

Recommendation 1: Revise definitions related to commercial buying to simplify their application and eliminate inconsistency.

Problem

The FAR's commercial buying terms are confusing, poorly defined, or undefined altogether. The term *commercial item* is overly broad, encompassing both commercial products and commercial services. The terms *commercial item* and *commercially available off-the-shelf item* appear in the U.S. Code in numerous sections, but do not incorporate the same universal definition; in some instances, the terms are defined differently, and in other instances they lack any definition at all. Subcontracting, which is subject to dozens of unique definitions for the terms *subcontract* and *subcontractor*, reflects similar disharmony. The inconsistency among commercial definitions generates confusion and creates risk that contracting officers may fail to apply commercial practices uniformly.

Background

Commercial buying represents an important component of the DoD acquisition process. For more than 2 decades, Congress and DoD have sought to encourage use of commercial buying by easing the statutory, regulatory, and procedural framework for buying commercial goods and services, as well as broadening the scope of goods and services that are eligible for revised commercial buying policies. The Section 800 Panel recognized the potential of commercial buying and recommended a number of changes in law to facilitate its acceptance. Included within its preference for buying commercial items, the Section 800 Panel recommended a definition for commercial item.¹ The Section 800 Panel's efforts contributed to passage of the 1994 FASA in which Congress took a number of important steps to enhance the federal government's access to the broader commercial market. These steps included exempting qualifying items procured at the prime or subcontract level from various statutes, policies, and contracting requirements unique to the federal procurement process. For this reason, the matter of the definitions that serve as the criteria for determining if an item qualifies is critically important. Two years after FASA was signed into law, Congress passed the 1996 FARA, which furthered the preference for buying commercial items by creating a definition for COTS items.²

Notwithstanding these efforts to promulgate a wide-ranging commercial buying policy, DoD's acquisition workforce has struggled to consistently interpret and apply the policy.³ Confusion over how to identify eligible commercial products and services has subjected DoD contracting officers to increased criticism and oversight.⁴ It has also sparked frequent legislative and regulatory revisions in an effort to improve the policies and tools available to buy commercially.⁵

¹ Acquisition Law Advisory Panel to the United States Congress, *Streamlining Defense Acquisition Laws*, accessed June 6, 2017, <http://www.dtic.mil/docs/citations/ADA262699>.

² FY 1996 NDAA, Pub. L. No. 104–106, 110 Stat. 186 (1996).

³ USD(AT&L), *Guidance on Commercial Item Determinations and the Determination of Price Reasonableness for Commercial Items*, accessed June 6, 2017, <http://www.acq.osd.mil/dpap/policy/policyvault/USA003554-16-DPAP.pdf>.

⁴ DoDIG, *Procuring Noncompetitive Spare Parts Through an Exclusive Distributor*, June 6, 2017, <http://www.dodig.mil/audit/reports/fy08/08-048.pdf>. GAO, *Contract Management: DOD Vulnerabilities to Contracting Fraud, Waste, and Abuse*, accessed June 6, 2017, <http://www.gao.gov/new.items/d06838r.pdf>.

⁵ USD(AT&L), *Guidance on Commercial Item Determinations and the Determination of Price Reasonableness for Commercial Items*, June 6, 2017, <http://www.acq.osd.mil/dpap/policy/policyvault/USA003554-16-DPAP.pdf>.

Findings

The Section 809 Panel identified a number of problems regarding definitions used in the procurement of commercial items.

Definition of Commercial Item

Congress gave DoD the widest possible access to the commercial marketplace by including in the definition the phrase *of a type*, which provides DoD the flexibility needed to take full advantage of the vibrant and constantly changing commercial marketplace. Many challenges have been raised regarding portions of the definition intended to allow the federal government to acquire items that are of a type sold in the commercial marketplace or that have *minor* modifications to satisfy a government-unique requirement. The same is true for items that are newly *offered for sale*, allowing the government the opportunity to be among the first to procure these state-of-the-art products. Both government and industry have, in recent years, established a better understanding of the application of the definition. Issues typically arise regarding facts of a particular acquisition, not as a result of a serious deficiency in the statutory definitions. Tinkering with the definition to address unique, fact-specific examples would not give DoD the broadest reasonable definition for accessing the commercial marketplace.

The definition of a commercial item encompasses both commercial products and commercial services. Defining an item as meaning either a product or service is confusing. The term *item* is not generally thought to include a *service*. For example, a standard dictionary definition for item is individual article or unit; 41 U.S.C. § 108, Item and Item of Supply, defines an item as “an individual part, component, subassembly, or subsystem integral to a major system;” and FAR 2.101, Definitions, defines a *common item* as a “material that is common to the applicable government contract and the contractor’s other work.”⁶ To illustrate the confusion caused by the existing definition, a service can be a commercial item offered in support of a product that is also a commercial item. Furthermore, a COTS item is a subset of a commercial item, but the definition of a COTS item only includes products and does not include services.⁷

Commercial Services

Commercial services have become substantially more important in the 24 years since their inclusion in FASA. DoD obligated more than \$23 billion for commercial services in FY 2017, which was 18 percent of all service obligations.⁸ The important statutory language addressing commercial services lies buried within several subparagraphs of the definition of a commercial item. This aspect of the definition may lead to confusion over the distinction between services offered directly in support of a commercial item, and services unrelated to a specific commercial item, but of a type offered in the commercial marketplace.

Defining a commercial item in a way that includes both commercial products and commercial services does not reflect the significant roles services and commercial services play today in the DoD

⁶ Item and Item of Supply, 41 U.S.C. §108. Definitions, FAR 2.101.

⁷ Commercially Available Off-the-Shelf Item, 41 U.S.C. §104.

⁸ FPDS Data, accessed January 7, 2017.

procurement budget. Carefully bifurcating the existing definition into commercial products and *commercial services* would better serve DoD.

Addressing Commercial Processes

The existing definition of a commercial item does not properly consider the output of *commercial processes* because it fails to encompass products that are manufactured to federal government specifications or drawings by manufacturers that customarily manufacture to customer specifications and drawings (such as paint, castings, mounting components on circuit cards using their standard commercial processes).

The Section 800 Panel originally made the recommendation with the intention of providing the federal government access to this important element of the commercial marketplace.⁹ The Section 800 Panel recommendation to allow DoD to access commercial processes, in addition to commercial products and services, continues to make sense and would benefit DoD today. For DoD to have broader access to the commercial marketplace and further the objective of greater integration of the commercial and defense industrial bases, it is important to expand the definition of a commercial item to include not only commercial products but also certain commercial processes.

Unintended Consequences of the Definition of COTS

In 1996, with the definition of commercial item less than 2 years old, Congress created a new definition for COTS item.¹⁰ COTS items are a much narrower subset of the broader universe of commercial products.¹¹ The intent was to provide additional opportunities for the government to buy from the commercial market by providing for additional statutory exemptions for commercial items that satisfied the much narrower COTS definition. FAR 12.505, Applicability of Certain Laws for the Acquisition of COTS Items, and DFARS 212.570, Applicability of Certain Laws to Contracts and Subcontracts for the Acquisition of Commercially-Available Off-the-Shelf Items, were established to identify statutes that were inapplicable or modified in some fashion to further simplify the acquisition of COTS.

The definition of COTS has provided little additional opportunity for procuring commercial products, and may have unintended consequences of limiting the acceptance of the broader definition of commercial products.

Commercial products are defined, generally, as items of a type that have been sold, leased, or licensed—or offered for sale, lease, or license—to the general public. An item that is not yet available in the market, but evolved from one that is, may also be procured as a *commercial item*. By contrast, a COTS item must be sold in substantial quantities in the marketplace, a throwback to the pre-FASA days of the substantial sales-based commercial item TINA exception.

A product may be considered commercial if it includes a customary modification or a unique modification specifically to meet a federal government requirement, as long as that unique

⁹ Section 800 Panel Report, section 8.3.1.6.

¹⁰ Clinger-Cohen Act of 1996, section 4203 (FY 1996 NDAA, Pub. L. No. 104-106).

¹¹ Commercially Available Off-the-Shelf Item, 41 U.S.C. §104. The term *COTS* does not apply to commercial services.

modification is *minor*. By contrast, a COTS item must be procured by the government *without modification* and in the same form as is sold in the commercial marketplace.

The combination of the requirement for COTS products to have sales in *substantial quantities* and be without modification substantially limits DoD's ability to leverage the commercial market, especially for new or state-of-the-art products. For example, if a commercial company offered for sale a new, substantially improved version of an existing server, DoD would need to wait until the server was sold in substantial quantities to be able to procure the product using the additional COTS exemption.

As of January 2018, there are 18 statutes and associated FAR or DFARS clauses that are either exempt or modified with regard to their applicability to COTS products (see Appendix F, Table F-1). Of those 18, five exemptions/modifications are established in statute, 11 result from a determination by the FAR Council or Office of Federal Procurement Policy (OFPP), and two result from a determination by DoD. Only six of these 18 exemptions/modifications are identified in FAR 12.503 or DFARS 212.570.

Although these additional COTS exemptions appear helpful on the surface, they may, in fact have created two distinct classes of commercial products: the broad, inclusive commercial product, and the very narrow COTS product.

The effect of creating these two classes is that much of the streamlining Congress intended for commercial products is being more narrowly applied to COTS items. For example, FAR 52.222-50, Combating Trafficking in Persons, paragraph (h), requires contractors that offer supplies other than COTS to prepare and maintain a compliance plan. It is unclear why a contractor selling supplies that meet the narrow definition of a COTS product should be exempt from the requirement to prepare and maintain a compliance plan, yet a contractor selling similar supplies that differ only in that they are not sold in substantial quantities, should not also be exempt.

Granting relief to contractors selling COTS items, but not those selling the broader commercial products and commercial services, serves as an obstacle to the government's stated goal of attracting the best and the brightest to the government marketplace to solve its most difficult problems. If DoD is seeking a high-tech, cutting-edge solution, that solution will likely not satisfy the **sold in substantial quantities** and **without modification** criteria of the COTS definition. Rather, it is more likely to be *new and innovative* and, therefore, **sold in less-than-substantial quantities; offered, but not yet sold; or entirely new technologies** that evolved from existing products, all of which fall under the definition of commercial products.

It is time for Congress and DoD to fully accept and embrace the commercial product and commercial services definitions and use them with all the flexibility FASA intended. DoD needs greater access to the full breadth of the commercial market place, and especially the cutting edge of that marketplace. Relieving the burden of government-unique requirements is an important step DoD must take to make that happen, but relieving the burden on only the very narrow universe of COTS products will not produce the desired result. Progress will only be made when real relief exists across the full spectrum of commercial products and commercial services.

Unique Statutory Definitions of Commercial Items

Congress codified the definition of a *commercial item* at 41 U.S.C § 103. This definition is used when determining whether an item qualifies for certain exemptions provided by Congress. To achieve the maximum benefit and avoid confusion, it is essential that the definitions be clear, well understood, and consistent. The Section 809 Panel analysis of 10 U.S.C. and 41 U.S.C. identified 40 distinct definitions of *commercial item*. Although the majority of these references point to the primary definitions at 41 U.S.C. § 103, many others do not, providing their own unique definitions, or none at all.

The definition from 41 U.S.C. § 103 is used for 34 of the 40 distinct citations for commercial items. Six terms in Title 10 do not incorporate the primary definitions by reference, whether due to the use of alternative definitions or through the absence of definitions entirely. Six instances of the term commercial item lacked a definition in accord with Title 41 (see Appendix F, Table F-2). Four of the terms lacked any definition; a fifth term referred to a definition of commercial items later in its own section; and a sixth term referred only to the commercial acquisition procedures of FAR Part 12.

There does not appear to be any stated rationale for the differing definitions in the case of these six citations. The Section 809 Panel reviewed the legislative histories of each provision, but found no justification for omitting the primary definitions of Title 41.¹² The underlying statutes themselves also did not explain the lack of definitions, or the existence of separate definitions.

Harmonizing the Use of Terms in Statute

Commercial buying processes would benefit from harmonizing all U.S.C. references to commercial products and commercial services—including 41 U.S.C., 10 U.S.C., and other miscellaneous uses of the terms in other titles of the U.S.C.—with the primary definitions of those terms in Title 41. The Section 809 Panel identified more than 75 uses of the term commercial item in statute. Every use of the terms commercial product and commercial service in the U.S.C. should incorporate, by reference, the primary definitions of those terms at 41 U.S.C. §§ 103, 103a and 104, respectively.

An exception to this general perspective that requires further elaboration is the commercial item definition at Core Logistics Capabilities, 10 U.S.C. § 2464(a)(3). This unique definition of commercial item was crafted in 1998.

10 U.S.C. §2464 (a)(5), Core Logistics Support states,

(5) The commercial items covered by paragraph (3) are commercial items that have been sold or leased in substantial quantities to the general public and are purchased without modification in the same form that they are sold in the commercial marketplace, or with minor modifications to meet Federal Government requirements.

It consists of portions of the definitions of a COTS item (41 U.S.C. § 104) and a commercial item (41 U.S.C. § 103). This unique definition likely represented the early thinking and concerns about how

¹² Based on Section 809 Panel analysis.

the relatively new definition (1995) of commercial item at 41 U.S.C. § 103 might be implemented and the effect it may have on weapon systems, subsystems, and components.

The definition states that the covered items addressed in 10 U.S.C. § 2464 are commercial items (a term that is defined in 10 U.S.C. § 2302 and 41 U.S.C. § 103), but then continues by carving out portions of the commercial item definition as well as portions of the definition of a COTS item (also defined at 10 U.S.C. 2302 and 41 U.S.C. § 104). The 10 U.S.C. § 2464 definition of commercial item does not include items of a type, items offered for sale, items that *evolved from commercial items*, and items that are not yet available in the commercial marketplace but will be available in time to meet the federal government delivery requirement. These are all important elements of the commercial item definition Congress created to give the federal government the opportunity to procure items that are state-of-the-art but may not otherwise be available to them under a COTS sold in substantial quantities criteria. The 10 U.S.C. § 2464 definition allows for minor modifications unique to the federal government, but does not include modifications to commercial items that are *customarily available in the commercial marketplace*. The 10 U.S.C. § 2464 definition appears to reflect the early concerns that contracting officers would take a very liberal approach to the definition, procuring many items as commercial, to the point that it would potentially undermine the depot role in weapon system readiness by tying support of such items to industry.

The potential concerns expressed above were prevalent in the late 1990s, but over time, they have generally proven unfounded. The distinction between commercial and noncommercial items has remained firm, particularly in regard to the kinds of items that would likely be maintained in a depot. Contracting officers have been careful to understand the commercial marketplace for an item and the extent of minor modifications necessary to meet the federal government requirements before making a determination that an item is a commercial item. Contracting officers have also been careful to consider the realities of the commercial marketplace (most notably concerning technical data) and to address the data already available to other customers in the commercial marketplace, as well as data necessary for the minor modifications.

The unique definition of a commercial item at 10 U.S.C. § 2464 presents a potential practical problem for the DoD acquisition and logistics support workforce. As noted above, at the time an item is being considered for procurement as a commercial item, the contracting officer considers all the available information and, based on the definition at 41 U.S.C. § 103 (commercial item) or § 104 (COTS item), determines if the item satisfies the appropriate definition and may be procured using the unique FAR policies and procedures for commercial items and COTS items. Later, when that same item is being considered for logistics support, the logistics community makes another determination of the item's *commerciality* using the unique definition at 10 U.S.C. § 2464.

These two separate determinations, using two distinct definitions of *commercial item*, create considerable conflict, and ignore the reality that the decisions made at the time of initial procurement, including decisions with regard to the procurement of technical data, make later decisions using different criteria difficult, if not impractical. This situation is especially relevant when an item originally procured and planned for support as a commercial product or COTS product under 41 U.S.C. §§ 103 or 104, later is determined by the logistics support team not to meet the 10 U.S.C. § 2464 definition, but lacks the data necessary for depot-based support. The logistics support

community should participate at the time the initial determination of *commerciality* is made by the contracting officer using the definition at 41 U.S.C. §§ 103 or 104, and then carry forward that determination into the logistics support phase. Making a separate determination, using a different definition at a later point in time, leads to confusion and inconsistency in the determination. Congress has recently taken steps at 10 U.S.C. § 2306a(b)(2) to avoid similar inconsistencies in how the initial commercial item determinations are handled by DoD.

The past 22 years have established a firm foundation for the application of the 41 U.S.C. § 103 commercial item definition and its impact on the depot logistics support, and no longer represents a compelling argument in favor of a unique definition of commercial item. For these reasons, 10 U.S.C. § 2464 should not retain its own unique definition. The citation should be conformed to the primary definition at 41 U.S.C. § 103 (commercial item).

Another exception that requires further elaboration is the commercial item definition at 10 U.S.C. § 2321, Validation of Proprietary Data Restrictions. This section addresses the contractor justifications for data use or release restrictions and DoD review and challenge of these restrictions. Paragraph (f) of this section addresses the special rules “with respect to technical data of a contractor or subcontractor under a contract for commercial items.” Subsection (f)(1) provides, generally, that “the contracting officer shall presume the contractor or subcontractor has justified the restriction on the basis that the item was developed at private expense.” This presumption applies, according to (f)(2)(A):

with regard to a commercial subsystem or component of a major system, if the major system was acquired as a commercial item in accordance with section 2379(a) of this title;
with regard to a component of a subsystem, if the subsystem was acquired as a commercial item in accordance with section 2379(b) of this title; and
with regard to any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements

Paragraph (i) provides that a *commercial subsystem or component of a major system* qualifies for the special presumption because it *was acquired as a commercial item*. In this paragraph (i), the term commercial item has the meaning in 10 U.S.C. § 2302, Definitions, subsection which refers back to the definition at 41 U.S.C. § 103. The same analysis is true in paragraph (ii) for components of a subsystem, if the subsystem was acquired as a commercial item.

Subsection (f)(2)(A)(iii) provides that a component that is not part of a major system or subsystem would only qualify for the presumption of being developed at private expense if it is a COTS item or a COTS item with modifications of a type customarily available in the marketplace or minor modifications made to meet federal government requirements.¹³ This later portion of subparagraph (iii) is actually a blending of the existing COTS definition at 41 U.S.C. § 104 and the commercial item

¹³ Validation of Proprietary Data Restrictions, 10 U.S.C. § 2321 (f)(2)(A)(iii).

definition at 41 U.S.C. § 103, with several key elements of the commercial item definition left out. The legislative history provides no rationale for this unique definition.

This unique definition sets up a number of conflicts and adds confusion over the critical issue of proprietary data restrictions for products procured in the commercial marketplace. The following are examples:

- By virtue of being in Chapter 137, 10 U.S.C. § 2321 is tied to the definition of commercial item and COTS item at 41 U.S.C. § 103 and § 104, respectively. The text of 10 U.S.C. § 2321 includes its own twist on these two established definitions, introducing unnecessary confusion and potential conflict.
- The blended language raises questions with regard to the criteria for items with minor modifications. For example, if an item is a “commercially available off-the shelf item with ...minor modifications made to meet Federal Government requirements,”¹⁴ it is unclear if that means it must meet the sold in substantial quantities criteria in the COTS definition to qualify for the presumption. It is also unclear if an item with minor modifications incorporated to meet unique federal government requirements is likely to be sold in substantial quantities to the general public.

The language of § 2321 (f)(2) is intended to define when a component is a commercial component, yet 41 U.S.C. § 102 already defines a commercial component as a “component that is a ‘commercial item.’”¹⁵

When procuring a component found in the commercial marketplace, the contracting officer will evaluate the item against the criteria for a commercial item in Definitions, FAR 2.101. The language of 2.101 is the same definition found in Definitions, 41 U.S.C. § 103. When evaluating the contractor or offeror assertion that a component was developed at private expense, the contracting officer must use the unique definition in 10 U.S.C. § 2321 to establish if the component meets the criteria for the special presumption. The possibility exists that the contracting officer could determine a component meets the definition of a commercial item but does not meet the criteria for the presumption of being developed at private expense. This ambiguity unnecessarily complicates the contracting officer’s already difficult task.

Because the standard 41 U.S.C. § 103 definition of a commercial item is not used in § 2321(f)(A), certain components would not qualify, such as those that are of a type customarily used by the general public or items sold, leased, or licensed to the general public at less than the substantial quantities criteria found in the COTS definition; or “any item that evolved...through advances in technology or performance and that is not yet available in the commercial marketplace.”¹⁶ These items are exactly the types of state-of-the-art technologies DoD is pursuing. This type of confusion can lead to frustration

¹⁴ Ibid.

¹⁵ Commercial Component, 41 U.S.C. § 102.

¹⁶ Commercial Item, 41 U.S.C. § 103 and Commercially Available Off-the-Shelf Item, 41 U.S.C. § 104.

and unnecessary issues over protection of proprietary data for these types of item, making it more difficult to do business in the high-tech marketplace.

It is problematic to have a unique definition of commercial product solely for the purpose of protecting proprietary data that is inconsistent with the standard definition of the term used throughout the U.S.C. and the FAR. This inconsistency can only lead to further confusion and complexity, and potentially serve to discourage high technologies firms in the commercial marketplace from offering their best to DoD.

Definitions of Subcontract and Subcontractor

In today's defense marketplace, prime contractors typically subcontract more than 60 percent of their work to other firms through numerous tiers of commercial and noncommercial subcontracts. Even for the most complex, government-unique items, the further down the supply chain one looks, the more likely one is to find commercial suppliers with commercial items. Through the flow down process, the commercial item policies, procedures, and government-unique terms also generally apply to these subcontracts, regardless of tier, which complicates the process for procuring commercial items and commercial services at the subcontract level.

The FAR currently defines the term *contract*, an important term used widely throughout the FAR and DFARS. However, neither the FAR nor DFARS defines the term *subcontract*, another term used throughout the FAR and DFARS. The FAR would benefit from a definition for the terms *subcontract* and *subcontractor*, both of which today have numerous definitions in the FAR and DFARS.

A search of the FAR and DFARS produced 27 distinct definitions of the term *subcontract*. Seventeen of these definitions were essentially the same with only minor differences. The other 10 were unique in one way or another, but shared many of the same common elements. 41 U.S.C. § 87, the Anti-Kickback Act, implemented at FAR 3.5 was the only definition based in statute (see Appendix F, Table F-3).

The FAR and DFARS search also produced 21 distinct definitions of *subcontractor*. Most of those definitions shared common elements that could be conducive to drafting a single, common definition. Several had a unique element that would require accommodation (see Appendix F, Table F-4).

Subcontracts for Commercial Items for Inventory or Multiple Contracts

The Section 809 Panel heard from many companies regarding the cost and significant administrative effort required to flow down terms and conditions to their subcontracts. Of particular interest to the Panel were the issues associated with the flow down of government-unique terms and conditions to commercial suppliers, and where the contractor procured items and components from its subcontractors for multiple contracts or for their inventory and not for a specific contract.

The requirement to flow down a clause to subcontractors may be mandatory or subject to certain criteria contained within the clause. A relative few clauses limit the flow down to prime contractors' first tier of subcontractors, yet other clauses flow down to subcontractors at all tiers that meet the specified criteria contained in the clause.

The mechanics of flowing down such clauses is often administratively complex, costly, and time consuming for prime contractors, and potential subcontractors at each successive tier. Before accepting

these terms and conditions, proposed subcontractors must evaluate each of the clauses, assess the effects of the requirements of the clause on their businesses and confirm their ability to comply with each of the individual requirements. In the government business environment, there is an expectation of strict literal compliance with these requirements, and there is considerable oversight to ensure such compliance.¹⁷ A subcontractor would be taking a substantial business risk to shortcut this important process.

For those firms that regularly participate in the federal government procurement process at the prime contractor or subcontracting tier, the flow down of terms and conditions is difficult, complex, and carries potentially great business risk, yet it is a process that has become one of the *costs of doing business* with the federal government. For a prime or subcontractor that sells in both commercial and government markets, or one that sells only in the commercial market, it is more than just a cost of doing business.

Federal government contracting regulations generally assume that procurements are fulfilled on a *job-order* basis, for which each contract stands alone and subsystems and components are only procured subsequent to, and in direct response to, the award of the higher-tier contract. Commercial business is most often based on forecasts of future sales and anticipated demand, for which contractors' order materials and subcomponents from their suppliers to satisfy current production and inventory for meeting future market demands.

The dichotomy between government and commercial markets presents a number of practical and compliance risks. For example, a contractor in the commercial market, manufacturing a commercial product, will typically procure commercial components for inventory without knowing, at the time the orders are placed, who the customers will be for the yet-to-be-manufactured end items. If the government subsequently procures even one of those commercial end items, the prime contractor must accept the government-unique terms, including the requirement for mandatory flow down to lower-tier suppliers. The prime contractor is then faced with the dilemma of asserting that its suppliers have been given the mandatory terms even though it has already procured the components, and the components currently reside in its inventory.

To address this risk, commercial manufacturers may choose to flow down government-unique terms to all of their subcontractors (some of which may not accept them) on the chance the government might at some point procure one of its end items. A commercial contractor that has little or no expectation of selling to the government would have no reason to take such an inclusive approach to flow down at the time it procures its components. If the government wanted to procure a commercial item from such a company, the contractor might be faced with the risk of accepting the terms without the ability to flow the terms down because the product or components are already on the shelf. The FAR makes no provisions for situations in which a commercial product is manufactured with components that were

¹⁷ "Men must turn square corners when they deal with the government," Supreme Court Justice Oliver Wendell Holmes, Jr. *Rock Island C.R.R. v. United States*, 254 U.S. 141, 143 (22 November 1920). In today's federal market, oversight includes formal oversight from DCMA, DCAA, DOD/IG, GAO, and Congress, and informal oversight by public watch-dog groups, whistle blowers, and False Claims Act relators.

procured for general inventory and already in the prime contractor's inventory before contracting with the government.

One commercial contractor that spoke to the Section 809 Panel cited a specific example of an increased subcontractor workload resulting from flow-down requirements. This commercial contractor sells the same or similar items in both government and commercial markets but procures its common components from its suppliers by administratively issuing two separate purchase orders for the same part number—one with the mandatory government flow-down terms to satisfy anticipated government demand and another without the flow down to satisfy anticipated demand from its commercial customers. This idea of segregating the procurement of the identical parts simply to satisfy flow down requirements raises the question of whether the contractor also needs to segregate the parts in the warehouse. Situations such as this one represent an unreasonable burden on contractors and their commercial suppliers, and likely serve as a deterrent to firms contemplating entering the government marketplace.

Congress recently noted this burden and took several steps to address it in two similar sections of the FY 2017 NDAA. Section 877, Treatment of Commingled Items Purchased by Contractors as Commercial Items, (codified at 10 U.S.C. § 2380B) addresses the burden associated with the flow down of mandatory, government-unique terms and conditions on relatively low-value items (less than \$10,000). Section 874, Inapplicability of Certain Laws and Regulations to the Acquisition of Commercial Items and Commercially Available Off-The-Shelf Items, (codified at 10 U.S.C. § 2375 (c)(3)) addresses the issue in a different manner by excluding procurement of certain items from treatment as a *subcontract*, and thus the requirement for flow down of government-unique terms. Below is a summary comparison of the two provisions.

10 U.S.C § 2380B

- Applies to *items* (presumably both commercial and noncommercial) with a value of less than \$10,000.
- For use in performance of multiple contracts with the department of defense and other parties.
- Not identifiable to any particular contract.
- Must be treated as a *commercial item* (and still receive terms to be flowed down, but presumably only terms and conditions associated with *commercial products*).

10 U.S.C § 2375(c)(3)

- Applies to agreements for *commodities* (the term *commodities* is undefined).
- Is intended for use in performance of multiple contracts with DoD and other parties.
- Is not identifiable to any particular contract.

- Agreement must not be considered a *subcontract* for a commercial item (and, therefore, is not subject to flow down of any government-unique terms and conditions).
- Is limited in its application to “this subsection.”

Section 874 uses the term *commodities*. This term is undefined, and the Section 809 Panel was unable to identify an established DoD definition of the term but did identify the DoD standard definition of the term *commodity loading*, an indication of how the term might be defined:

commodity loading — A method of loading in which various types of cargoes are loaded together, such as ammunition, rations, or boxed vehicles, in order that each commodity can be discharged without disturbing the others.¹⁸

A standard dictionary definition provides an alternative, narrower approach, defining a commodity as “a mass-produced unspecialized product: *commodity* chemicals, commodity memory chips.”¹⁹

10 U.S.C. § 2380B and 10 U.S.C. § 2375(c)(3) are positive steps, but procurement of common commercial items and commercial services can be further simplified. The most practical approach would be to exclude from the scope of the term *subcontract* the procurement of commodities as well as commercial products and commercial services that are intended for use in multiple current or future contracts. Commercial products are, by their very nature, fungible and likely to be procured from suppliers not generally engaged in business with the federal government and consequently not subject to the burdens and risks discussed above. Likewise, commercial services are often procured to meet specialized needs that cross many products, product lines, and contracts. Exempting commercial products and common commercial services from flow down of government-unique terms makes clear to both government and industry that Congress is serious about simplifying the procurement process, especially for items that are clearly available on the commercial market, for which the burden would be the greatest.

Conclusions

The following actions would enhance the federal government’s preference for acquiring commercial items:

- Bifurcate the definition of commercial items into commercial products and commercial services, creating two separate definitions.
- Incorporate in the definition of a commercial product a provision for a product that the commercial marketplace manufactures from a customer’s drawings or specifications using its commercial processes.
- Remove the definitions of COTS from 41 U.S.C. § 104. Congress and DoD have avoided granting the relief from government-unique requirements needed to access the full breadth of

¹⁸ DoD Dictionary of Military and Associated Terms, August 2017.

¹⁹ Merriam Webster Dictionary.

the commercial marketplace, and the COTS item definition has had an unintended consequence of contributing to this problem.

- Align the definitions of commercial products and commercial services. In most instances, the variation in definitions for commercial items represent an oversight or drafting error, rather than a deliberate policy decision. This lack of definitional unity can carry real consequences, potentially generating confusion and risking disputes among stakeholders applying differing interpretations of commercial products and commercial services to the procurement process.
- Harmonize the use of terms in statute. Commercial buying processes would benefit from harmonizing all U.S. Code references to commercial products and commercial services—including 41 U.S.C., 10 U.S.C., and other miscellaneous uses of the terms in other titles of the U.S. Code—with the primary definitions of those terms in 41 U.S.C. Every use of the terms commercial item in the U.S. Code should incorporate, by reference, the primary definitions of those terms at 41 U.S.C. §§ 103, 103a, and 104, respectively. This recommendation should be implemented in accordance with the previous recommendation to split the term commercial item into commercial product and commercial service in 41 U.S.C. §§ 103 and 103a.
- Establish a uniform definition of subcontract in the U.S. Code and the FAR. The dozens of distinct definitions of the term subcontract are unnecessary. The difference between the definition of subcontract at 41 U.S.C. § 87 and the recommended U.S. Code definition is inconsequential, and using a single definition will simplify the procurement process. A few instances exist for which it is appropriate to supplement the general definition of subcontract to accommodate a unique component of the definition.
- Establish a uniform FAR definition of subcontractor. It is unnecessary to have 21 distinct definitions of the term subcontractor when the differences among them are inconsequential.
- Exclude from the definition of subcontract procurements of commodities, commercial products, and commercial services to be used on multiple contracts. The flow down of government-unique terms and conditions represents a costly and administratively complex demand on contractors engaged in the sale of commercial products to the federal government. The federal government cannot, however, expect to successfully pursue a preference for commercial products at all tiers of the supply chain and attract new, innovative commercial supplies, while still imposing a burden and risk on the procurement of commercial components. Congress should take bold steps beyond the current language of Sections 877 and 874 of the FY 2017 NDAA by adding a new definition of subcontract to 41 U.S.C. and 10 U.S.C. § 2302. The definition would exempt purchases of commodities, commercial products, and commercial services that are being procured for multiple contracts from the flow down of government-unique terms.

Implementation

Legislative Branch

- Delete the definition of *Commercial Item* at 41 U.S.C. § 103.
- Establish the definition of *Commercial Product* at 41 U.S.C. § 103, and add language to address commercial process in the definition.
- Establish the definition of *Commercial Service* at 41 U.S.C. § 103a.
- Delete the definition of *Commercially Available Off-the-Shelf Item* at 41 U.S.C. § 104.
- Revise all references in U.S. Code to the above terms.
- Revise U.S. Code to align all definitions of the above terms with the definitions at 41 U.S.C. Chapter 1.
- Revise the definition of *Commercial Component* at 41 U.S.C. § 102.
- Revise the definition of *Non-developmental item* at 41 U.S.C. § 110.
- Establish a definition of *Subcontract* at 41 U.S.C. § 115.
- Revise the references to the above terms at 10 U.S.C. § 2302.

Executive Branch

The FAR Council should do the following:

- Amend FAR 2.101, Definitions of Words and Terms, to align with the changes to U.S. Code described under Legislative Branch above.
- Modify FAR and DFARS references to align with the changes to U.S. Code described under Legislative Branch above.
- Establish the definition of subcontractor in FAR 2.101, Definitions of Words and Terms.
- Modify FAR and DFARS to align with the new definitions of subcontractor.

Implications for Other Agencies

- FASA, Title VIII, placed the commercial item and COTS definitions in the OFPP Act (41 U.S.C. § 103), making the definitions applicable to all federal government agencies that are subject to the FAR. Changes to the definitions of subcontract and subcontractor would be made in the FAR and would be applied to most federal agencies.

Recommendation 1

LEGISLATIVE PROVISIONS — 809 PANEL STATUTORY RECOMMENDATIONS RELATING TO COMMERCIAL BUYING

TITLE III—COMMERCIAL BUYING

Sec. 301. Revision of definition of “commercial item” for purposes of Federal acquisition statutes.

Sec. 302. Definition of subcontract.

Sec. 303. Limitation on applicability to Department of Defense commercial contracts of certain provisions of law and certain Executive orders and regulations.

SEC. 301. REVISION OF DEFINITION OF “COMMERCIAL ITEM” FOR PURPOSES OF FEDERAL ACQUISITION STATUTES.

(a) DEFINITIONS IN CHAPTER 1 OF TITLE 41, UNITED STATES CODE.—

(1) SEPARATION OF “COMMERCIAL ITEM” DEFINITION INTO DEFINITIONS OF
“COMMERCIAL PRODUCT” AND “COMMERCIAL SERVICE”.—Chapter 1 of title 41, United
States Code, is amended by **striking section 103** and inserting the following new
sections:

“§ 103. Commercial product

“In this subtitle, the term ‘commercial product’ means any of the following:

“(1) A product, other than real property, that—

“(A) is of a type customarily used by the general public or by
nongovernmental entities for purposes other than governmental purposes; and

“(B) has been sold, leased, or licensed, or offered for sale, lease, or
license, to the general public.

“(2) A product that—

1 “(A) evolved from a product described in paragraph (1) through advances
2 in technology or performance; and

3 “(B) is not yet available in the commercial marketplace but will be
4 available in the commercial marketplace in time to satisfy the delivery
5 requirements under a Federal Government solicitation.

6 “(3) A product that would satisfy the criteria in paragraph (1) or (2) were it not
7 for—

8 “(A) modifications of a type customarily available in the commercial
9 marketplace; or

10 “(B) minor modifications made to meet Federal Government
11 requirements.

12 “(4) A product that—

13 “(A) is produced in response to a Federal Government drawing or
14 specification; and

15 “(B) is ordinarily produced using customer drawings or specifications for
16 the general public using the same workforce, plant, or equipment.

17 “(5) Any combination of products meeting the requirements of paragraph (1), (2),
18 (3), or (4) that are of a type customarily combined and sold in combination to the general
19 public.

20 “(6) A product, or combination of products, referred to in paragraphs (1) through
21 (5), even though the product, or combination of products, is transferred between or
22 among separate divisions, subsidiaries, or affiliates of a contractor.

1 “(7) A nondevelopmental item if the procuring agency determines, in accordance
2 with conditions in the Federal Acquisition Regulation, that—

3 “(A) the product was developed exclusively at private expense; and

4 “(B) has been sold in substantial quantities, on a competitive basis, to
5 multiple State and local governments or to multiple foreign governments.

6 **“§ 103a. Commercial service**

7 “In this subtitle, the term ‘commercial service’ means any of the following:

8 “(1) Installation services, maintenance services, repair services, training services,
9 and other services if—

10 “(A) those services are procured for support of a commercial product,
11 regardless of whether the services are provided by the same source or at the same
12 time as the commercial product; and

13 “(B) the source of the services provides similar services
14 contemporaneously to the general public under terms and conditions similar to
15 those offered to the Federal Government;

16 “(2) Services of a type offered and sold competitively, in substantial quantities, in
17 the commercial marketplace—

18 “(A) based on established catalog or market prices;

19 “(B) for specific tasks performed or specific outcomes to be achieved; and

20 “(C) under standard commercial terms and conditions.

21 “(3) A service, even though the service is transferred between or among separate
22 divisions, subsidiaries, or affiliates of a contractor.”.

1 (2) REPEAL OF DEFINITION OF COMMERCIALY AVAILABLE OFF-THE-SHELF ITEM.—

2 Section **104** of such title is repealed.

3 (3) CONFORMING AMENDMENTS TO TITLE 41 DEFINITIONS. —

4 (A) DEFINITION OF COMMERCIAL COMPONENT.—Section **102** of such title
5 is amended by striking “commercial item” and inserting “commercial product”.

6 (B) DEFINITION OF NONDEVELOPMENTAL ITEM.—Section **110(1)** of such
7 title is amended by striking “commercial item” and inserting “commercial
8 product”.

9 (4) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1
10 of title 41, United States Code, is amended by striking the items relating to sections 103
11 and 104 and inserting the following new items:

“103. Commercial product.
“103a. Commercial service.”.

12 (b) CONFORMING AMENDMENTS TO OTHER PROVISIONS OF TITLE 41, U.S.C.—Title 41,
13 United States Code, is further amended as follows:

14 (1) Section **1502(b)** is amended—

15 (A) in paragraph (1)(A), by striking “commercial items” and inserting
16 “commercial products or commercial services”;

17 (B) in paragraph (1)(C)(i), by striking “commercial item” and inserting
18 “commercial product or commercial services”; and

19 (C) in paragraph (3)(A)(i), by striking “commercial items” and inserting
20 “commercial products or commercial services”.

21 (2) Section **1705(c)** is amended by striking “commercial items” and inserting
22 “commercial products and commercial services”.

1 (3) Section **1708** is amended by striking “commercial items” in subsections (c)(6)
2 and (e)(3) and inserting “commercial products or commercial services”.

3 (4) Section **1901** is amended—

4 (A) in subsection (a)(2), by striking “commercial items” and inserting
5 “commercial products or commercial services”; and

6 (B) in subsection (e)—

7 (i) by striking “COMMERCIAL ITEMS” in the subsection heading and
8 inserting “COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES”; and

9 (ii) by striking “commercial items” and inserting “commercial
10 products or commercial services”.

11 (5) Section **1903(c)** is amended—

12 (A) in the subsection heading, by striking “COMMERCIAL ITEM” and
13 inserting “COMMERCIAL PRODUCT OR COMMERCIAL SERVICE”;

14 (B) in paragraph (1), by striking “as a commercial item” and inserting “as
15 a commercial product or a commercial service”; and

16 (C) in paragraph (2), by striking “for an item or service treated as a
17 commercial item” and inserting “for a product or service treated as a commercial
18 product or a commercial service”.

19 (6)(A) Section **1906** is amended by striking “commercial items” each place it
20 appears in subsections (b), (c), and (d) and inserting “commercial products or commercial
21 services”.

22 (B)(i) The heading of such section is amended to read as follows:

1 **§ 1906. List of laws inapplicable to procurements of commercial products and commercial**
2 **services”.**

3 (ii) The table of sections at the beginning of chapter 19 is amended by striking the
4 item relating to section 1906 and inserting the following new item:

“1906. List of laws inapplicable to procurements of commercial products and commercial services.”.

5 (7)(A) Section **1907** is repealed.

6 (B) The table of sections at the beginning of chapter 19 is amended by striking the
7 item relating to section 1907.

8 (8) Section **3304** is amended by striking “commercial item” in subsections (a)(5)
9 and (e)(4)(B) and inserting “commercial product”.

10 (9) Section **3305(a)(2)** is amended by striking “commercial items” and inserting
11 “commercial products or commercial services”.

12 (10) Section **3306(b)** is amended by striking “commercial items” and inserting
13 “commercial products or commercial services”.

14 (11)(A) Section **3307** is amended—

15 (i) in subsection (a)—

16 (I) by striking “COMMERCIAL ITEMS” in the subsection heading and
17 inserting “COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES; and

18 (II) in paragraph (1), by striking “commercial items” and inserting
19 “commercial products and commercial services”; and

20 (III) in paragraph (2), by striking “a commercial item” and
21 inserting “a commercial product or commercial service”;

22 (ii) in subsection (b)—

1 (I) in paragraph (2), by striking “commercial items or, to the extent
2 that commercial items suitable to meet the executive agency's needs are
3 not available, nondevelopmental items other than commercial items” and
4 inserting “commercial services or commercial products or, to the extent
5 that commercial products suitable to meet the executive agency's needs are
6 not available, nondevelopmental items other than commercial products”;
7 and

8 (II) in paragraph (3), by striking “commercial items and
9 nondevelopmental items other than commercial items” and inserting
10 “commercial services, commercial products, and nondevelopmental items
11 other than commercial products”;

12 (iii) in subsection (c)—

13 (I) in paragraphs (1) and (2), by striking “commercial items or
14 nondevelopmental items other than commercial items” and inserting
15 “commercial services or commercial products or nondevelopmental items
16 other than commercial products”;

17 (II) in paragraphs (3) and (4), by striking “commercial items or, to
18 the extent that commercial items suitable to meet the executive agency's
19 needs are not available, nondevelopmental items other than commercial
20 items” and inserting “commercial services or commercial products or, to
21 the extent that commercial products suitable to meet the executive
22 agency's needs are not available, nondevelopmental items other than
23 commercial products”; and

1 (III) in paragraphs (5) and (6), by striking “commercial items” and
2 inserting “commercial products and commercial services”;

3 (iv) in subsection (d)(2), by striking “commercial items or, to the extent
4 that commercial items suitable to meet the executive agency's needs are not
5 available, nondevelopmental items other than commercial items” and inserting
6 “commercial services or commercial products or, to the extent that commercial
7 products suitable to meet the executive agency's needs are not available,
8 nondevelopmental items other than commercial products”; and

9 (v) in subsection (e)—

10 (I) in paragraph (1), by inserting “103a, 104,” after “sections 102,
11 103,”;

12 (II) in paragraph (2)(A), by striking “commercial items” and
13 inserting “commercial products or commercial services”;

14 (III) in the first sentence of paragraph (2)(B), by striking
15 “commercial end items” and inserting “end items that are commercial
16 products”;

17 (IV) in paragraphs (2)(B)(i), (2)(C)(i) and (2)(D), by striking
18 “commercial items or commercial components” and inserting
19 “commercial products, commercial components, or commercial services”;

20 (V) in paragraph (2)(C), in the matter preceding clause (i), by
21 striking “commercial items” and inserting “commercial products or
22 commercial services”;

1 (VI) in paragraph (4)(A), by striking “commercial items” and
2 inserting “commercial products or commercial services”;

3 (VII) in paragraph (4)(C)(i), by striking “commercial item, as
4 described in section 103(5)” and inserting “commercial product, as
5 described in section 103a(1)”; and

6 (VIII) in paragraph (5), by striking “items” each place it appears
7 and inserting “products”.

8 (B)(i) The heading of such section is amended to read as follows:

9 **§ 3307. Preference for commercial products and commercial services”.**

10 (ii) The table of sections at the beginning of chapter 33 is amended by striking the
11 item relating to section 3307 and inserting the following new item:

“3307. Preference for commercial products and commercial services.”.

12 (12) Section **3501** is amended—

13 (A) in subsection (a)—

14 (i) by striking paragraph (1);

15 (ii) by redesignating paragraphs (2) and (3) as paragraphs (1) and
16 (2), respectively; and

17 (iii) in paragraph (2) (as so redesignated), by striking “commercial
18 items” and inserting “commercial products or commercial services”; and

19 (B) in subsection (b)—

20 (i) by striking “ITEM” in the heading for paragraph (1); and

21 (ii) by striking “commercial items” in paragraphs (1) and (2)(A)
22 and inserting “commercial services”.

23 (13) Section **3503** is amended—

1 (A) in subsection (a)(2), by striking “a commercial item” and inserting “a
2 commercial product or a commercial service”; and

3 (B) in subsection (b)—

4 (i) by striking “COMMERCIAL ITEMS” in the subsection heading and
5 inserting “COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES; and

6 (ii) by striking “a commercial item” each place it appears and
7 inserting “a commercial product or a commercial service”.

8 (14) Section **3505(b)** is amended by striking “commercial items” each place it
9 appears and inserting “commercial products or commercial services”.

10 (15) Section **3509(b)** is amended by striking “commercial items” and inserting
11 “commercial products or commercial services”.

12 (16) Section **3704(c)(5)** is amended by striking “commercial item” and inserting
13 “commercial product”.

14 (17) Section **3901(b)(3)** is amended by striking “commercial items” and inserting
15 “commercial products or commercial services”.

16 (18) Section **4301(2)** is amended by striking “commercial items” and inserting
17 “commercial products or commercial services”.

18 (19)(A) Section **4505** is amended by striking “commercial items” in subsections
19 (a) and (c) and inserting “commercial products or commercial services”.

20 (B)(i) The heading of such section is amended to read as follows:

21 **§ 4505. Payments for commercial products and commercial services”.**

22 (ii) The table of sections at the beginning of chapter 45 is amended by striking the
23 item relating to section 4505 and inserting the following new item:

“4505. Payments for commercial products and commercial services.”.

1 (20) Section **4704(d)** is amended by striking “commercial items” both places it
2 appears and inserting “commercial products or commercial services”.

3 (21) Sections **8102(a)(1)**, **8703(d)(2)**, and **8704(b)** are amended by striking
4 “commercial items (as defined in section 103 of this title)” and inserting “commercial
5 products or commercial services (as defined in sections 103 and 103a, respectively, of
6 this title)”.

7 (c) AMENDMENTS TO CHAPTER **137** OF TITLE 10, UNITED STATES CODE.—Chapter 137 of
8 title 10, United States Code, is amended as follows:

9 (1) Section **2302(3)** is amended—

10 (A) by redesignating subparagraphs (J), (K), and (L) as subparagraphs (K),
11 (L), and (M); and

12 (B) by striking subparagraph (I) and inserting the following new
13 subparagraphs (I) and (J):

14 “(I) The term ‘commercial product’.

15 “(J) The term ‘commercial service’.”.

16 (2) Section **2304** is amended—

17 (A) in subsections (c)(5) and (f)(2)(B), by striking “brand-name
18 commercial item” and inserting “brand-name commercial product”;

19 (B) in subsection (g)(1)(B), by striking “commercial items” and inserting
20 “commercial products or commercial services”; and

21 (C) in subsection (i)(3), by striking “commercial item” and inserting
22 “commercial product”.

23 (3) Section **2305** is amended—

1 (A) in subsection (a)(2), by striking “commercial items” and inserting
2 “commercial products or commercial services”; and

3 (B) in subsection (b)(5)(B)(v), by striking “commercial item” and
4 inserting “commercial product”.

5 (4) Section **2306(b)** is amended by striking “commercial items” and inserting
6 “commercial products or commercial services”.

7 (5) Section **2306a** is amended—

8 (A) in subsection (b)—

9 (i) in paragraph (1)(B), by striking “a commercial item” and
10 inserting “a commercial product or a commercial service”;

11 (i) in paragraph (2)—

12 (I) by striking “COMMERCIAL ITEMS” in the paragraph
13 heading and inserting “COMMERCIAL PRODUCTS OR COMMERCIAL
14 SERVICES”; and

15 (II) by striking “commercial item” each place it appears
16 and inserting “commercial product or commercial services”;

17 (iii) in paragraph (3)—

18 (I) by striking “COMMERCIAL ITEMS” in the paragraph
19 heading and inserting “COMMERCIAL PRODUCTS”; and

20 (II) by striking “item” each place it appears and inserting
21 “product”; and

22 (iv) in paragraph (4)—

- 1 (I) by striking “COMMERCIAL ITEM” in the paragraph
2 heading and inserting “COMMERCIAL PRODUCT OR COMMERCIAL
3 SERVICE”;
- 4 (II) by striking “commercial item” in subparagraph (A)
5 after “applying the”;
- 6 (III) by striking “prior commercial item determination” in
7 subparagraph (A) and inserting “prior commercial product or
8 commercial service determination”;
- 9 (IV) by striking “of such item” in subparagraph (A) and
10 inserting “of such product or service”;
- 11 (V) by striking “of an item previously determined to be a
12 commercial item” in subparagraph (B) and inserting “of a product
13 or service previously determined to be a commercial product or a
14 commercial service”;
- 15 (VI) by striking “of a commercial item,” in subparagraph
16 (B) and inserting “of a commercial product or a commercial
17 service, as the case may be,”;
- 18 (VII) by striking “the commercial item determination” in
19 subparagraph (B) and inserting “the commercial product or
20 commercial service determination”; and
- 21 (VIII) by striking “commercial item” in subparagraph (C);
22 and

1 (v) in paragraph (5), by striking “commercial items” and inserting
2 “commercial products or commercial services”;

3 (B) in subsection (d)(2), by striking “commercial items” each place it
4 appears and inserting “commercial products or commercial services”; and

5 (C) in subsection (h)—

6 (i) in paragraph (2), by striking “commercial items” and inserting
7 “commercial products or commercial services”; and

8 (ii) by striking paragraph (3).

9 (6) Section **2307(f)** is amended—

10 (A) by striking “COMMERCIAL ITEMS” in the subsection heading and
11 inserting “COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES”;

12 (B) by striking “commercial items” in paragraphs (1) and (2) and inserting
13 “commercial products and commercial services”.

14 (7) Section **2320(b)** is amended—

15 (A) in paragraph (1), by striking “a commercial item, the item” and
16 inserting “a commercial product , the product”; and

17 (B) in paragraph (9)(A), by striking “any noncommercial item or process”
18 and inserting “any noncommercial product or process”.

19 (8) Section **2321(f)** is amended—

20 (A) in paragraph (1)—

21 (i) by striking “commercial items” and inserting “commercial
22 products”; and

1 (ii) by striking “the item” both places it appears and inserting
2 “commercial products”; and

3 (B) in paragraph (2)(A)—

4 (i) in clauses (i) and (ii), by striking “commercial item” and
5 inserting “commercial product”; and

6 (ii) in clause (iii), by striking “is a commercially” and all that
7 follows and inserting “is a commercial product; and”.

8 (9) Section **2324(l)(1)(A)** is amended by striking “commercial items” and
9 inserting “commercial products or commercial services”.

10 (10) Section **2335(b)** is amended—

11 (A) by striking “commercial items” and inserting “commercial products
12 and commercial services”; and

13 (B) by striking “, the procurement of commercial-off-the-shelf-items,”.

14 **(d) AMENDMENTS TO CHAPTER 140 OF TITLE 10, UNITED STATES CODE.**—Chapter 140 of
15 title 10, United States Code, is amended as follows:

16 (1) Section **2375** is amended—

17 (A) in subsection (a)—

18 (i) by striking “commercial item” in paragraphs (1) and (2) and
19 inserting “commercial product or commercial service”; and

20 (ii) by striking paragraph (3);

21 (B) in subsections (b) and (c)—

22 (i) by striking “COMMERCIAL ITEMS” in the subsection heading and
23 inserting “COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES”; and

1 (ii) by striking “commercial items” each place it appears and
2 inserting “commercial products and commercial services”;

3 (C) by striking subsection (d); and

4 (D) in subsection (e)(3), by striking “commercial items” and inserting
5 “commercial products and commercial services”.

6 (2) Section **2376(1)** is amended—

7 (A) by striking “terms ‘commercial item’,” and inserting “terms
8 ‘commercial product’, ‘commercial service’,”; and

9 (B) by striking “chapter 1 of title 41” and inserting “sections 103, 103a,
10 110, 105, and 102, respectively, of title 41”.

11 (3) Section **2377** is amended—

12 (A) in subsection (a)—

13 (i) in paragraph (2), by striking “commercial items or, to the extent
14 that commercial items suitable to meet the agency's needs are not
15 available, nondevelopmental items other than commercial items” and
16 inserting “commercial services or commercial products or, to the extent
17 that commercial products suitable to meet the agency's needs are not
18 available, nondevelopmental items other than commercial products”; and

19 (ii) in paragraph (3), by striking “commercial items and
20 nondevelopmental items other than commercial items” and inserting
21 “commercial services, commercial products, and nondevelopmental items
22 other than commercial products”;

23 (B) in subsection (b)—

1 (i) in paragraphs (1) and (2), by striking “commercial items or
2 nondevelopmental items other than commercial items” and inserting
3 “commercial services or commercial products or nondevelopmental items
4 other than commercial products”;

5 (ii) in paragraphs (3) and (4), by striking “commercial items or, to
6 the extent that commercial items suitable to meet the agency's needs are
7 not available, nondevelopmental items other than commercial items” and
8 inserting “commercial services or commercial products or, to the extent
9 that commercial products suitable to meet the agency's needs are not
10 available, nondevelopmental items other than commercial products”; and

11 (iii) in paragraphs (5) and (6), by striking “commercial items” and
12 inserting “commercial products and commercial services”;

13 (C) in subsection (c)—

14 (i) in paragraph (2), by striking “commercial items or, to the extent
15 that commercial items suitable to meet the agency's needs are not
16 available, nondevelopmental items other than commercial items” and
17 inserting “commercial services or commercial products or, to the extent
18 that commercial products suitable to meet the agency's needs are not
19 available, nondevelopmental items other than commercial products”; and

20 (ii) in paragraph (4), by striking “items other than commercial
21 items” and inserting “products other than commercial products or services
22 other than commercial services”;

23 (D) in subsection (d)—

1 (i) in the first sentence, by striking “commercial items” and
2 inserting “commercial products or commercial services”;

3 (ii) in paragraph (1), by striking “items” and inserting “products or
4 services”; and

5 (iii) in paragraph (2), by striking “items” and inserting “products or
6 services”; and

7 (E) in subsection (e)(1), by striking “commercial items” and inserting
8 “commercial products and commercial services”.

9 (4) Section **2379** is amended—

10 (A) by striking “COMMERCIAL ITEMS” in the headings of subsections (b)
11 and (c) and inserting “COMMERCIAL PRODUCTS”;

12 (B) by striking “commercial item” and “commercial items” **each place**
13 they appear and inserting “commercial product” and “commercial products”,
14 respectively;

15 (C) in subsections (b) and (c), by striking “commercially available off-the-
16 shelf item as defined in section 104 of title 41” and inserting “commercial
17 product”; and

18 (D) in subsection (d)(3), by striking “commercially available off-the-shelf
19 item” and inserting “commercial product”.

20 (5) Section **2380** is amended—

21 (A) in subsection (a), by striking “commercial item determinations” in
22 paragraphs (1) and (2) and inserting “commercial product and commercial service
23 determinations”; and

1 (B) in subsection (b) (as added by section 848 of the National Defense
2 Authorization Act for Fiscal Year 2018)—

3 (i) by striking “ITEM” in the subsection heading;

4 (ii) by striking “an item” each place it appears and inserting “a
5 product or service”;

6 (iii) by striking “item” after “using commercial” each place it
7 appears;

8 (iv) by striking “prior commercial item determination” and
9 inserting “prior commercial product or service determination”;

10 (v) by striking “such item” and inserting “such product or service”;

11 and

12 (vi) by striking “the item” both places it appears and inserting “the
13 product or service”.

14 (6) Section **2380a** is amended—

15 (A) in subsection (a)—

16 (i) by striking “items and” and inserting “products and”; and

17 (ii) by striking “commercial items” and inserting “commercial
18 products and commercial services, respectively,”; and

19 (B) in subsection (b), by striking “commercial items” and inserting
20 “commercial services”.

21 (7) Section **2380B** is amended by striking “commercial item” and inserting
22 “commercial product”.

23 (8) AMENDMENTS TO HEADINGS, ETC.—

1 (A) The heading of such chapter is amended to read as follows:

2 **“CHAPTER 140—PROCUREMENT OF COMMERCIAL PRODUCTS AND**
3 **COMMERCIAL SERVICES”.**

4 (B) The heading of section 2375 is amended to read as follows:

5 **“§ 2375. Relationship of other provisions of law to procurement of commercial products**
6 **and commercial services”.**

7 (C) The heading of section 2377 is amended to read as follows:

8 **“§ 2377. Preference for commercial products and commercial services”.**

9 (D) The heading of section 2379 is amended to read as follows:

10 **“§ 2379. Procurement of a major weapon system as a commercial product: requirement for**
11 **prior determination by Secretary of Defense and notification to Congress”.**

12 (E) The heading of section 2380 is amended to read as follows:

13 **“§ 2380. Commercial product and commercial service determinations by Department of**
14 **Defense”.**

15 (F) The heading of section 2380a is amended to read as follows:

16 **“§ 2380a. Treatment of certain products and services as commercial products and**
17 **commercial services”.**

18 (G) Section 2380B is redesignated as section 2380b and the heading of
19 that section is amended to read as follows:

20 **“§ 2380b. Treatment of commingled items purchased by contractors as commercial**
21 **products”.**

22 (H) The table of sections at the beginning of such chapter is amended to
23 read as follows:

“2375. Relationship of other provisions of law to procurement of commercial products and commercial services.
“2376. Definitions.
“2377. Preference for commercial products and commercial services.
“2379. Procurement of a major weapon system as a commercial product: requirement for prior determination by Secretary of Defense and notification to Congress.
“2380. Commercial product and commercial service determinations by Department of Defense.
“2380a. Treatment of certain products and services as commercial products and commercial services.
“2380b. Treatment of commingled items purchased by contractors as commercial products.”.

1 (e) **OTHER** AMENDMENTS TO TITLE 10, UNITED STATES CODE.—Title 10, United States
2 Code, is further amended as follows:

3 (1) Section **2226(b)** is amended by striking “for services” and all that follows
4 through “deliverable items” and inserting “for services or deliverable items”.

5 (2) Section **2384(b)(2)** is amended by striking “commercial items” and inserting
6 “commercial products”.

7 (3) Section **2393(d)** is amended by striking “commercial items (as defined in
8 section 103 of title 41)” and inserting “commercial products or commercial services (as
9 defined, respectively, in sections 103 and 103a of title 41)”.

10 (4) Section **2402(d)** is amended—

11 (A) in paragraph (1), by striking “commercial items” both places it
12 appears and inserting “commercial products or commercial services”; and

13 (B) in paragraph (2), by striking “the term” and all that follows and
14 inserting “the terms ‘commercial product’ and ‘commercial service’ have the
15 meanings given those terms in sections 103 and 103a, respectively, of title 41.”.

16 (5) Section **2408(a)(4)(B)** is amended by striking “commercial items (as defined
17 in section 103 of title 41)” and inserting “commercial products or commercial services
18 (as defined, respectively, in sections 103 and 103a of title 41)”.

19 (6) Section **2410b(c)** is amended by striking “commercial items” and inserting
20 “commercial products”.

1 (7) Section **2410g(d)(1)** is amended by striking “Commercial items (as defined in
2 section 103 of title 41)” and inserting “Commercial products or commercial services (as
3 defined, respectively, in sections 103 and 103a of title 41)”.

4 (8) Section **2447a** is amended—

5 (A) in subsection (a)(2), by striking “commercial items and technologies”
6 and inserting “commercial products and technologies”; and

7 (B) in subsection (c), by inserting before the period at the end the
8 following: “and the term ‘commercial product’ has the meaning given that term in
9 sections 103 of title 41”.

10 (9) Section **2451(d)** is amended by striking “commercial items” and inserting
11 “commercial products (as defined in section 103 of title 41)”.

12 (10) Section **2464** is amended—

13 (A) in subsection (a)—

14 (i) in paragraph (3), by striking “commercial items” and inserting
15 “commercial products”; and

16 (ii) in paragraph (5), by striking “commercial items” the first place
17 it appears and all that follows in that paragraph and inserting “commercial
18 products covered by paragraph (3) are commercial products as defined in
19 section 103 of title 41.”; and

20 (B) in subsection (c)—

21 (i) by striking “COMMERCIAL ITEMS” in the subsection heading and
22 inserting “COMMERCIAL PRODUCTS”; and

1 (ii) by striking “commercial item” and inserting “commercial
2 product”.

3 (11) Section **2484(f)** is amended—

4 (A) by striking “COMMERCIAL ITEMS” in the subsection heading and
5 inserting “COMMERCIAL PRODUCTS”; and

6 (B) by striking “commercial item” and inserting “commercial product”.

7 (12) The items relating to chapter 140 in the tables of chapters at the beginning of
8 subtitle A, and at the beginning of part IV of subtitle A, are amended to read as follows:

“140. Procurement of Commercial Products and Commercial Services 2377”.

9 (f) AMENDMENTS TO PROVISIONS OF NATIONAL DEFENSE AUTHORIZATION ACTS.—

10 (1) Section 806(b) of the National Defense Authorization Act for Fiscal Years
11 1992 and 1993 (Public Law 102-190; **10 U.S.C. 2302 note**) is amended by striking
12 “commercial items (as defined in section 103 of title 41, United States Code)” and
13 inserting “commercial products or commercial services (as defined in sections 103 and
14 103a, respectively, of title 41, United States Code)”.

15 (2) Section 821(e) of the Floyd D. Spence National Defense Authorization Act for
16 Fiscal Year 2001 (as enacted into law by Public Law 106-398; **10 U.S.C. 2302 note**) is
17 amended—

18 (1) by striking paragraph (2);

19 (2) by redesignating paragraph (3) as paragraph (2).

20 (3) Section 821(b) of the National Defense Authorization Act for Fiscal Year
21 2008 (Public Law 110-181; **10 U.S.C. 2304 note**) is amended—

1 (A) in paragraph (1), by striking “a commercial item” and inserting “a
2 commercial product or a commercial service”;

3 (B) in paragraph (2), by striking “commercial item” and inserting
4 “commercial product ”; and

5 (C) by adding at the end the following new paragraph”

6 “(3) The term ‘commercial service’ has the meaning provided by section 103a of
7 title 41, United States Code.”.

8 (4) Section 817 of the Bob Stump National Defense Authorization Act for Fiscal
9 Year 2003 (Public Law 107-314; **10 U.S.C. 2306 note**) is amended—

10 (A) in subsection (d)—

11 (i) in the subsection heading, by striking “ANNUAL REPORT ON
12 BOTH COMMERCIAL ITEM AND EXCEPTIONAL CASE EXCEPTIONS AND
13 WAIVERS” and inserting “ANNUAL REPORT ON COMMERCIAL PRODUCTS
14 AND COMMERCIAL SERVICES AND EXCEPTIONAL CASE EXCEPTIONS AND
15 WAIVERS”;

16 (ii) in paragraph (1), by striking “commercial item exceptions” and
17 inserting “commercial product-commercial service exceptions”; and

18 (iii) in paragraph (2)(A)—

19 (I) by striking “commercial item exception” and inserting
20 “commercial product-commercial service exception”; and

21 (II) by striking “commercial items” and inserting
22 “commercial products or commercial services, as the case may
23 be”.

1 (B) in subsection (e)(2), by striking “commercial item exception” and
2 inserting “commercial product-commercial service exception”.

3 (5) Section 852(b)(2)(A)(ii) of the National Defense Authorization Act for Fiscal
4 Year 2007 (Public Law 109-364; **10 U.S.C. 2324 note**) is amended by striking “a
5 commercial item, as defined in section 103 of title 41” and inserting “a commercial
6 product or a commercial service, as defined in sections 103 and 103a, respectively, of
7 title 41”.

8 (6) Section 805 of the National Defense Authorization Act for Fiscal Year 2008
9 (Public Law 110-181; **10 U.S.C. 2330 note**) is amended—

10 (A) in subsection (b), by striking “commercial items” in paragraphs (1)
11 and (2)(A) and inserting “commercial services”; and

12 (B) in subsection (c)—

13 (i) by striking “ITEM” in the headings for paragraphs (1) and (2)
14 and inserting “SERVICES”;

15 (ii) in the matter in paragraph (1) preceding subparagraph (A), by
16 striking “commercial item” and inserting “commercial service”;

17 (iii) in paragraph (1)(A), by striking “a commercial item, as
18 described in section 103(5) of title 41” and inserting “a product, as
19 described in section 103a(1) of title 41”;

20 (iv) in paragraph (1)(C)(i), by striking “section 103(6) of title 41”
21 and inserting “section 103a(2) of title 41”; and

22 (v) in paragraph (2), by striking “item” and inserting “service”.

1 (7) Section 849(d) of the National Defense Authorization Act for Fiscal Year
2 2017 (Public Law 114-328; **10 U.S.C. 2377 note**) is amended—

3 (A) by striking “commercial items” in paragraph (1) and inserting
4 “commercial products”;

5 (B) by striking “commercial item” in paragraph (3)(B)(i) and inserting
6 “commercial product”; and

7 (C) by adding at the end the following new paragraph:

8 “(5) DEFINITION.—In this subsection, the term ‘commercial product’ has the
9 meaning given that term in section 103 of title 41.”.

10 (8) Section 856(a)(1) of the National Defense Authorization Act for Fiscal Year
11 2016 (Public Law 114-92; **10 U.S.C. 2377 note**) is amended by striking “commercial
12 items or services” and inserting “a commercial product or a commercial service, as
13 defined in sections 103 and 103a, respectively, of title 41.”.

14 (9) Section 879 of the National Defense Authorization Act for Fiscal Year 2017
15 (Public Law 114-328; **10 U.S.C. 2302 note**) is amended—

16 (A) in the section heading, by striking “**COMMERCIAL ITEMS**” and
17 inserting “**COMMERCIAL PRODUCTS**”;

18 (B) in subsection (a), by striking “commercial items” and inserting
19 “commercial products”;

20 (C) in subsection (c)(3)—

21 (i) by striking “**COMMERCIAL ITEMS**” in the paragraph heading and
22 inserting “**COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES**”; and

1 (ii) by striking “commercial items” and inserting “commercial
2 products or commercial services”; and

3 (D) in subsection (e)(2), by striking “item” in subparagraphs (A) and (B)

4 (10) Section 880 of the National Defense Authorization Act for Fiscal Year 2017
5 (Public Law 114-328; **41 U.S.C. 3301 note**) is amended by striking “commercial items”
6 in subsection (a)(1) and inserting “commercial products”.

7 (g) CONFORMING AMENDMENTS TO OTHER STATUTES.—

8 (1) Section 604(g) of the American Recovery and Reinvestment Act of 2009 (**6**
9 **U.S.C. 453b(g)**) is amended—

10 (A) by striking “COMMERCIAL ITEMS” in the subsection heading and
11 inserting “COMMERCIAL PRODUCTS”;

12 (B) by striking “procurement of commercial” in the first sentence and all
13 that follows through “items listed” and inserting “procurement of commercial
14 products notwithstanding section 1906 of title 41, United States Code, with the
15 exception of commercial products listed”; and

16 (C) in the second sentence—

17 (i) by inserting “product” after “commercial”; and

18 (ii) by striking “in the” and all that follows and inserting “in
19 section 103 of title 41, United States Code.”.

20 (2) Section 142 of the Higher Education Act of 1965 (**20 U.S.C. 1018a**) is
21 amended—

22 (A) in subsection (e)—

1 (i) by striking “COMMERCIAL ITEMS” in the subsection heading and
2 inserting “COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES”;

3 (ii) by striking “that commercial items” and inserting “that
4 commercial products or commercial services”;

5 (iii) by striking “special rules for commercial items” and inserting
6 “special rules for commercial products and commercial services”;

7 (iv) by striking “without regard to—” and all that follows through
8 “dollar limitation” and inserting “without regard to any dollar limitation”;

9 (v) by striking “; and” and inserting a period; and

10 (vi) by striking paragraph (2);

11 (B) in subsection (f)—

12 (i) by striking “ITEMS” in the subsection heading and inserting
13 “PRODUCTS AND SERVICES”;

14 (ii) by striking “ITEMS” in the heading of paragraph (2) and
15 inserting “PRODUCTS AND SERVICES”; and

16 (iii) by striking “a commercial item” in paragraph (2) and inserting
17 “a commercial product or a commercial service”;

18 (C) in subsection (h)—

19 (i) by striking “ITEMS” in the subsection heading and inserting
20 “SERVICES”; and

21 (ii) by striking “commercial items” in paragraph (1) and inserting
22 “commercial services”; and

23 (D) in subsection (l)—

1 (i) by redesignating paragraphs (2), (3), (4), and (5) as paragraphs
2 (3), (4), (5), and (6), respectively;

3 (ii) by striking paragraph (1) and inserting the following new
4 paragraphs:

5 “(1) COMMERCIAL PRODUCT.—The term ‘commercial product’ has the meaning
6 given the term in section 103 of title 41, United States Code.

7 “(2) COMMERCIAL SERVICE.—The term ‘commercial service’ has the meaning
8 given the term in section 103a of title 41, United States Code.”;

9 (iii) in paragraph (3), as so redesignated, by striking “in section”
10 and all that follows and inserting “in section 152 of title 41, United States
11 Code.”;

12 (iv) in paragraph (5), as so redesignated—

13 (I) by striking “COMMERCIAL ITEMS” in the paragraph
14 heading and inserting “COMMERCIAL PRODUCTS AND COMMERCIAL
15 SERVICES”;

16 (II) by striking “commercial items” and inserting
17 “commercial products and commercial services”; and

18 (III) by striking “pursuant to” and all that follows and
19 inserting “pursuant to sections 1901 and 3305(a) of title 41, United
20 States Code.”; and

21 (v) in paragraph (6), as so redesignated, by striking “pursuant to”
22 and all that follows and inserting “pursuant to sections 1901(a)(1) and
23 3305(a)(1) of title 41, United States Code.”.

1 (3) Section **3901(a)(4)(A)(ii)(II) of title 31**, United States Code, is amended by
2 striking “commercial item” and inserting “commercial product”.

3 (4) Section 2455(c)(1) of the Federal Acquisition Streamlining Act of 1994 (**31**
4 **U.S.C. 6101 note**) is amended—

5 (A) by striking “commercially available off-the-shelf items (as defined in
6 section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))”
7 and inserting “commercial products (as defined in section 103 of title 41, United
8 States Code)”; and

9 (B) by striking “commercial items” and inserting “commercial products”.

10 (5) Section 508(f) of the Federal Water Pollution Control Act (**33 U.S.C. 1368(f)**)
11 is amended—

12 (A) in paragraph (1), by striking “commercial items” and inserting
13 “commercial products or commercial services”; and

14 (B) in paragraph (2), by striking “the term” and all that follows and
15 inserting “the terms ‘commercial product’ and ‘commercial service’ have the
16 meanings given those terms in sections 103 and 103a, respectively, of title 41,
17 United States Code.”.

18 (6) Section **3707 of title 40**, United States Code, is amended by striking “a
19 commercial item (as defined in section 103 of title 41)” and inserting “a commercial
20 product (as defined in section 103 of title 41) or a commercial service (as defined in
21 section 103a of title 41)”.

22 (7) Subtitle III of **title 40**, United States Code, is amended—

1 (A) in section **11101(1)**, by striking “COMMERCIAL ITEM.—The term
2 ‘commercial item’ has” and inserting “COMMERCIAL PRODUCT.—The term
3 ‘commercial product’ has”; and

4 (B) in section **11314(a)(3)**, by striking “items” each place it appears and
5 inserting “products”.

6 (8) Section 8301(g) of the Federal Acquisition Streamlining Act of 1994 (**42**
7 **U.S.C. 7606 note**) is amended by striking “commercial items” and inserting “commercial
8 products or commercial services”.

9 (9) Section **40118(f) of title 49**, United States Code, is amended—

10 (A) in paragraph (1), by striking “commercial items” and inserting
11 “commercial products”; and

12 (B) in paragraph (2), by striking “commercial item” and inserting
13 “commercial product”.

14 (10) **Chapter 501 of title 51**, United States Code, is amended—

15 (A) in sections **50113(c)**—

16 (i) by striking “COMMERCIAL ITEM” in the subsection heading and
17 inserting “COMMERCIAL PRODUCT OR COMMERCIAL SERVICE”; and

18 (ii) by striking “commercial item” in the second sentence and
19 inserting “commercial product or commercial service”; and

20 (B) in sections **50115(b)**—

21 (i) by striking “COMMERCIAL ITEM” in the subsection heading and
22 inserting “COMMERCIAL PRODUCT OR COMMERCIAL SERVICE”; and

1 (ii) by striking “commercial item” in the second sentence and
2 inserting “commercial product or commercial service”; and

3 (C) in sections **50132(a)**—

4 (i) by striking “COMMERCIAL ITEM” in the subsection heading and
5 inserting “COMMERCIAL SERVICE”; and

6 (ii) by striking “commercial item” in the second sentence and
7 inserting “commercial service”.

8 (h) SAVINGS PROVISION.—Any provision of law that on the day before the effective date
9 of this section is on a list of provisions of law included in the Federal Acquisition Regulation
10 pursuant to section 1907 of title 41, United States Code, shall be deemed as of that effective date
11 to be on a list of provisions of law included in the Federal Acquisition Regulation pursuant to
12 section 1906 of such title.

13 **SEC. 302. DEFINITION OF SUBCONTRACT.**

14 (a) STANDARD DEFINITION IN TITLE 41, UNITED STATES CODE.—

15 (1) IN GENERAL.—Chapter 1 of title 41, United States Code, is amended—

16 (A) by redesignating sections 115 and 116 as sections 116 and 117,
17 respectively; and

18 (B) by inserting after section 114 the following new section 115:

19 **“§ 115. Subcontract**

20 “(a) IN GENERAL.—In this subtitle, the term ‘subcontract’ means a contract entered into
21 by a prime contractor or subcontractor for the purpose of obtaining supplies, materials,
22 equipment, or services of any kind under a prime contract. The term includes a transfer of a

1 commercial product or commercial service between divisions, subsidiaries, or affiliates of a
2 contractor or subcontractor.

3 “(b) MATTERS NOT INCLUDED.—In this subtitle, the term ‘subcontract’ does not
4 include—

5 “(1) a contract the costs of which are applied to general and administrative
6 expenses or indirect costs; or

7 “(2) an agreement entered into by a contractor or subcontractor for the supply of a
8 commodity, a commercial product, or a commercial service that is intended for use in the
9 performance of multiple contracts.”.

10 (2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1
11 of title 41, United States Code, is amended by striking the items relating to sections 115
12 and 116 and inserting the following new items:

“115. Subcontract.

“116. Supplies.

“117. Technical data.”.

13 (b) CONFORMING AMENDMENTS TO TITLE 41, UNITED STATES CODE.—Title 41, United
14 States Code, is further amended as follows:

15 (1) Section 1502(b)(1) is amended—

16 (A) by striking subparagraph (A);

17 (B) by redesignating subparagraphs (B) and (C) as subparagraphs (A) and
18 (B), respectively; and

19 (C) in subparagraph (B), as so redesignated, by striking “Subparagraph
20 (B)” and inserting “Subparagraph (A)”.

21 (2) Section 1906 is amended—

22 (A) in subsection (c)—

- 1 (i) by striking paragraph (1);
- 2 (ii) by redesignating paragraphs (2), (3), and (4) as paragraphs (1),
- 3 (2), and (3), respectively;
- 4 (iii) in paragraph (1), as so redesignated, by striking “paragraph
- 5 (3)” and inserting “paragraph (2)”; and
- 6 (iv) in paragraph (2), as so redesignated, by striking “paragraph
- 7 (2)” and inserting “paragraph (1)”; and
- 8 (B) in subsection (e), by striking “(c)(3)” both places it appears and
- 9 inserting “(c)(2)”.

10 (3) Section 3307(e)(2) is amended—

- 11 (A) by striking subparagraph (A);
- 12 (B) by redesignating subparagraphs (B), (C), (D), and (E) as
- 13 subparagraphs (A), (B), (C), and (D), respectively;
- 14 (C) in subparagraph (C), as so redesignated—
- 15 (i) by striking “subparagraph (B)” and inserting “subparagraph
- 16 (A)”; and
- 17 (ii) by striking “subparagraph (C)” and inserting “subparagraph
- 18 (B)”; and
- 19 (D) in subparagraph (D), as so redesignated, by striking “subparagraph
- 20 (B)” and inserting “subparagraph (A)”.

21 (4) Section 3501(a) is amended by striking paragraph (3).

22 (c) INCORPORATION OF TITLE 41 DEFINITION IN CHAPTERS 137 AND 140 OF TITLE 10,
23 UNITED STATES CODE.—

1 (1) DEFINITIONS FOR PURPOSES OF CHAPTER 137.—Section 2302(3) of title 10,
2 United States Code, is amended by adding at the end the following new subparagraph:

3 “(N) The term ‘subcontract’.”.

4 (2) DEFINITIONS FOR PURPOSES OF CHAPTER 140.—

5 (A) Section 2375(c) of title 10, United States Code, is amended—

6 (i) by striking paragraph (3); and

7 (ii) by redesignating paragraph (4) as paragraph (3).

8 (B) Section 2376(1) of such title is amended by striking “and ‘commercial
9 component’ have” and inserting “‘commercial component’, and ‘subcontract’
10 have”.

11 **SEC. 303. LIMITATION ON APPLICABILITY TO DEPARTMENT OF DEFENSE**
12 **COMMERCIAL CONTRACTS OF CERTAIN PROVISIONS OF LAW**
13 **AND CERTAIN EXECUTIVE ORDERS AND REGULATIONS.**

14 (a) INAPPLICABILITY OF CERTAIN PROVISIONS OF LAW.—

15 (1) SECTION 2375.—Section **2375** of title 10, United States Code, is amended—

16 (A) in subsection (b)(2), by striking “January 1, 2015” and inserting
17 “October 13, 1994”; and

18 (B) in subsections (b)(2), (c)(2), and (d)(2), by striking “unless the” and all
19 that follows and inserting a period.

20 (2) SECTION 2533a.—Section **2533a** of such title is amended—

21 (A) in subsection (a), by striking “through (h)” and inserting “through (i)”;
22 and

23 (B) by striking subsection (i) and inserting the following:

1 “(i) EXCEPTION FOR PURCHASES OF COMMERCIAL PRODUCTS.—Subsection (a) does not
2 apply to purchases of commercial products, as defined in section 103 of title 41.”;

3 (3) SECTION 2533b.—Section **2533b** of such title is amended—

4 (A) by striking subsection (h) and inserting the following:

5 “(h) EXCEPTION FOR PURCHASES OF COMMERCIAL PRODUCTS.—Subsection (a) does not
6 apply to acquisitions of commercial products.”;

7 (B) in subsection (j)(2), by striking “commercially available off-the-shelf
8 items” and inserting “commercial products”; and

9 (C) in subsection (m), by striking paragraph (5) and inserting the
10 following:

11 “(5) The term ‘commercial product’ has the meaning provided in section 103 of
12 title 41.”.

13 (b) INAPPLICABILITY OF CERTAIN EXECUTIVE ORDERS AND REGULATIONS.—Chapter 140
14 of title 10, United States Code, is amended by inserting after section 2375 the following new
15 section:

16 **“§ 2375a. Applicability of certain executive orders and regulations**

17 “(a) EXECUTIVE ORDERS.—

18 “(1) COMMERCIAL CONTRACTS.—No Department of Defense commercial contract
19 shall be subject to an Executive order issued after the date of the enactment of this section
20 unless the Executive order specifically provides that it is applicable to contracts for the
21 procurement of commercial products and commercial services by the Department of
22 Defense.

1 “(2) SUBCONTRACTS UNDER COMMERCIAL CONTRACTS.—No subcontract under a
2 Department of Defense commercial contract shall be subject to an Executive order issued
3 after the date of the enactment of this section unless the Executive order specifically
4 provides that it is applicable to subcontracts under Department of Defense contracts for
5 the procurement of commercial products and commercial services.

6 “(b) REGULATIONS AND POLICIES.—

7 “(1) COMMERCIAL CONTRACTS.—No Department of Defense commercial contract
8 shall be subject to any Department of Defense regulation or policy prescribed after the
9 date of the enactment of this section unless the regulation or policy specifically provides
10 that it is applicable to contracts for the procurement of commercial products and
11 commercial services by the Department of Defense.

12 “(2) SUBCONTRACTS UNDER COMMERCIAL CONTRACTS.—No subcontract under a
13 Department of Defense commercial contract shall be subject to any Department of
14 Defense regulation or order prescribed after the date of the enactment of this section
15 unless the regulation or policy specifically provides that it is applicable to subcontracts
16 under Department of Defense contracts for the procurement of commercial products and
17 commercial services.

18 “(c) DEPARTMENT OF DEFENSE COMMERCIAL CONTRACTS.—In this section, the term
19 “Department of Defense commercial contract” means a contract for the procurement of a
20 commercial product or commercial service entered into by the Secretary of Defense.”.

21 (2) CLERICAL AMENDMENT.—The table of sections at the beginning of such
22 chapter is amended by inserting after the item relating to section 2375 the following new
23 item:

“2375a. Applicability of certain Executive orders and regulations.”.

- Amend U.S. Code, Title 41, to add the following new section:

41 U.S.C. XXX – “*Subcontract* means any contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract. The term includes a transfer of commercial product or service between divisions, subsidiaries, or affiliates of a contractor or subcontractor. The term does not include contracts the costs of which are normally applied to general and administrative expenses or indirect costs. The term does not include agreements entered into by a contractor or subcontractor for the supply of commodities, commercially available off-the-shelf products, or commercial services that are intended for use in the performance of multiple contracts.”

- Amend FAR, Subpart 2.101, Definitions of Words and Terms, to add the following new definition:

Subcontract means any contract, as defined in Subpart 2.101, entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract. The term includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. The term does not include contracts the costs of which are normally applied to general and administrative expenses or indirect costs. The term does not include agreements entered into by a contractor or subcontractor for the supply of commodities, commercial products, or commercial services that are intended for use in the performance of multiple contracts.

- Amend FAR and DFARS at the citations noted and in the manner noted for each citation in Appendix F).

- Amend FAR, Subpart 2.101, Definitions of Words and Terms, to add the following new definition:

“*Subcontractor* means any person other than the prime contractor (including a supplier, distributor, vendor, consultant, or firm) furnishing supplies, materials, equipment or services under a subcontract.”

- Revise FAR 2.101, Definitions, as follows

Commercial computer software means any computer software that is a commercial ~~item~~ product or commercial service.

~~“Commercial item” means—~~

~~(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—~~

~~(i) Has been sold, leased, or licensed to the general public; or,~~

~~(ii) Has been offered for sale, lease, or license to the general public;~~

~~(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;~~

~~(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for—~~

~~(i) Modifications of a type customarily available in the commercial marketplace; or~~

~~(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;~~

~~(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;~~

~~(5) Installation services, maintenance services, repair services, training services, and other services if—~~

~~(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and~~

~~(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;~~

~~(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—~~

~~(i) “Catalog price” means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and~~

~~(ii) “Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.~~

~~(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or~~

~~(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.~~

Commercial product means -

(1) A product, other than real property, that—

(A) is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes; and

(B) has been sold, leased, or licensed, or offered for sale, lease, or license, to the general public.

(2) A product that—

(A) evolved from a product described in paragraph (1) through advances in technology or performance; and

(B) is not yet available in the commercial marketplace but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(3) A product that would satisfy the criteria in paragraph (1) or (2) were it not for—

(A) modifications of a type customarily available in the commercial marketplace; or

(B) minor modifications made to meet Federal Government requirements.

(4) A product that—

(A) is produced in response to a Federal Government drawing or specification; and

(B) is ordinarily produced using customer drawings or specifications for the general public using the same workforce, plant, or equipment.

(5) Any combination of products meeting the requirements of paragraph (1), (2), (3), or (4) that are of a type customarily combined and sold in combination to the general public.

(6) A product, or combination of products, referred to in paragraphs (1) through (5), even though the product, or combination of products, is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(7) A nondevelopmental item if the procuring agency determines, in accordance with conditions in the Federal Acquisition Regulation, that—

(A) the product was developed exclusively at private expense; and

(B) has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

Commercially available off-the-shelf (COTS) ~~item~~ product -

(1) Means any ~~item~~ product or supply (including construction material) that is—

(i) A commercial ~~item~~ product (as defined in paragraph (1) of the definition in this section);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

Commercial service means -

(1) Installation services, maintenance services, repair services, training services, and other services if—

(A) those services are procured for support of a commercial product, regardless of whether the services are provided by the same source or at the same time as the commercial product; and

(B) the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

(2) Services of a type offered and sold competitively, in substantial quantities, in the commercial marketplace—

(A) based on established catalog or market prices;

(B) for specific tasks performed or specific outcomes to be achieved; and

(C) under standard commercial terms and conditions.

(3) A service, even though the service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

Nondevelopmental item means --

(1) A commercial product;

(2) ~~Any~~ previously developed item of supply that is in use by a department or agency of the Federal Government, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(3) An item of supply described in paragraph (1) or (2) that requires only minor modification or modifications of the type customarily available in the commercial marketplace ~~in order~~ to meet the requirements of the procuring department or agency; or

(~~3~~4) Any item of supply currently being produced that does not meet the requirements of paragraph (1), (2) or (3) solely because the item is not yet in use.

- Add the following definition of “commercial item” at 10 U.S.C. § 2464

Note: The highlighted text is shared between the definition at 10 U.S.C. § 2464 and the two definitions at 41 USC 103 and 104.

10 USC 2464 (a)(5), Core Logistics Support:

(5) The commercial items covered by paragraph (3) are commercial items that have been sold or leased in substantial quantities to the general public and are purchased without modification in the same form that they are sold in the commercial marketplace, or with minor modifications to meet Federal Government requirements.

- Modify 41 U.S.C. § 103, Commercial Item (portions relevant to an item or product) as indicated below:

§ 103. Commercial item

In this subtitle, the term "commercial item" means—

(1) an item, other than real property, that—

(A) is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes; and

(B) has been sold, leased, or licensed, or offered for sale, lease, or license, to the general public;

(2) an item that—

(A) evolved from an item described in paragraph (1) through advances in technology or performance; and

(B) is not yet available in the commercial marketplace but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation;

(3) an item that would satisfy the criteria in paragraph (1) or (2) were it not for—

(A) modifications of a type customarily available in the commercial marketplace; or

(B) minor modifications made to meet Federal Government requirements;

(4) any combination of items meeting the requirements of paragraph (1), (2), (3), or (5) that are of a type customarily combined and sold in combination to the general public;

- Modify 41 U.S.C. § 104, COTS as indicated below:

41 U.S.C. § 104, COTS:

§104. Commercially available off-the-shelf item

In this subtitle, the term "commercially available off-the-shelf item"—

(1) means an item that—

(A) is a commercial item (as described in section 103(1) of this title);

(B) is sold in substantial quantities in the commercial marketplace; and

(C) is offered to the Federal Government, without modification, in the same form in which it is sold in the commercial marketplace; but

(2) does not include bulk cargo, as defined in section 40102(4) of title 46, such as

agricultural products and petroleum products.

- Amend 10 U.S.C. § 2464 as follows:

Section 2464 is amended— in subsection (a) — in paragraph (5), by striking “commercial items” the first place it appears and all that follows in that paragraph and inserting “commercial products covered by paragraph (3) are **commercial products as defined in section 103 and 104 of title 41.**”;