Buying	▪ Shay Assad, Defense Procurement and Acquisition Policy
May 25, 2017	
Research Findings: NAICS Cyber Security Requirements and Mid-Tier Companies	▪ Leslie Lewis, PhD, Independent Consultant
Findings and Recommendations Related to Reduced Acquisition Opportunities for Mid-Sized and Small Businesses	▪ John Gilligan, Coalition for Competition ▪ Jim Neu, Coalition for Competition
June 8, 2017	
MIBP's Industry Data Analytics and Work with OSD Small Business Office	▪ Dr. Jerry McGinn, Acting DASD for Manufacturing and Industrial Base Policy
The Impact of Defense Regulations on Suppliers of Commercial Items to DoD	▪ Eric Roegner, EVP and Group President, Arconic Global Rolled Products and President, Arconic Defense
June 22, 2017	
Rental Services for COTS Test and Measurement Equipment	▪ Tony Ricotta, Director, Strategic Services, Aerospace & Defense Electro Rent Corporation
Barriers to Entry into the Defense Market	▪ Darryl Anunciado, President/CEO, Action Drone
Barriers to Entry Roundtable	▪ Lou Kelly, Director, San Diego Regional Innovation Cluster ▪ Rebecca Unitec, Fuse Integration ▪ Scott Velazquez, Innovation Digital ▪ Gary Abramov, Pacific Blue Innovations ▪ Jim Winso, Spectral Labs
August 24, 2017	
Protests and Modernizing CICA	▪ Ralph Nash, Professor Emeritus of Law, The George Washington University
Unique Perspectives and Challenges in Selling in the Federal Marketplace	▪ Wyn Elder, Director, Strategic Initiatives and Business Development, U.S. Government, Apple
Positive Features of FY18 NDAA and Impediments to Reform	▪ John Anderson, Legislative Representative, American Federation of Government Employees

September 14, 2017	
Mission Engineering	▪ James Moreland, Jr., PhD, Deputy Director, Naval Warfare OUSD ATL/Tactical Warfare Systems
Using Data Analytics to Enhance Decision-making in DoD Procurement	▪ Eric Heffernan and Christine Kettler, Grant Thornton
NASA iTech	▪ Kira Blackwell, NASA HQ, Innovation Program Executive, Office of the Chief Technologist
September 28, 2017	
IDIQ Contracts, SWACs, and MACs	▪ Richard Ginman, former Director, DPAP
Measurement, Workforce Competencies, and Procurement Technology	▪ Raj Sharma, Chairman, Public Spend Forum
Recommendations to the Section 809 Panel	▪ Roger Waldron, Coalition for Government Procurement
January 11, 2018	
Improving Services Acquisition	▪ Ronda Schrenk, Senior Policy Advisor, Intelligence and National Security Alliance (INSA) ▪ Ellen McCarthy, Chair, INSA Acquisition Management Council, Noblis-NSP ▪ Howard Weitzner, Vice Chair, INSA Acquisition Management Council, Managing Director, U.S. Federal, Accenture Federal Services
Other Transaction Agreements: An Enabler for Space Launch	▪ Gary Kyle, President, Persistent Agility, Inc. ▪ Ron Poussard, Applied Federal Contract Associates
Rapid Acquisition	▪ Tonico Beope, Director of Contracting, Air Force Special Access Programs, SAF/AQ
The Future Impact of Cloud Computing on Acquisition	▪ Jay Huie, Director, GSA TTS Secure Cloud Portfolio ▪ John Hamilton, FedRAMP PM for Operations ▪ Evan Issacs, FedRAMP PMO Support

Team Meetings/Interviews

- (ISC)^2
- Action Drone
- Aerospace Industries Association
- AFCEA
- Air Force Materiel Command
- Allen Federal Business Partners
- Amazon Business, Public Policy, and Web Services
- American Federation of Government Employees
- ANG Budget Division Chief
- Anser
- Apple, Inc.
- Arconic Defense
- Arlluk Technology Solutions
- Army Cyber Institute (ACI)
- U.S. Army Tank-automotive and Armaments Command (TACOM)
- ASN (RDA), DASN Unmanned
- Arnold & Porter Kaye Scholer LLP
- Ausco, Inc.
- BAE
- Bain Capital
- Baker Tilly
- Berkley Research Group LLC
- BMNT Partners
- Boeing
- Booz Allen Hamilton
- Boston Engineering
- Buchanan & Edwards
- Catalytic
- Carnegie Mellon University, Software Engineering Institute
- Celero Strategies LLC
- Coalition for Competition
- Coalition for Government Procurement
- Cohen Mohr LLP
- Covington & Burling LLP
- Cpacket Networks
- Crowell & Moring LLP
- Center for Strategic and Budgetary Assessments (CSBA)
- Cyber Security Strategies, LLC
- Cymmetria
- Defense Advanced Research Projects Agency (DARPA), Contracts Management Office
- DART
- DASD, Manufacturing and Industrial Base Policy
- Defense Acquisition University
- DCode42
- Defense Contract Management Agency
- Defense Entrepreneurs Forum
- Defense Technical Information Center (DTIC)
- Defense Logistics Agency
- Defensewerx
- Deloitte
- Department of Commerce
- Department of Energy
- Dewberry
- DFJ Venture
- Department of Health and Human Services (DHHS), Biomedical Advanced Research and Development Authority (BARDA)
- Direct Steel LLC
- Defense Innovation Unit Experimental (DIUx)
- Doolittle Institute, Inc.
- Dozuki
- Draper
- Defense Systems Management College (DSMC)
- Electro Rent Corporation
- Ernst & Young
- Etherton & Associates
- EWA
- Federal Aviation Administration (FAA)
- ForgeRock
- Fortney & Scott LLC
- Frankel PLLC
- Fuse Integration
- GAO, Acquisitions and Sourcing Management Office

- General Dynamics
- General Electric
- Grant Thornton
- Grey Aviation Advisors & Solutions
- GSE Dynamics
- Hacking4Defense
- Harvard Kennedy School of Business
- HeartFlow
- Heritage Foundation
- Hogan Lovells LLP
- Holland & Knight LLP
- Headquarters, Department of the Army (HQDA), Deputy Assistant Secretary for Procurement (DASA P)
- InfoReliance Corporation
- Information Systems Asset Management
- Information Systems Security Association
- Innovation Digital
- Integrated Dual Use Commercial Companies (IDCC)
- Invensense
- IT Alliance for Public Sector (ITAPS)
- Jenner & Block LLP
- JLT Specialty USA
- Johnson & Johnson, Government Business Compliance
- Jones Day
- Latham & Watkins LLP
- Leidos
- LMI
- Lockheed Martin
- Mayer Brown LLP
- Microsoft
- Mead & Hunt
- Miles and Stockbridge P.C.
- Ministry of Finance Kyrgyz Republic
- MITRE
- Morrison & Foerster LLP
- MVM, Inc.
- National Aeronautics and Space Administration (NASA), Contracts and Grants Policy and Office of Procurement
- NASA, Office of the Chief Technologist
- National Defense University
- NGC
- National Oceanic and Atmospheric Administration (NOAA)
- NRI Secure Technologies
- National Security Technology Accelerator (NSTXL)
- Nyotron
- Office of the Assistant Secretary of the Navy, Financial Management and Comptroller (OASN(FM&C)), FMB
- ODG
- U.S. Office of Management and Budget (OMB), Office of Federal Procurement Policy (OFPP)
- Omera Khan
- Office of the Chief of Naval Operations (OPNAV), N9
- Office of the Secretary of Defense – Comptroller
- OUSD(AT&L), Tactical Warfare Systems
- Pacific Architects and Engineers, Inc.
- Pacific Blue Innovations
- Perkins Coie LLP
- Phillips Screw Company
- Precision Gear
- Prevalent
- PricewaterhouseCoopers
- Procurement Technical Assistance Center – Illinois, Maryland, and Virginia
- Professional Services Council
- Progressive Industries, Inc.
- Public Spend Forum
- Qualcomm Institute
- QCWare
- Raytheon
- Rogers Joseph O'Donnell, P.C.
- San Diego Regional Innovation Cluster
- Sandia National Laboratories
- SBDC Florida
- Section 813 Panel
- Senator Collins Staff
- Sevatec
- Sheffield Asset Management

- Software Engineering Institute
- SOS International LLC
- Sourcing Outcomes and Solutions LLC
- SpaceX
- Spectral Labs
- SS8
- Steptoe & Johnson LLP
- Symantec
- Telefonica
- The ELOCEN Group
- UI LABS
- U.S. Air Force, Acquisition Law and Litigation Directorate
- U.S. Army Contracting Command
- U.S. Army Corps of Engineers
- United Technologies
- University of Illinois at Urbana-Champaign; School of Information Sciences
- University of San Diego
- OUSD(AT&L), Defense Procurement Acquisition Policy (DPAP)
- United States Special Operations Command (USSOCOM)
- Varonis
- Vencore
- ViaStat
- Wiley Rein LLP
- Wing Venture Capital
- Wittenberg-Weiner Consulting
- Woods Peacock
- Yaniv Strategies

APPENDIX E: PANEL TEAMS

FAR to Statute Baseline

FAR to Statute Baseline is reviewing how statutes, regulations, or procedures should be written to take into account the threat and business environments that exist today. The team is systematically reviewing the FAR and identifying the statutory basis for regulations when they exist, as well as listing regulations that could potentially be deleted.

Streamlined Procurement Process

Streamlined Procurement Process is researching options for substantially streamlining noncomplex acquisitions less than $15 million. Although the current acquisition system generally treats $1 million contracts the same as $1 billion contracts, the team is considering ways to enable DoD to meet its acquisition needs for smaller contracts more efficiently and effectively.

Commercial Buying

Commercial Buying is focused on simplifying DoD's commercial buying practices. Simplification will enable greater access to companies not currently selling to DoD and to be more adaptable and agile in its acquisition process.

Barriers to Entry

Barriers to Entry is focused on evaluating and removing regulatory, cultural, or bureaucratic barriers to entering the DoD marketplace. Removing barriers to entry will attract companies interested in conducting business with DoD that have not previously entered the DoD marketplace.

Characteristics of Successful Programs

Characteristics of Successful Programs is identifying the attributes and qualities common to successful programs, with an eye toward identifying techniques, tools, and practices that can be widely employed. The team will make recommendations for best practices, regulations, and statutes.

IT Acquisition

IT Acquisition is investigating how to best streamline the information technology (IT) acquisition process as DoD modernizes its use of IT, with a specific focus on defense business systems and IT services. The ultimate goal is to increase use of commercial best practices and business processes, delivering capability faster and keeping DoD's technology current and supportable.

Budget

Budget is considering the broader budgeting process in DoD. The team aims to arrive at recommendations that will optimize budgeting policy and processes to maintain military technological superiority through the efficient flow of resources in the acquisition system.

Streamlining Regulations

Streamlining Regulations is identifying regulations pertaining to defense acquisition that are no longer necessary. The team is packaging together comprehensive ideas that would substantially streamline the acquisition process.

Cost Accounting Standards

Cost Accounting Standards is reviewing the administrative and accounting requirements of cost accounting standards (CAS), along with exemptions from CAS and thresholds for applying CAS to contracts. The team will make recommendations aimed, broadly, at streamlining requirements.

Workforce

Workforce is looking at statutory and regulatory reform that would foster a culture of authority and accountability in the acquisition process, enabling the workforce to serve the mission free of unnecessary obstacles. Defense acquisition is a human activity dependent on the judgments and decisions of people operating in the real world.

Statutory Reorganization

The statutory reorganization effort will propose a reorganization and consolidation of the acquisition-related provisions of title 10, U.S. Code, and other related provisions of law to provide a more cohesive and coherent structure for defense acquisition statutes within title 10. Nonsubstantive revisions will be made to improve readability and achieve greater internal consistency and, where possible, revisions will be made to achieve greater consistency with parallel provisions in title 41.

APPENDIX G: PANEL MEMBERS AND PROFESSIONAL STAFF

Commissioners

Mr. David A. Drabkin
Chair

Mr. David G. Ahern

Mr. Elliott B. Branch

VADM Joseph W. Dyer, USN (Ret.)

BG Michael D. Hoskin

Maj Gen Kenneth D. Merchant, USAF (Ret.)

Dr. Terry L. Raney

LTG N. Ross Thompson III, USA (Ret.)

Maj Gen Casey D. Blake, USAF

The Honorable Allan V. Burman

Ms. Cathleen D. Garman

The Honorable William A. LaPlante

Mr. David P. Metzger

Maj Gen Darryl A. Scott, USAF (Ret.)

Mr. Laurence M. Trowel

Mr. Charlie E Williams, Jr.

Former Commissioners

Ms. Claire M. Grady

Mr. Harry P. Hallock

The Honorable Deidre A. Lee

Major Contributors to This Report

Mr. Terry Albertson

Mr. Brent Calhoun

Mr. Patrick Fitzgerald

Mr. John Hindman

Mr. Roger Holbrook

Maj Gen Cameron G. Holt

Mr. Pete Modigliani

Ms. Barbara Michael

Ms. Linda Neilson

Mr. Bill Romenius

Mr. Louis Rosen

Mr. Jim Thomas

Mr. Steve Trautwein

Mr. Richard J. Wall

The Section 809 Panel also recognizes the contributions of the Lockheed Martin Corporation, The MITRE Corporation, and personnel from various DoD organizations.

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APPENDIX G: ACRONYM LIST

Acronym/Term	Definition
AFICA	Air Force Installation Contracting Agency
AIR	Acquisition Information Repository
ALD	Acquisition Leader Development
AMC	U.S. Army Materiel Command
APL	Approved Products List
AQS	Acquisition Qualification Standard
ASBCA	Armed Services Board of Contract Appeals
ASPR	Armed Services Procurement Regulation
AWF	Acquisition Workforce
AWQI	Acquisition Workforce Qualification Initiative
AWS	Amazon Web Services
BAA	Buy American Act
BPA	Blanket Purchase Agreement
BPR	Business Process Reengineering
C2S	Commercial Cloud Services
CAE	Component Acquisition Executive
CAI	Center for Acquisition Innovation
CAP	Critical Acquisition Position
CAS	Cost Accounting Standards
CASTLE	Cloud Adoption Survival Tips, Lessons, and Experiences
CCA	Clinger–Cohen Act
CCE	Common Computing Environment
CCoE	Cloud Center of Excellence
CD	Compact Disk
CDO	Chief Data Officer
CFR	Code of Federal Regulations
CICA	Contracting in Competition Act
CIO	Chief Information Officer
CISO	Chief Information Security Officer
CJCS	Chairman, Joint Chiefs of Staff
CLIN	Contract Line-Item Numbers
CLP	Continuous Learning Point
CMO	Chief Management Officer
CNAS	Center for New American Studies
CO	Contracting Officer

Acronym/Term	Definition
CoE	Center of Excellence
COTS	Commercially Available Off-the-Shelf
CPA	Certified Public Accountant
CSO	Commercial Solutions Opening
CSP	Cloud Service Providers
DAC	Defense Acquisition Corps
DACM	Director, Acquisition Career Manager
DAU	Defense Acquisition University
DAR Council	Defense Acquisition Regulations Council
DAWDF	Defense Acquisition Workforce Development Fund
DAWIA	Defense Acquisition Workforce Improvement Act
DBS	Defense Business System
DCAA	Defense Contract Audit Agency
DCMA	Defense Contract Management Agency
DHA	Defense Health Agency
DISA	Defense Information Systems Agency
DITAP	Digital IT Acquisition Program
DITPR	DoD Information Technology Portfolio Repository
DLA	Defense Logistics Agency
DoD IG	DoD Inspector General
DoDD	DoD Directive
DoDI	DoD Instruction
DODIN	Department of Defense Information Network
ECMS	Electronic Case Management System
ES	Eisenhower School (at National Defense University)
ESPC	Energy Savings Performance Contract
EWI	Education with Industry
FACA	Federal Advisory Committee Act
FAC-C-DS	Federal Acquisition Certification in Contracting Core-Plus Specialization in Digital Services
FAR Council	Federal Acquisitions Regulatory Council
FASA	Federal Acquisition Streamlining Act
FBO	Federal Business Opportunities
FCA	Joint Capability Area
FedRAMP	Federal Risk and Authorization Management Program
FFP	Firm–Fixed–Price

Acronym/Term	Definition
FISMA	Federal Information Security Management Act
FITARA	Federal Information Technology Acquisition Reform Act
FLSA	Fair Labor Standards Act
FM	Financial Management
FPDS	Federal Procurement Data System
FPDS-NG	Federal Procurement Data System-Next Generation
FRN	Federal Register Notice
FSM	Functional Services Manager
FTE	Full-Time Equivalent
GAO	Government Accountability Office
GovFlex	Government Freelance Exchange
GPA	Agreement on Government Procurement (World Trade Organization)
GPC	Government Purchase Card
GS	General Service
GSA	General Services Administration
HASC	House Armed Services Committee
HCI	Human Capital Initiatives (Office)
IC	Intelligence Community
ICD	Initial Capabilities Document
IDIQ	Indefinite-Delivery/Indefinite-Quantity
IDP	Individual Development Plan
IoT	Internet of Things
IP	Intellectual Property
IT	Information Technology
ITEP	Information Technology Exchange Program
ITMRA	Information Technology Management Reform Act
JEDI	Joint Enterprise Defense Infrastructure
JPME	Joint Professional Military Education
LLCOE	Leadership Learning Center of Excellence
MA IDIQ	Multiple-Award Indefinite Delivery/Indefinite Quantity
MDA	Milestone Decision Authority
MDAP	Major Defense Acquisition Program
MGT	Modernizing Government Technology
MTA	Middle Tier Acquisition
NACI	National Agency Check with Inquiries
NDS	National Defense Strategy

Acronym/Term	Definition
NDU	National Defense University
NMCARS	Navy Marine Corps Acquisition Regulation Supplement
NSS	National Security System
OCI	Organizational Conflict-of-Interest
ODCs	Other Direct Costs
OEM	Original Equipment Manufacturer
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget
OPM	Office of Personnel Management
OSHA	Occupational Safety and Health Act
OT	Other Transactions (agreement)
OTA	Other Transaction Authority
OUSD	Office of the Under Secretary of Defense
PAE	Portfolio Acquisition Executive
PALT	Procurement Administrative Lead Time
PCI	Personal Conflict-of-Interest
PEO	Program Executive Officer
PM	Program Manager
PMA	President's Management Agenda
PPEP	Public–Private Exchange Program
PSC	Product Service Code
QASP	Quality Assurance Surveillance Plan
RAP	Readily Available Procedure
RCO	Rapid Capabilities Office
RFP	Request for Proposal
RFQ	Request for Quote
SaaS	Software as a Service
SAE	Service Acquisition Executive
SAE	Senior Acquisition Executive
SAF	Security Assessment Framework
SAM	System for Award Management
SAP	Special Access Program
SAPs	Simplified Acquisition Procedures
SASC	Senate Armed Services Committee
SBA	Small Business Administration
SECDEF	Secretary of Defense

Acronym/Term	Definition
SES	Senior Executive Service
SETA	Systems Engineering and Technical Assistance
SF	Standard Form
SME	Subject Matter Expert
SOO	Statement of Objectives
SRG	Security Requirements Guide
SSDD	Source Selection Decision Document
STRAP	Streamlined Acquisition Plan
TDY	Temporary Duty
U.S.C.	United States Code
USD	Under Secretary of Defense
USD(A&S)	Under Secretary of Defense (Acquisition and Sustainment)
USD(AT&L)	Under Secretary of Defense for Acquisition, Technology and Logistics
USD(R&E)	Under Secretary of Defense (Research and Engineering)
USDA	U.S. Department of Agriculture
WCF	Working Capital Funds
XaaS	Everything as a Service

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how to engage with our staff and commissioners
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SECTION 809 PANEL

Streamlining & Codifying Acquisition

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