

Recommendation 35: Replace commercial buying and the existing simplified acquisition procedures and thresholds with simplified readily available procedures for procuring readily available products and services and readily available products and services with customization.

What kind of a system requires a 47-page solicitation—that incorporates, by my guess, at least 500 pages of text by reference—in order to buy a max of \$18,000 worth of cheap furniture? It’s lunacy. You cannot reform such a system. You’ve got to destroy it in order to save it, and to save us.

- Vern Edwards, Wifcon Forum¹

Problem

Many of the products and services on which DoD relies are available in today’s marketplace for anyone to buy. These are products and services that both directly and indirectly enhance warfighting capabilities. DoD is just one of many customers in the dynamic marketplace. Many companies do not view DoD as a viable, much less a critical, business partner. In 2016, for example, FedEx received 40 percent of all DoD contract actions, but the dollars associated with those contracts barely accounted for 1 percent of FedEx’s total annual revenue.² GAO compiled a list of some of the top innovative companies in the United States with total sales or total revenue ranging from \$7 billion to \$216 billion and found that direct sales to DoD made up zero, less than one, or less than two percent of those figures.³ DoD’s business practices have only been able to evolve to a certain degree, leaving it with tools and processes that are not optimized for the current economic reality—one in which DoD often has limited or no influence in affecting price, terms and conditions, and product and service development in highly competitive markets.

In the past, DoD may have been able to dictate the behavior of companies that made up the traditional military industrial base in which sellers relied on DoD as an integral part of their business strategy. Increasingly, sellers dictate how DoD will behave if DoD wants access to the products and services they offer in a particular market segment. Even traditional DoD suppliers like Boeing and Honeywell, which have substantial private-sector sales, are using business-to-business e-commerce portals to sell aircraft parts used by both public and private-sector buyers and provide logistical planning functions via online shopping carts.⁴ Today there is no mechanism available to DoD buyers to leverage these types of dynamically-priced streamlined acquisition tools. Creation of the Defense Innovation Unit and increased use of OTs for more than just research and development demonstrate DoD’s need to contract in a manner that is more consistent with how the private sector does business. Many believe the only

¹ “This is What is Wrong with Government Contracting,” Vern Edwards, Wifcon Forums and Blogs, September 3, 2016, accessed July 23, 2018, <http://www.wifcon.com/discussion/index.php?topic/3712-this-is-what-is-wrong-with-government-contracting/&tab=comments#comment-33249>.

² Calculated from numbers included in Federal Express, *FedEx Annual Report 2016*, accessed November 3, 2018, http://s1.q4cdn.com/714383399/files/oar/2016/docs/FedEx_2016_Annual_Report.pdf. FPDS, *Top 100 Contractors Report, Fiscal Year 2016*, accessed November 2, 2017, https://www.fpds.gov/fpdsng_cms/index.php/en/reports.html.

³ GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, July 2017, 8, accessed October 31, 2018, <https://www.gao.gov/assets/690/686012.pdf>.

⁴ “Honeywell Aerospace Flies High with its Redesigned B2B Portal,” Mark Brohan, B2B E-Commerce World, July 3, 2018, accessed November 2, 2018, <https://www.digitalcommerce360.com/2018/07/03/honeywell-aerospace-flies-high-with-its-redesigned-b2b-portal/>.

way DoD can remain competitive with near-peer competitors and address emerging threats is to operate outside of the FAR, despite all the efforts over the past 25 years to improve and emphasize the use of simplified commercial buying procedures and terms and conditions.⁵

To provide capability at the speed of relevance, Congress and DoD may continue to expand, or over rely, on tools like OTs to get around the FAR and the procurement system. Alternatively, Congress and DoD could walk the pathway laid out in this section. The Section 809 Panel’s recommendations that address commercial buying, simplified acquisition, and small business innovation in an *evolutionary* manner are necessary to reform the existing acquisition system in the short term. This recommendation, however, would *revolutionize* the existing procurement system into something that does not require work-arounds to meet warfighter needs quickly and efficiently. It is clear a serious problem exists when venture capital firms looking to invest in cutting-edge commercial software companies advise those companies not to do business with the federal government, even via the existing work-arounds.⁶ It is time to stop creating or expanding authorities for DoD to operate outside the acquisition system and deliberately implement changes that will make DoD’s acquisition system function in today’s private-sector-driven marketplace; establishing a system that meets warfighters’ needs in a way that provides agility and values time. Table 1-1 highlights the differences between the complex way DoD currently buys from the commercial marketplace to the simplified and more private-sector-accessible way it would buy if this recommendation were adopted.

⁵ See “DoD is Buying Fewer, Yes, Fewer Commercial Items. Oops!,” Colin Clark, Breaking Defense, July 19, 2017, accessed October 3, 2018, <https://breakingdefense.com/2017/07/dod-is-buying-fewer-yes-fewer-commercial-items-oops/>.

⁶ Stakeholder meetings with the Section 809 Panel, May–October 2018. .

Table 1-1. Comparison of Current DoD Commercial Buying Practices to Proposed Readily Available Pathways

Current DoD Commercial Buying	Readily Available	Readily Available with Customization
<ul style="list-style-type: none"> ▪ Narrow and complicated 8-part definition ▪ Not-inclusive of all open market available products 	<ul style="list-style-type: none"> ▪ Simpler, broader definition ▪ Includes nondevelopmental items 	<ul style="list-style-type: none"> ▪ Readily available products customized via commercial processes ▪ Almost all services
Procedures		
<ul style="list-style-type: none"> ▪ FAR 13.5 simplified acquisition procedures when under \$7M, more complex Part 15 procedures over \$7M 	<ul style="list-style-type: none"> ▪ New DFARS 213.1 readily available procedures (RAPs) for under \$15M – higher authority may authorize use above \$15M 	<ul style="list-style-type: none"> ▪ New DFARS 213.1 procedures with no upper threshold – contracting officer may rely on market based competition when below \$15M
Advertising/Competition		
<ul style="list-style-type: none"> ▪ Publicly post each procurement expected to exceed \$25K and vendors submit proposals or quotes ▪ Limited use of simplified procedures like standing price quotes and oral solicitation ▪ Competition standard is maximum extent practicable under \$7M, “full and open” over \$7M 	<ul style="list-style-type: none"> ▪ No public advertising required; preference for relying on market research and market-based competition ▪ Utilize standing price quotes and oral/direct solicitation ▪ Contracting officer may waive System of Award Management (SAM) requirement for small/nontraditional businesses 	<ul style="list-style-type: none"> ▪ Written or electronic solicitations will usually be necessary; must be publicly posted for all actions above \$15M ▪ Under \$15M the contracting officer may rely on market-based competition ▪ Contracting officer may waive SAM registration requirements for small/nontraditional businesses
Contract/Transaction Method		
<ul style="list-style-type: none"> ▪ Firm fixed price, fixed price with economic price adjustment (EPA), or time and materials contracts with up to 165 FAR and DFARS clauses ▪ Various FAR and DFARS clauses flow down to commercial subcontractors 	<ul style="list-style-type: none"> ▪ Firm fixed price or fixed price with EPA purchase orders and Government Purchase Card (GPC) transactions 	<ul style="list-style-type: none"> ▪ Firm fixed price, fixed price with EPA, or time and materials ▪ Purchase orders, GPC transactions, and contracts with minimal clauses ▪ Additional clauses must be approved by higher authority ▪ Supply chain and other technical risks should be mitigated via requirements generation process
Small Business Set-Asides		
<ul style="list-style-type: none"> ▪ All procurements below simplified acquisition threshold (SAT) are 100% set-aside for small business; <i>rule of two</i> still applies above the threshold 	<ul style="list-style-type: none"> ▪ No mandatory small business set-asides; small businesses will receive a 5% price preference ▪ DoD must still meet small business utilization goals 	<ul style="list-style-type: none"> ▪ The same 5% price preference will be used with no mandatory set-asides ▪ DoD must still meet small business utilization goals

Current DoD Commercial Buying	Readily Available	Readily Available with Customization
Socioeconomic		
<ul style="list-style-type: none"> ▪ BAA applies above the micro-purchase threshold (MPT); COTS are exempt ▪ Berry Amendment does not apply below the SAT ▪ Davis-Bacon (DBA) and Service Contract Act (SCA) labor rates apply, even below MPT 	<ul style="list-style-type: none"> ▪ No BAA or Berry Amendment application due to established global supply chain/lack of tech advancement ▪ DBA and SCA rates do not apply 	<ul style="list-style-type: none"> ▪ No Buy American Act or Berry Amendment application due to established global supply chain/lack of tech advancement ▪ DBA and SCA rates do not apply
Transparency/Accountability		
<ul style="list-style-type: none"> ▪ Basic purchasing information posted to Federal Procurement Data System–Next Generation (FPDS-NG), notices of pre-solicitation, solicitation, and award published to FedBizOps ▪ Pre- and postaward protests may be filed at the agency, GAO, and/or COFC 	<ul style="list-style-type: none"> ▪ All awards will be posted online; including market research, price comparison, and award decision basis if based on factors other than price ▪ Limited protests may be filed with agency 	<ul style="list-style-type: none"> ▪ Awards made using market-based competition will be publicly posted ▪ When solicitations are publicly advertised; procurements will be subject to pre- and postaward protests

Background

The Section 809 Panel’s June 2018, *Volume 2 Report* described operationalizing the Dynamic Marketplace as providing DoD with “a new set of simplified acquisition procedures to utilize when it is buying from the private sector, while also streamlining the way DoD develops and acquires everything else.”⁷ This section addresses the legal and regulatory changes necessary to effectively modernize and simplify DoD’s acquisition of readily available products and services consistent with the goal of behaving the way buyers in the private sector do. This recommendation is an effort to reduce barriers to doing business with DoD, to facilitate delivering capability and lethality to U.S. warfighters, and to out-pace near-peer competitors and nonstate actors.

DoD leadership, Congress, and stakeholders interviewed by the Section 809 Panel indicated that DoD must become a more agile player in an increasingly dynamic and competitive marketplace. The Center for New American Security’s *Future Foundry* paper, GAO’s July 2017 report on military acquisitions to the Senate Armed Services Committee, and the commercial buying and small business chapters of the Section 809 Panel’s *Volume 1* and *Volume 2 Reports* highlight challenges DoD faces in leveraging the private-sector marketplace.⁸ Challenges persist, in part, because decades of legislation and policy initiatives that governed, and often attempted to reform, the acquisition system continue to rely on

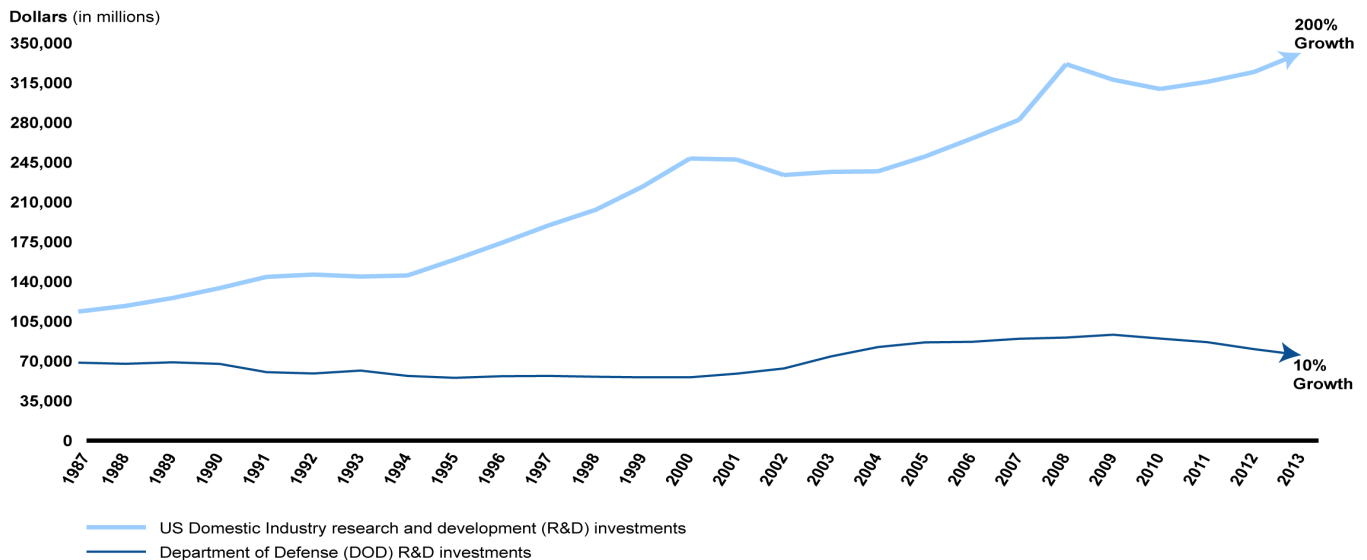
⁷ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 2 of 3*, 184 (2018).

⁸ Ben FitzGerald, Alexandra Sander, and Jacqueline Parziale, *Future Foundry: A New Strategic Approach to Military-Technical Advantage*, Center for New American Security, December 2016, accessed October 12, 2018, <https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report-FutureFoundry-final.pdf?mtime=20161213162640>. GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, July 2017, accessed October 31, 2018, <https://www.gao.gov/assets/690/686012.pdf>.

unique terms, conditions, and processes better suited to the industrial age, not the information age, much less the rapidly approaching artificial intelligence age. These industrial-age artifacts are not agile, do not value time, and serve as barriers to small and nontraditional businesses.

The Section 809 Panel’s vision of a future DoD acquisition system is one that is agile, efficient, and effective at procuring products and services offered for sale to the public or other government agencies, or are otherwise readily available in the marketplace. Figure 1-1 demonstrates the dramatic growth of private-sector research and development spending, compared to DoD. As a result of this investment, the progress of commercial technology has dramatically expanded over the last 2 decades, driving incredible growth in the public’s demand for technologies that at one time were limited to government or defense-specific applications. The fact that the computing power of a smart phone in the average American teenager’s pocket dwarfs that of the Apollo guidance computer used to navigate to the moon and back is a well-worn anecdote of the advancement in commercial technology.⁹ In addition to cutting-edge consumer electronics and software being readily available in the marketplace, the growth of a globally accessible marketplace and the rise of global corporations and supply chains drives private-sector demand for complex logistics, data analytics, and other specialized services.

Figure 1-2. DoD and Private-sector Research and Development Spending¹⁰



Source: GAO presentation of National Science Foundation and Office of Management and Budget data. | GAO-17-644

The Section 809 Panel has thus far recommended an important *evolution* in commercial buying to narrow the gap between how DoD behaves in today’s marketplace and how other buyers behave, but a *revolution* in the way DoD functions in the marketplace is necessary. How Congress and DoD think about competition, total procurement costs, pricing, value, and transparency must be further expanded to enable DoD to effectively leverage today’s, and more importantly tomorrow’s, marketplace to

⁹ “How the Computing Power in a Smartphone Compares to Supercomputers Past and Present,” infographic, Business Insider, accessed November 2, 2018, <http://www.businessinsider.com/infographic-how-computing-power-has-changed-over-time-2017-11>.

¹⁰ GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, 6, accessed October 31, 2018, <https://www.gao.gov/assets/690/686012.pdf>. The expenditures have been adjusted for inflation in accordance with DoD National Defense Budget Estimates for Fiscal Year 2017. Industry research and development spending may include funding provided by DoD for research performed by industry.

empower “the warfighter with the knowledge, equipment, and support systems to fight and win.”¹¹ It is time to abandon some of the more onerous and outdated concepts, as compared to private-sector practices, that create unnecessary friction in the acquisition system. This friction inhibits rapid fielding of readily available products and services that increase lethality, ensure technological dominance, and provide critical warfighter support. This section lays out a pathway for DoD to become a more sophisticated buyer in the increasingly Internet-based, globally interconnected, privately-funded, and innovation-rich marketplace.

Discussion: Readily Available

In the *Volume 1 Report* and the *Volume 2 Report*, the Section 809 Panel has recommended changes to the FAR’s commercial buying processes and procedures, which if implemented wholesale, will substantially improve DoD’s ability to rapidly and efficiently acquire those products and services that meet the statutory definition of commercial. Even with those proposed changes, the definition of what is commercial is far too narrow to provide access to today’s marketplace and is too complicated in its application. Inconsistent or stalled commercial determinations made by contracting officers as well as requirements for companies to produce supporting data to prove a product or service is commercial, are challenges that persist and will continue even if all of the Section 809 Panel’s earlier commercial recommendations are adopted.¹² Some industry stakeholders explained, in the context of their purchasing systems under government prime contracts, that they do not attempt to make a commercial determination and use the current simplified commercial buying procedures because of the scrutiny applied by DCMA to their determinations and a lack of certainty as to what DCMA might evaluate in a given case. This lack of certainty is exacerbated by the potential for reviews by various inspection regimes like the DoD Inspector General (DoD IG) and GAO and during audits conducted by DCAA. The effect is a culture of risk aversion that is characterized by a lack of agility and unnecessary delays in the procurement process.

Effectively accessing the full extent of the capabilities readily available in the private sector, necessitates abandoning the terms *commercial* and *commercial buying* for something simpler and more inclusive. This revolution is necessary to implement the simple and effective process for accessing the marketplace as envisioned by Congress when the Federal Acquisition Streamlining Act (FASA)¹³ was passed.

The concept of *readily available* products and services, is defined in the *Volume 2 Report* as

Any product or service that requires no customization by the vendor and can be put on order by customers.¹⁴ Optional priced features of products and services in a form that is offered for sale in the normal course of business, fall within the definition of readily available.

¹¹ DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military’s Competitive Edge*, 5, accessed June 5, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

¹² USD(AT&L) Memorandum, *Guidance on Commercial Item Determinations and the Determination of Price Reasonableness for Commercial Items*, accessed July 23, 2018, <https://www.acq.osd.mil/dpap/policy/policyvault/USA003554-16-DPAP.pdf>.

¹³ The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 (1994).

¹⁴ This includes products and services that only governments buy or only governments can buy due to export controls or other legal limitations.

The terms *readily available* and *readily available with customization* subsume everything that would currently meet the *commercial product and services* definitions and also includes many products and services that would not. Nondevelopmental items and products and services that may only be sold or offered for sale to other defense departments and other federal or local government entities would also generally be considered readily available.¹⁵ These products or services are developed and paid for by private investment (not DoD or the U.S. government), have established supply chains, and are available for potential customers to put on order, although production lead times and available stock levels may delay delivery. DoD needs greater flexibility to procure these products and services in a manner that more closely resembles other consumers in the market and makes DoD a more attractive business partner.

Near-peer competitors and nonstate actors are not encumbered by the same bureaucracy in their purchasing systems as the U.S. government. A story, recounted at the signing ceremony of FASA, highlighted the issue of the U.S. government not being able to buy Motorola radios from the company's commercial line in support of Operation Desert Storm. The Japanese government ended up purchasing the radios for DoD. Such situations still exist, albeit at a different level of sophistication. DoD must be able to rapidly field existing technology that might be the 80 or 90 percent solution, and let its smart and talented operators innovatively use that technology to realize tomorrow's solutions today. Spending years developing and fielding yesterday's solution is the wrong strategy. The following are the key elements of this proposal:

- **Readily Available Procedures:** The readily available procedures (RAPs) and the authorities recommended in this section apply to procurement of readily available products and services below a \$15 million threshold. In many cases, the increased dollar value of readily available products and services does not result in increased procurement risk. In those cases, a contracting officer should request authorization to use these procedures for procurements in excess of the threshold. These procedures would replace existing Simplified Acquisition Procedures (SAPs) in FAR Part 13 for DoD, and readily available buying would replace FAR Part 12 commercial buying for DoD. In situations for which DoD requires capabilities not offered by the private-sector, RAPs would not be used.
- **Competition:** Competition would be achieved primarily through documented market research, recognizing that readily available products and services exist in the market and can be found through a variety of private-sector tools. Market forces set the prices that consumers pay for these products and services because they are publicly available for consumers to compare and evaluate. Even when a new product is only offered by one vendor, pricing and product quality are driven by what the market will bear. Issuing a competitive RFP for these products typically does not increase competition. In fact, soliciting the product or service using today's processes presents a barrier to entry for many companies, and likely increases the total procurement cost and delivery timelines.

¹⁵ Congress, for decades, to no avail, has tried to move the DoD to buy more non-developmental items. GAO, *Procurement: DoD Efforts Relating to Nondevelopmental Items*, GAO/NSIAD-89-51, February 1989, accessed August 23, 2018, <https://www.gao.gov/assets/220/210964.pdf>.

- **Applicable Laws:** The statutory relief that currently only applies to *commercially available off-the-shelf* (COTS) items would be expanded to apply to *all* readily available products and services. The current system of small business set-asides would be changed in favor of a small business price preference for evaluation purposes. The Military Services and Defense Agencies, through their contracting activities, would be required to use small-businesses strategically, as discussed in the small-business policy pivot described in the *Volume 1 Report* and directed by Section 851 of the FY 2019 NDAA.¹⁶
- **Price Reasonableness:** Contracting officers should, in most cases, be able to determine price reasonableness based on multiple offerings of similar products and services in the marketplace. When a new or substantially updated product is offered for sale, the end-user should be able to provide input into the price reasonableness determination by articulating whether the products or services provide value at a given price. Price should be the primary factor for making an award decision in many instances, but past performance, capability, warranties, and other similar factors may also be considered.
- **Transaction Methods:** Transactions for readily available products and services should be conducted using Government Purchase Cards (GPCs) and simple fixed-price purchase orders. The terms and conditions that would be included in a purchase order are a subset of what is left of the Contract Terms and Conditions – Commercial Items clause at FAR 52.212-4 after all of the Section 809 Panel’s commercial buying recommendations have been implemented.¹⁷ Prime contractors would not be required to flow down any DoD clauses when procuring readily available products and services from subcontractors in support of defense-unique development contracts. This recommendation includes authorizing contracting officers to make purchases with their GPCs up to their warrant or the \$15 million threshold, whichever is lower, without issuing a purchase order. This practice means accepting sellers’ terms and conditions and using terms and conditions included in DoD’s agreements with the financial institutions that issue the GPCs.
- **Transparency and Accountability:** To improve transparency and provide for public accountability, award information would be published for each award, to include the results of the contracting officer’s market research and a short award decision document when a decision was based on factors other than low price. Protests would be limited to agency-level protests with the grounds for a protest limited to situations for which the product or service that was procured using the readily available procedures was not readily available or the contracting officer did not conduct market research consistent with these procedures.

In general, procuring readily available products and services poses few risks that must be managed by government-unique contract terms and conditions. As a result, the process for procuring these

¹⁶ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 167-194 (2018).

¹⁷ See, Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 32-42 and Tables F-5, 6, and 7, A-39-67 (2018).

products and services should be very simple. When exceptions to this rule exist, additional terms and conditions should be applied only by exception and as required by the end-user.

To adequately streamline procurement of readily available products and services, the same statutory relief that is currently reserved for COTS products and services must be expanded to the broader universe of readily available. This recommendation would achieve what the Section 809 Panel argued for in the Commercial Buying section of the *Volume 1 Report*.¹⁸ DoD would be able to seek out “high-tech, cutting-edge solution(s), that...will likely not satisfy the *sold in substantial quantities*...criteria of the COTS definition,”¹⁹ and engage those vendors on their terms. This new construct must replace existing commercial buying and simplified acquisition procedures for DoD. Maintaining the current construct, as an alternative, would undermine the objectives of these recommendations by adding complexity and confusion to a process that needs to be more simple and straightforward.

Determining what is a readily available product or service should be much simpler than the current commercial item determination process, and the applicable implementing guidance must direct that any reviewing body, such as DCMA, DoD IG, or GAO, must presume the determination made by a contracting officer, or a DoD prime contractor, will not be subject to criticism unless it can affirmatively prove a product or service was not readily available at the time of the procurement. A readily available service that requires no customization is one for which the contracting officer can purchase the service exactly as it is offered by the vendor at prices advertised to the public. Examples of readily available services include subscription services like cable television, commercial Internet service, or cloud storage for which the contracting officer selects from priced options that are available. In addition, one-time services like maintenance service calls or short-term expert consultant services and simple transactional services like dry cleaning or an oil change may also be procured using these readily available procedures.

Most of the readily available products and services DoD procures are available from multiple reputable vendors meeting generally accepted quality standards with basic commercial terms and conditions. Not all products that meet the minimum requirements in a purchase request are created equal, and not all businesses offer the same policies regarding shipping, returns, or warranties. Contracting officers may generally be able to rely on price as the only factor in making an award decision, but they should consider reliable past performance information related to the vendor and the product to inform the award decision. There are also publicly available consumer and expert reviews of products and vendors that should be considered, in addition to the government’s past performance database and the experience of the contracting officer and the requiring activity. Favorable shipping or return policies and other considerations, like the length of a manufacturer- or vendor-offered warranty, should also be considered in making a best-value determination when appropriate. Market research and understanding the requiring activity’s need will enable the contracting officer to determine what factors should be considered in making an award decision.

¹⁸ Ibid, 20-21.

¹⁹ Ibid, 21.

Stakeholders interviewed by the Section 809 Panel indicated the intellectual property (IP) of private-sector companies will not be protected by DoD under existing policy.²⁰ The readily available procedures must clearly state that DoD receives no more IP from vendors than that which the vendors typically include in the sale of their products and services in the marketplace.

Stakeholders in industry and the government shared concerns about the desire of some acquisition programs and contracting officers in DoD to procure source code for commercial software products, even though they do not have capacity to do anything with that source code. In addition, a number of software companies, and the private investors many of the companies rely on, fear that if DoD partnered with the company to develop an innovative solution, it could lead to DoD taking the idea and turning it into an RFP to find someone who might be able to produce the solution at a cheaper price. It must be clear to the private sector that DoD values the intellectual capital companies invest in their products and services and that their IP and their solutions will be protected. DoD must be more strategically selective with decisions to pursue IP rights and technical data related to privately developed, readily available products and services.

The statutory changes needed to implement these readily available procedures are detailed in the subrecommendations at the end of this section. In addition, changes to the existing simplified acquisition procedures found in FAR Part 13 are also provided at the end of this section, with the intent being to heavily amend DFARS Part 213 to provide RAPs for DoD. These procedures would be applicable up to a threshold of \$15 million, which, according to Bloomberg analysis of Federal Procurement Data System (FPDS) data, could streamline as much as 90 percent of DoD's transactions, and up to 55 percent of the dollars spent based on FY 2017 spending.²¹ Understanding that the monetary value of a procurement does not necessarily translate into increased procurement risk, the authority to use these procedures may be granted to the contracting officer by the chief of the contracting office when the expected value of the procurement exceeds \$15 million.²² One of the fundamental changes that Congress and DoD must be willing to embrace in implementing these procedures is the manner in which effective competition is achieved for readily available products and services—competition that allows DoD access to the entire marketplace, not just those companies that have been able to navigate the complex and confusing government system.

Competition

The current universal standard for competition is the federal government's requirement for *full and open* competition. For simplified acquisitions, FASA recognized in 1994 that the competition standard should be exercised to the "maximum extent practicable."²³ In today's commercial marketplace, DoD-administered full and open competitions result in an artificial competition that is neither full nor open. Countless stakeholders have shared frustration with the barriers to entry that prevent them from being considered for a DoD contract and the full and open competition process is chief among them.

²⁰ Commercial Items, Components, or Processes, DFARS 227.7102(b).

²¹ Bloomberg provided analysis of FPDS-NG data. This data captures all DoD contract actions and therefore would include in the number of transactions valued below \$15 million a large number of contract modifications and actions for products and services that would not meet the definition of readily available.

²² For the definition of the Chief of the Contracting Office term, see, Definitions, FAR 2.1.

²³ Contracts: Competition Requirements, 10 U.S.C. § 2304. Promoting Competition, FAR 13.104.

To participate in a full and open competition, a company must monitor FedBizOps, register in the System for Award Management (SAM), and be willing and able to respond to an RFP laden with FAR/DFARS clauses and provisions. Most of the readily available products and services DoD contracting officers buy every day are available from multiple easily accessed sources, with prices transparently advertised online or through catalogues. These products and their prices are available to anyone, including the nation's near-peer competitors and nonstate actors, which also see them. These prices, along with product quality, shipping rates, warranties, and vendors' commercial business practices are subject to continuous competition and are transparent to the public. DoD should have the authority to leverage this continuous market-based competition, which constitutes true full and open, transparent, competition.

The private sector uses market-based competition in everyday transactions to buy readily available products and services. Companies that sell in the private sector do not need to see a publicly posted RFP to know that their products, prices, and related terms and conditions must be competitive, if they are going to succeed. To remain competitive, they constantly adjust their prices and terms and conditions.

For DoD purposes, market-based competition, as discussed in the *Volume 2 Report*, means:

The consideration of sources that offer readily available products and services at prices available to any potential buyer, resulting in competition being established through market forces.

Adopting the definition above would give contracting officers discretion to use standing price quotations as defined by recommendations in the *Volume 2 Report*, use oral solicitations, or send a short electronic solicitation that may be no more than an email or the completion of an online request for a quote.²⁴ If a contracting officer determines that a publicly posted solicitation is necessary, nothing would prevent posting one for a period determined by the contracting officer based on the nature of the requirement.

The contracting officer's market research must be thorough but does not need to be exhaustive. The requirement to post elements of the contract file on award provides information on whether the rules for market-based competition were followed and an opportunity to search for trends that indicate process corruption. The process would be more transparent to the taxpayers because pricing information for competitors in the market would be publicly available.

Online buying through individual vendor websites and e-marketplaces like Amazon, Grainger, and the Boeing Parts Page "is becoming the new normal for American businesses."²⁵ Congress has recognized this trend and directed the General Services Administration (GSA) to implement a program for procuring COTS products through commercial e-commerce portals.²⁶ GSA is considering how to implement this authorization by examining a mixture of e-commerce, e-marketplace, and e-portal

²⁴ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 2*, 9 (2019).

²⁵ "B2B E-Commerce Trends to Take Notice of in 2018," Jary Carter, *Forbes*, February 15, 2018, accessed July 25, 2018, <https://www.forbes.com/sites/theyec/2018/02/15/b2b-e-commerce-trends-to-take-notice-of-in-2018/#57a6500f7339>.

²⁶ FY 2018 NDAA, Pub. L. No. 115-91 (2017).

concepts, which could be extraordinarily useful in procuring readily available products and services.²⁷ Although the statute authorizes purchases through the portal up to the simplified acquisition threshold, the House of Representatives proposed increase of the micro-purchase threshold from \$10,000 to \$25,000 for purchases made through the e-commerce portal did not get enacted in the FY 2019 NDAA.²⁸ The e-commerce portal provisions are a step in the right direction, but will provide limited benefit because they will not provide access to the entire marketplace and will not accelerate DoD's ability to procure innovative, readily available products and technology solutions, other than COTS products valued at less than \$10,000. The existing e-commerce portal concept would provide a source contracting officers could use in doing market research for some readily available products. An e-commerce portal that provides a gateway to all the products and services offered for sale on the Internet could be the primary source from which DoD might acquire readily available products and services under the authorities provided in this proposal.

E-commerce portals could also provide DoD a tool for collecting data on spending patterns to "critically analyze an organization's spending and use the information to make better business decisions."²⁹ Such analysis is the goal of spend management, strategic sourcing, and category management—concepts that are gaining momentum within DoD.³⁰ Often strategic sourcing translates to awarding large indefinite-delivery/indefinite-quantity (IDIQ) contracts, with negotiated pricing. The practice of concentrating buying under a limited number of large-agency or governmentwide contracts has the potential to inhibit innovation and limit competition. Rather than creating a complex multiple award IDIQ, the Section 809 Panel's readily available proposal would enable DoD to bargain with vendors for enterprise or agencywide discounts when organizations place individual orders. The vendors would not need to decide which IDIQ vehicles to spend their bid and proposal costs on and incur operating costs to meet the compliance requirements associated with an IDIQ.³¹

Facilitating contracting officers' ability to make individual transactions with vendors in the open market has the potential to reduce reliance on multiple award IDIQs, the GSA schedules, and other governmentwide contracts that limit competition. More decentralized buying, relying on the open market, however, may increase the chances that contracting officers could procure counterfeit products or information technology products that present cybersecurity concerns. Approved product lists and qualified vendor lists—created when only certain products meet DoD's requirements or only certain vendors are qualified to provide certain products or services—would provide a means of mitigating this concern. An example would be the existing DoD Information Network (DoDIN) Approved

²⁷ GSA, *Procurement Through E-Commerce Portals: Implementation Plan*, March 2018, accessed August 30, 2018, <https://interact.gsa.gov/sites/default/files/Commercial%20Platform%20Implementation%20Plan.pdf>.

²⁸ FY 2019 NDAA, Pub. L. 115-232, Conference Report, H. Rept. 115-874, 905.

²⁹ "Category Management and Strategic Sourcing Defined," Defense Pricing and Contracting (DPC), accessed November 6, 2018, <https://www.acq.osd.mil/dpap/ss/index.html>.

³⁰ "AF Aims to Save \$2B, Improve Lethality with New Acquisition Approach," Debbie Aragon, U.S. Air Force, April 26, 2018, accessed August 7, 2018, <https://www.af.mil/News/Article-Display/Article/1504349/af-aims-to-save-2b-improve-lethality-with-new-acquisition-approach/>. "Category Management and Strategic Sourcing Defined," Defense Pricing and Contracting (DPC), accessed November 6, 2018, <https://www.acq.osd.mil/dpap/ss/index.html>.

³¹ See, "An Excess of Multiple-Award Contracts is Creating New Problems for Government," Brian Freil, Government Executive, April 20, 2016, accessed August 7, 2018, <https://www.govexec.com/excellence/promising-practices/2016/04/excess-multiple-award-contracts-creating-new-problems-government/127645/>.

Products List (APL) managed by DISA.³² The DoDIN APL provides “a consolidated list of products that have complete interoperability and cybersecurity certification” and DISA has established procedures for testing and certifying products to be added to the APL.³³ The e-commerce portal being developed by GSA could provide simultaneous access to all products and services advertised and searchable on the Internet, while only allowing buyers to purchase approved products. Some have advanced the theory that by not advertising upcoming purchases to the world, individual DoD procurement actions for readily available products will facilitate hiding in plain sight and make sabotage and fraud against the purchasing process less likely.

Some of the basic tenants of public procurement, like publicly posting RFPs for readily available products and services, have become outdated and create barriers to entry for nontraditional companies and barriers to innovation for DoD. Continued use of complicated RFPs poses challenges for DoD in maintaining its edge over near-peer competitors. To resolve this issue, the United States must reshape public procurement provisions in trade agreements to which it is a party. The following, describing the North American Free Trade Agreement’s public procurement chapter, is true regarding other trade agreements, including the foundational World Trade Organization Agreement on Government Procurement (GPA):

NAFTA’s current government procurement chapter was written before digital technologies changed not only the products and services being purchased but also how the purchases are made in the procurement market both in the U.S. and with our key trading partners.³⁴

These trade agreements apply to most of the products and services that are readily available in the marketplace. The GPA, for instance, provides very specific requirements for publicly advertising RFPs for any covered procurement.³⁵ All covered procurements must follow these rules. For commercial buying, each procurement must be publicly advertised for a minimum of 10 days.³⁶ The concept of readily available will need to be incorporated into these trade agreements. As a whole, the concept should be agreeable to the international community, as it recognizes the global nature of supply chains and should further open the United States defense market to responsible foreign sources of supply.

Practices like BAAs and the newly implemented CSO push the boundaries of the advertising requirements found in these trade agreements.³⁷ CSO is a step in the right direction for contracting officers to have greater flexibility to access innovative commercial solutions, including research and

³² “Approved Product List Integrated Tracking System,” DISA, accessed November 2, 2018, <https://aplits.disa.mil/processAPList.action>.

³³ Ibid.

³⁴ “Government Procurement Moves to Center Stage in NAFTA Renegotiations,” Eminence Griffin, TechWonk Blog, January 23, 2018, accessed July 28, 2018, <https://www.itic.org/news-events/techwonk-blog/government-procurement-moves-to-center-stage-in-nafta-renegotiations>.

³⁵ See, World Trade Organization, *Revised Agreement on Government Procurement*, Articles VII and XI, accessed July 25, 2018, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf.

³⁶ Ibid.

³⁷ Section 879 of FY 2017 NDAA, Pub. L. 114-328 (2016). USD(A&S) Memorandum, *Class Deviation—Defense Commercial Solutions Opening Pilot Program*, June 26, 2018, accessed November 6, 2018, <https://www.acq.osd.mil/dpap/policy/policyvault/USA001228-18-DPAP.pdf>.

development, and authorizes competition requirements to be met through technical analysis.³⁸ Other than the fact that CSO is only a pilot program, and is not a permanent authority, there is a single, large, problem with the statutory definition of *innovative*. The commercial solution opening may only be used to acquire “innovative commercial items, technologies, and services” with innovative being defined as

- (1) any technology, process, or method, including research and development, that is new as of the date of submission of a proposal; or
- (2) any application that is new as of the date of submission of a proposal of a technology, process, or method existing as of such date.³⁹

How the term *new* in the definition is interpreted could be problematic and will likely be inconsistent across DoD, if not across individual contracting offices. It is unclear whether the term means new to DoD or new to the private sector. It is also unclear what happens if a solution is not considered new, but the concept is evaluated and the program office or operator wants to procure it and field it quickly. Broader authority to compete solutions and negotiate the business arrangement after the technical competition is necessary for DoD to adequately leverage industry expertise and commercial technology advancement. Such authority should not be limited by how an acquisition official or agency attorney might interpret the term *new*.

Maximizing competition and access to innovation requires that contracting officers have authority to waive SAM registration requirements for vendors offering readily available products and services when doing so is in DoD’s best interest. Contracting officers should encourage companies to register in SAM if the companies are seeking to do business with DoD on a regular basis.

Under the proposed readily available procedures, contracting offices would need to periodically publish notices of anticipated procurements on FedBizOps and other online media likely to reach small and nontraditional businesses in a given industry. These notices would be published by individual contracting activities and indicate that they only apply to the specific contracting activity issuing the notice. In addition to the list of readily available products and services the buying activity expects to procure, the notice would explain that contracting officers will rely on publicly available product information and pricing to conduct market research and make award decisions in procuring those products and services.

Applicable Laws

In addition to applying the same statutory relief to readily available products and services as is currently provided for COTS items, the proposed new system should allow for eliminating domestic purchasing preferences and certain labor rate protections. BAA and the Berry Amendment undermine DoD’s ability to acquire the most innovative products at reasonable prices due to their restriction on non-U.S. components.⁴⁰ BAA and Berry Amendment provisions are increasingly out of step with

³⁸ USD(A&S) Memorandum, *Class Deviation—Defense Commercial Solutions Opening Pilot Program*, June 26, 2018, accessed November 6, 2018, <https://www.acq.osd.mil/dpap/policy/policyvault/USA001228-18-DPAP.pdf>.

³⁹ Section 879 of FY 2017 NDAA, Pub. L. 114-328 (2016).

⁴⁰ Requirement to Buy Certain Articles from American Sources; Exceptions, 10 U.S.C. § 2533a.

commercial practices and global supply chains across most product categories. Domestic sourcing needs should be addressed by DoD's Industrial Base office and the Commerce Department in identifying critical needs and allocating resources to stimulate cutting-edge domestic capacity. The labor rate protections of the Service Contract Act, Davis–Bacon Act, and Public Contracts Act (formerly Walsh–Healey Act) are both inflationary and duplicative of regulations like the Occupational Safety and Health Act (OSHA) and the Fair Labor Standards Act (FLSA).⁴¹ The challenges these statutes pose to DoD's effective use of precious resources are more fully discussed in Recommendations 64 and 65 of this report. Implementation of these recommendations will dramatically improve how the vast majority of DoD procurements are made, but will only remove the application of these laws from a small portion of the dollars spent.⁴²

Removing application of BAA and the Berry Amendment to readily available products and services will likely have a more substantial effect. Much of the textiles, clothing, and footwear currently subject to the Berry Amendment would generally meet the definition of readily available, as would many product categories currently under BAA restrictions. The limits BAA and the Berry Amendment place on accessing cutting-edge products produced outside of the United States are antithetical to efficiently procuring the most advanced readily available products and solutions.⁴³ Removing the requirement to apply these provisions to readily available products may also remove barriers to entry into the defense marketplace caused by supply chain restrictions. Small and nontraditional businesses unable to source U.S.-made components for readily available products now would be able to compete for DoD business under the proposed system.

Removing the federal government-unique labor rate requirements would have little to no effect on the service, construction, or manufacturing industries, especially considering the fairly limited scope of service contracts and construction projects that could be considered readily available without any customization. The safety and wage standards required by OSHA and the FLSA would continue to apply without including them as specific terms and conditions—they are laws of general applicability.

The statutory reservation of all contract awards under the current simplified acquisition threshold, and additional set-aside provisions in FAR Part 19, are inconsistent with the strategy proposed in the *Volume 1 Report* and directed by the FY 2019 NDAA.⁴⁴ For DoD to fully implement a strategy that focuses on investing in innovative small businesses and ensures DoD maintains technical dominance over near-peer competitors and emerging adversaries, DoD needs flexibility to determine how it meets the goals established by the Small Business Administration (SBA). Consequently, DoD must be able to implement a deliberate strategy to meet its small business goals through investments in innovation to ensure a robust industrial base. Much of that investment could come in the form of procuring privately developed, readily available technology solutions. Set-asides do not create the proper incentives for

⁴¹ Service Contract Labor Standards, 41 U.S.C. §§ 6701-6707. Rate of Wages for Laborers and Mechanics, 41 U.S.C. § 3142. Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$10,000, 41 U.S.C. §§ 6501-6511.

⁴² Based on FY 2017 FPDS-NG data collected and analyzed by Bloomberg and the Section 809 Panel staff.

⁴³ "Berry Amendment FAQ," Defense Pricing and Contracting (DPC), accessed November 6, 2018, https://www.acq.osd.mil/dpap/cpic/ic/berry_amendment_faq.html.

⁴⁴ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 167-194 (2018). FY 2019 NDAA, Pub. L. No. 115-262, 130 Stat. 2139 (2018).

DoD to procure readily available products, and these programs have the potential to stunt, rather than encourage, small business growth.

As discussed in the *Volume 1 Report*, set-asides and other small business programs incent small businesses to make extraordinary efforts to remain small.⁴⁵ Setting-aside all procurements under a certain dollar threshold does not encourage a small business to grow beyond that threshold, especially if that business relies on competing for procurements that are currently set aside for small business. Outgrowing the size standard makes those businesses ineligible to compete for the same contracts that, in many cases, were critical to the success of the small business. Using a price preference and requiring DoD to continue to meet the overarching small business use goal established by SBA will ensure the same amount of DoD dollars are invested in small business, while allowing capable small businesses to grow and compete for opportunities. Such a requirement could help achieve Congress's direction to DoD to "create opportunities and a pathway for small businesses to grow and compete for future DoD contracts as larger entities" where set-asides fall short for one reason or another.⁴⁶

The Section 809 Panel is not recommending that readily available products and services be exempt from mandatory sourcing required by FAR Part 8; however, prime contractors would not be required to procure from mandatory sources any products or services that may be included in the readily available solution that is being provided to DoD.⁴⁷ Readily available products and services have established supply chains and DoD should not be requiring contractors to develop unique supply chains, unless there is a national security-related basis for the requirement, which could necessitate customization or development that would make using these procedures inappropriate.

Pricing and Value

Most of the readily available products and services that DoD acquires are available from multiple sources, with publicly posted prices. In those cases, contracting officers would be able to compare available pricing and seek quantity or preferred-buyer discounts to determine price reasonableness. The existing FAR Part 13 procedures for determining price reasonableness are available to contracting officers in the proposed readily available procedures. In addition to those factors, contracting officers need to be able to rely on input from the requirement owner and consider value to the end user when existing pricing information may not be adequate to make a timely price reasonableness determination.

Value relative to price, not cost, is what matters in the private sector. Many companies that sell products that are expected to perform a certain function at a high standard invest substantial amounts of time, energy, and money in research, design, and the development of their intellectual capital. Technology companies like Apple, Microsoft, and Samsung price their products based on the capabilities their products provide and the value those capabilities provide to the consumer. If DoD wanted to buy an iPhone in 2006, a contracting officer would not have had a similar product, previous purchases, or earlier iterations of the iPhone against which to compare the price. In the case of a *first-mover*, like Apple in the touchscreen smartphone arena, contracting officers should seek input from end

⁴⁵ Section 809 Panel, *Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 176-177 (2018).

⁴⁶ FY 2017 NDAA, Senate Armed Services Committee Report, S. Rept. 114-255, May 18, 2016, accessed August 30, 2018, <https://www.congress.gov/congressional-report/114th-congress/senate-report/255/1>.

⁴⁷ See, Contract Clause, FAR 8.005. Contractor Qualifications Provisions and Clauses, FAR 52.208-9.

users or requirements owners as to whether a product or service represents value to the mission at the price being offered. This determination by the requirement owner could be a critical component of contracting officers' price reasonableness determination. Even in the case of emerging technologies, cost or pricing data and *other-than* cost or pricing data, should not be requested from vendors. Pricing of readily available products and services will need to be emphasized in training curriculum for DoD acquisition professionals when implementing this recommendation.

Contracting officers should contact vendors found through market research and bargain for quantity discounts, preferred customer discounts, or other benefits such as free shipping and extended warranties. In the consumer and business-to-business e-commerce world, vendors use unique discount or customer codes that provide better pricing or other benefits for recurring and high-volume customers. For example, Home Depot negotiated a standard discount for DoD which is automatically captured at the point of sale when the GPC is used.⁴⁸

Transaction Methods

The transaction methods and terms and conditions used by DoD were often cited by stakeholders as the most challenging part of doing business with DoD. The example provided in the Vern Edwards quote at the beginning of this section is typical of many federal government commercial procurements. Time, energy, and cost are expended across the system unnecessarily—time is not valued. It is difficult to understand how 47 pages of documentation, with 500 more pages incorporated by reference, are really necessary for the federal government to manage the risk associated with purchasing \$18,000 in sleeper sofas.⁴⁹ Most of the content in those 47 pages likely comprised boilerplate clauses, provisions, and terms and conditions, but it still took man-hours to assemble, review, and publish. This drill provides little benefit to the agency or the tax payer and deters new entrants from doing business with the government.

A phone call to a number of local sources, or an Internet search could have identified multiple potential sources willing to sell the needed product at a reasonable price. A simple credit card transaction would have saved time and resources, returned a rebate to the agency, and achieved the desired results.⁵⁰ The competitive nature of the market place and the terms and conditions offered by sellers in the readily available marketplace adequately mitigate most risks associated with buying these products. This recommendation would provide agencies with the authority to issue GPCs to contracting officers with a credit limit up to their warrant or the \$15 million threshold, if the contracting officer's warrant exceeds that threshold.

This proposal leaves the micro-purchase threshold and procedures in place so that contracting officers may continue to issue purchase cards and delegate the authority to make purchases that fall below the

⁴⁸ See, "Solutions for Government Buyers," Home Depot, accessed August 27, 2018, https://www.homedepot.com/c/Government_Customers.

⁴⁹ "This is What is Wrong with Government Contracting," Vern Edwards, Wifcon Forums and Blogs, September 3, 2016, accessed July 23, 2018, <http://www.wifcon.com/discussion/index.php?/topic/3712-this-is-what-is-wrong-with-government-contracting/&tab=comments#comment-33249>.

⁵⁰ In FY 2012 alone, the GPC rebates totaled \$306 million, which would increase dramatically if GPC use was expanded to purchase readily available products and services up to \$15 million. See, "SmartPay Benefits," GSA, accessed August 7, 2018, <https://smartpay.gsa.gov/content/about-gsa-smartpay#sa26>.

micro-purchase threshold to operators and end users outside of the contracting office.⁵¹ The vast majority of DoD's transactions fall below the recently increased micro-purchase threshold.⁵² Maintaining the capability for cardholders in a military unit to procure needed supplies and services that fall below the micro-purchase threshold is an effective force multiplier and efficient means of quickly acquiring capabilities.

The contracting officer would be able to execute transactions using the GPC, without the need for an underlying purchase order or existing contract vehicle. This situation is an obvious expansion of the traditional use of the GPC as a way of delegating buying authority for purchases under the micro-purchase threshold to cardholders within operational units outside of the contracting office. The U.S. Air Force instruction governing the use of the GPC currently states that the GPC is also the preferred payment method for placing task and delivery orders against prepriced contracts if authorized in the contract or agreement, and for contract payments on fully funded contracts for which it is advantageous to the government and the contractor accepts the GPC.⁵³ Air Force contracting officers are also authorized to make purchases from non-DoD contract vehicles with the GPC up to the Simplified Acquisition Threshold.⁵⁴ Using the GPC to make purchases of readily available products and services would maximize rebates to the agency, provide immediate payment to vendors, and would provide additional risk mitigation in the form of dispute resolution through the financial institution that issues the purchase cards.

In some cases, such as commercial software licensing agreements, there may need to be some standard government terms and conditions developed through the Office of Federal Procurement Policy Act rule-making process that would apply to all readily available transactions, but these terms and conditions must be kept to a minimum.⁵⁵ There also may be cases for which it is advantageous to DoD, and consistent with industry practices, to issue an RFP or purchase order with a DFARS 252.213-1 clause similar to the reduced FAR 52-212-4 clause described in the *Volume 1 Report*.⁵⁶ None of these clauses would be required to flow down to vendors' supply chains, which are likely made up of existing, often long-term, agreements. The contracting officer would have the flexibility to issue the RFP directly to the sources identified during market research, or post it publicly for a period of time that the contracting officer determines to be reasonable. DoD prime contractors subcontracting for readily available products and services in support of a FAR Part 15 defense-unique development contract would not be required to flow-down any clauses. Requirements the prime contractor needs to meet and any vendor within the supply chain needs to meet, must be treated as requirements and included in the requirements documents.⁵⁷

⁵¹ Actions At or Below the Micro-Purchase Threshold, FAR 13.2.

⁵² Per Section 829, FY 2019 NDAA, Pub. L. 115-262, 130 Stat. 2139 (2018), the MTP is now \$10,000.

⁵³ AFI 64-117, *Government Purchase Card Program*, June 22, 2018, 8, accessed November 2, 2018, http://static.e-publishing.af.mil/production/1/saf_ag/publication/afi64-117/afi64-117.pdf.

⁵⁴ *Ibid.*

⁵⁵ Office of Federal Procurement Policy Act of 1974, Pub. L. No. 93-400 (1974).

⁵⁶ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 32-42 (2018).

⁵⁷ This is an extension of Recommendations 62 and 63.

Transparency and Accountability

Transparency in federal procurement is currently achieved by posting opportunities on FedBizOps and post-procurement data in the Federal Procurement Data System-Next Generation (FPDS-NG), USAspending.gov, and through protests. Currently, only through protest litigation does that transparency include information regarding the extent to which officials followed the procurement rules established by statute and regulation. FedBizOps, FPDS-NG, and USAspending.gov data do not provide any insight into why a specific contract award was made. In the existing system, only *interested parties* may file either preaward or postaward protests to elucidate the decision-making process to ensure that the appropriate statutes and regulations were followed. Protests come at a cost to the interested parties who file protests, the agency, and the procurement system.

To achieve transparency and accountability in this recommendation, contracting officers would be required to post to a centralized public website, within 3 business days, each award made. FPDS-NG or FedBizOps could be modified to receive and display this data or a separate website could be created. Postings would include the products or services procured and the price paid. They would also include the results of contracting officers' market research efforts and a short award decision document when the award was based on factors other than price. When the award was based entirely on price, an abstract of the pricing found during market research would be sufficient to document how the award decision was made. If posting each procurement presents an operational security risk, the contracting officer could delay publishing for up to 60 days. The minimal documentation required should already be stored electronically and would only require uploading to a web-accessible database. This process would provide public access to much more DoD procurement information than is currently available. Industry and government oversight groups would be able to examine DoD and individual contracting activity compliance with these procedures and call out instances of bad behavior to appropriate officials.

This recommendation would eliminate the opportunity for preaward protests in cases for which contracting officers select a source based on market research or direct solicitation. Because solicitations or RFPs would not be publicly posted, there would be nothing to protest. This proposal would limit postaward protests to complaints filed with the competition advocate for the contracting activity. There would be only two bases for protests or complaints: the product or service procured was not readily available or the contracting officer failed to conduct market research in accordance with the readily available procedures. Competition advocates would be given authority, through the chief of the contracting office, to direct contracting officers to cancel purchases and return products, if they have been delivered but not consumed, or cancel services when doing so is in the best interest of the government. Contracting officers would be required to redo the procurement through proper market-based competition. Competition advocates should play a role in ensuring adequate market research is being accomplished and contracting officers are seeking the best products and services that provide the best value to DoD. All contracting personnel (including the competition advocate) responsible for procuring readily available products and services would require enhanced market research and private-sector pricing training.

Conclusions: Readily Available

Aligning DoD's procurement policies and practices with the state of today's marketplace is the overarching goal of this recommendation, and to do so requires changes that are revolutionary,

compared to today's processes, in how DoD thinks about competition, pricing, market research, and transparency. Small business policies, which are focused on meeting quotas through indiscriminate set-asides and reservations, are not benefiting DoD or small businesses in a way that ensures DoD has access to a robust, innovative, and globally competitive small business vendor-base. The example of a 47-page solicitation for a simple commercial buy further demonstrates the extent to which the existing system fails to keep pace with a dynamic marketplace, makes DoD an unappealing business partner, and requires Congress to create work-arounds for DoD acquisition to remain relevant. Rather than continuing to determine how to circumvent the acquisition system, it is time to overhaul the acquisition system, especially for procuring those products and services that are readily available in the marketplace. This substantially streamlined approach to procuring these products and services requires statutory changes, regulatory changes, and a culture shift away from buyers perfecting a process to buyers delivering the right capabilities to warfighters inside the turn of near-peer competitors and nonstate actors.

Some of the readily available products DoD requires must meet flight safety, cybersecurity, and other standards peculiar to that product or class of products and the systems of which they ultimately become a part. These standards may be addressed by qualifying vendors, creating approved product lists, and incorporating them into the requirements package. It is the requirement owner that understands what assurances are necessary for a given product. The commercial airline industry maintains fleets of aircraft at a very high reliability rate with airlines procuring and installing parts on a regular basis. DoD requirements, even when it comes to sustaining weapon systems, are no longer unique, and reliable business practices exist in the private sector that DoD could learn from and must seek to emulate if it is going to maintain sufficient access to those markets. This proposal seeks to move DoD and federal procurement in that direction.

Discussion: Readily Available with Customization

Updating DoD procurement practices will be the difference between a U.S. military that benefits from commercial innovation and one that is superseded by it.

- Ben Fitzgerald and Katrina Timlin, War on the Rocks⁵⁸

CNAS's *Future Foundry* paper, the foundation for the Dynamic Marketplace concept, argues that DoD "does not possess a viable, standardized method to acquire commercial technologies, adapt them for military purposes, and incorporate them into CONOPs, doctrine, and training at scale."⁵⁹

This general indictment of the acquisition system focuses on DoD's inability to acquire customized commercial or private-sector technologies and services, and this recommendation proposes a necessary step in filling that gap. As explained in the *Volume 1 Report*, increased use of streamlined commercial buying procedures and commercial-specific terms and conditions has been a priority for Congress and

⁵⁸ "Time for a Private-Sector Pivot on Military Technology," Ben Fitzgerald and Katrina Timlin, War on the Rocks, May 14, 2015, accessed August 8, 2018, <https://warontherocks.com/2015/05/time-for-a-private-sector-pivot-on-military-technology/>.

⁵⁹ Ben Fitzgerald, Alexandra Sander, and Jacqueline Parziale, *Future Foundry: A New Strategic Approach to Military-Technical Advantage*, Center for New American Security, December 2016, 22, accessed October 12, 2018, <https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report-FutureFoundry-final.pdf?mtime=20161213162640>.

DoD since the passage of FASA in 1994. Despite this focus by Congress and DoD, commercial-item spending declined by 29 percent between FY 2012 and FY 2017.⁶⁰ This decline is attributable to the expansion of commercial contract terms and conditions, confusing definitions and policies, and criticism of DoD's navigation of this complex web by DoD IG and GAO.⁶¹ The Section 809 Panel's proposal for procuring readily available products and services eliminates complex commercial product and service definitions in favor of the terms *readily available* and *readily available with customization*. The intent is to simplify even the concept of customization, so that a formal *determination* is not necessary for contracting officers and prime contractors to use the simplified procedures included in this section to purchase readily available products and services and readily available products and services that are customized for DoD.

The Section 809 Panel proposes that a product or service is readily available unless DoD is funding the development and the product or service is something that only defense entities would procure. Challenges to whether a product or service is readily available or readily available with customization would require the challenger to prove the product or service does not fit into these two categories. If a contracting officer or prime contractor followed a rational and reasonable process for determining a product or service is readily available, reviewers, whether they be from DCMA, DCAA, or the IG, may not substitute their judgement for that of the contracting officer or prime contractor.⁶² These fundamental shifts in how DoD does business are essential in changing the acquisition system so warfighters benefit from commercial innovation, rather than become casualties of it.

The Section 809 Panel defined customization in the *Volume 2 Report*. The definition of customization is bifurcated into customization for products and customization for services, based on a similar rationale for the panel's recommendation to bifurcate the commercial item definition.⁶³ For products customization means

*Changes, beyond optional, priced product features, made to a readily available product to meet a DoD need using commercial processes and equipment; or the manufacturing of a product based on a specification using only commercial processes and equipment.*⁶⁴

Services are considered customized when

*A performance work statement, statement of objectives, or other form of direction about how to perform the services is necessary to identify the services to be performed.*⁶⁵

Although the category of services that meets the definition of readily available, discussed above, may be small, nearly all of the services DoD procures should meet the definition of readily available with customization. Everything from janitorial services to engineering services and even armed security

⁶⁰ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 16-17 (2018).

⁶¹ *Ibid*, 17.

⁶² See Recommendations 62 and 63 regarding the existing commercial item determinations made by prime contractors.

⁶³ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 19-20 (2018).

⁶⁴ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 2 of 3*, 181 (2018).

⁶⁵ *Ibid*, 181-182.

services, are regularly contracted for in the private sector with vendors providing customization based on specific customer needs. DoD's need for customization is most often the same or similar to what other customers require. The mere fact of a DoD application of a service does not change the nature of the service. For instance, additively manufactured parts *printed* to meet a military specification, whether procured as a service or as a product, are a prime example of how DoD should be taking advantage of an established private-sector process in an efficient and expedient manner.

There are two circumstances under which DoD requires customization that may be DoD-unique: when services are provided in a combat zone, and in the business arrangement for which DoD acquires services under a cost reimbursable contract. Stakeholders explained that DoD's version of a cost reimbursable contract is inconsistent with private-sector practices. The private-sector application of cost reimbursable contracts does not provide customers with access to a service provider's accounting system to the same extent as DoD. Cost reimbursable contracts in the private sector more closely resemble what DoD would consider time and materials contracts. Despite time and materials contracts being the standard in the industry when fixed price contracts are not appropriate, DoD describes time and materials contracts as the least favorable contract type.⁶⁶ If DoD is going to gain access to a broader market of knowledge-based services, especially those offered by experts not affiliated with CAS compliant defense contractors, it must contract in ways that are more consistent with the private sector. The private sector does not track and report costs to customers consistent with what DoD requires under CAS. Their systems comply with generally accepted accounting practices, but more importantly it is extremely rare for a seller of goods and services in the private sector to give the buyer access to their financial systems, much less give them the right to dictate how those systems function.

Even when services are to be performed in a combat zone, which certainly adds risk and cost, the services being performed are typically logistical or base operating support services that are similar to those procured in the private sector. Procuring customized readily available products and, especially, services, will often result in longer-term contractual relationships rather than the more transactional buys characterized by procuring readily available products and services. These different procedures and contract types are aimed at addressing the differences in how the private sector buys and sells. The following are the key elements of this recommendation, and are intended to enable rapid acquisition and, in-turn, rapid fielding of existing private-sector innovation regularly *customized* in the private sector and tailored to DoD's needs.

- **Readily Available Procedures:** Expand the use of a slightly modified version of existing FAR 12 and FAR 13.5 simplified commercial buying procedures to be used when procuring readily available with customization. Additional flexibility to use market-based competition under certain circumstances would also be included, as discussed below. The procedures would be part of the new DFARS Part 213 discussed above.⁶⁷ Similar to the existing FAR Part 12

⁶⁶ USD(AT&L) Memorandum, *Guidance on Using Incentive and Other Contract Types*, April 1, 2016, 40, accessed November 6, 2018, <https://www.acq.osd.mil/dpap/policy/policyvault/USA001270-16-DPAP.pdf>.

⁶⁷ The Panel has already recommended moving simplified commercial buying procedures into Part 13. This recommendation expands that concept by putting all the simplified readily available procedures in one consolidated and organized location.

limitation, the use of cost reimbursement contracts requiring certified cost or pricing data are prohibited when procuring readily available products and services with customization.

- **Competition:** Market-based competition is still the primary driver of product or service quality and price as well as availability of sources for customized readily available products and services. Publicly posted RFPs or requests for quote (RFQs) would only be required when the value of a procurement is expected to exceed \$15 million or the period of performance for a service or requirements contract would exceed 12 months. An RFP or RFQ would typically be necessary to communicate between the buyer and seller so the seller understands the buyer's requirement and the buyer understands how the seller proposes to meet that requirement. When the expected value of the procurement does not exceed \$15 million or the contract period of performance is less than 12 months, the contracting officer has the discretion to directly solicit sources found as a result of market research. In many cases, even above this threshold, a publicly posted RFP or RFQ would not increase the competition that already exists in the marketplace and would not add value to the procurement. Where those circumstances exist, the Chief of the Contracting Office could authorize a contracting officer to rely solely on market-based competition despite the value of the procurement exceeding the threshold.
- **Applicable Laws:** The statutory relief that currently only applies to simplified commercial acquisition procedures for commercial buying below the threshold (\$7 million) should be expanded to apply to all readily available products and services with customization. In addition, relief from the labor standards of the Davis–Bacon Act, Service Contract Act, and Public Contracts Act as well as domestic preference statutes, BAA and the Berry Amendment, is necessary to leverage the entire marketplace and allow DoD to behave like other buyers. As with buying readily available products and services, a small business price preference for evaluation purposes would be used instead of a small business set-aside program. DoD contracting activities would be required to use small businesses consistent with the small business policy pivot described in the *Volume 1 Report*⁶⁸ and directed by the FY 2019 NDAA.⁶⁹
- **Price Reasonableness:** Contracting officers should be able to determine price reasonableness based on competitive quotes or proposals, but prices paid by other DoD buyers for similar products and services and an understanding of private-sector pricing, among other methods, may be necessary. Pricing would not be based on information not available in the marketplace or not normally communicated between buyers and sellers. Specifically, this would mean pricing would not be based on certified cost or pricing data, or other than certified cost or pricing data, that is outside of private-sector norms. Similar to the readily available proposal, contracting officers would be permitted to rely on value determinations by the requirement owner to assist in determining if a price being offered is reasonable.
- **Transaction Methods:** Customized readily available products and services would be contracted for using contract types that do not require contractors to have DoD-approved accounting systems, which are inconsistent with private-sector accounting methods. Contracts consistent

⁶⁸ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 167-194 (2018).

⁶⁹ Section 851, FY 2019 NDAA, Pub. L. 115-232, 130 Stat. 2139 (2018).

with private-sector practices provide adequate risk management for every consumer including DoD. The terms and conditions should be limited, to the maximum extent practicable, to the Contract Terms and Conditions—Commercial Items clause at FAR 52.212-4 as modified by the Section 809 Panel’s commercial buying recommendations in the *Volume 1 Report*.⁷⁰ Because customized readily available products and services encompass almost all the services, including construction, that DoD buys, additional clauses may be necessary. To add such additional clauses, the contracting officer must obtain approval from the Chief of the Contracting Office, and any such clauses must be limited to what is actually necessary for a specific procurement. Such clauses must closely approximate standard private-sector terms and conditions to the maximum extent practicable.

- **Transparency and Accountability:** Transparency and accountability are no less important when it comes to procuring customized readily available products and services. The reformed bid protest process recommended by the Section 809 Panel could be used to ensure transparency and accountability continue to be achieved when a publicly posted RFP or RFQ is used.⁷¹ In those cases, the process for procuring customized readily available products and services remains conducive to both preaward and postaward protests to identify situations in which DoD did not follow the law or federal acquisition rules. In situations when a publicly posted RFP or RFQ is not used, market research documentation, a redacted source selection decision document (SSDD), and a copy of the contract would be posted to the public-facing website where readily available procurements are posted.

The new DFARS Part 213 included in this recommendation would consolidate all of the policy guidance necessary for procuring readily available products and services, and customization of those products and services. Architect and engineering contracts would be the one exception. These contracts are solicited and competed through a unique process that the Section 809 Panel does not intend to upset, even though these services neatly fit into the definition of readily available with customization.⁷² The intent is to provide contracting officers and other acquisition professionals with an organized and consistent set of procedures for procuring almost all readily available products and services, with or without customization. Some references to other parts of the FAR are inevitable, but should be minimized to avoid the complexity-creep the panel has identified in the trend toward using complex FAR Part 15 procedures where FAR Part 12, 13, or 16.5 procedures are appropriate.⁷³ In fact, this proposal would require use of RAPs when procuring readily available products and services and readily available products and services with customization. A contracting officer would obtain approval to use other procedures available in the FAR/DFARS. A streamlined process for acquiring customized readily available products and services as defined by this recommendation would enable

⁷⁰ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 32-42 (2018).

⁷¹ See Recommendations 66–69.

⁷² Construction and Architect – Engineer Contracts, FAR 36.

⁷³ For example, Contract Clauses, FAR 36.5.

DoD to leverage, for example, 3-D printing and additive manufacturing that does not meet the current definition of commercial products or services.⁷⁴

Competition

Conducting more traditional full and open competitions for readily available products and services with customization may be viewed as more advantageous to the government and competition in general. Yet, conducting traditional full and open competitions not only results in participation by a limited number of competitors, it also creates an environment in which market research and market intelligence are not valued. This approach deprives warfighters access to innovation available in the marketplace. The current full and open competition standard is achieved by simply posting an RFP to FedBizOps and waiting for potential sources that are actively seeking opportunities with the government and understand how to do so, to respond. Instead, DoD needs competition standards that incentivize contracting officers to obtain market intelligence, so they can leverage the continuous competition that exists in the marketplace and provide warfighters with cutting-edge, readily available capabilities tailored for DoD that represent the best value for the dollar. The current full and open competition standard is not effective at achieving this end state.

There are a number of products and services that DoD procures for which there is a limited market and buyers are fully aware of the universe of suppliers that exist. In these cases, publicly posting an RFP or RFQ and waiting 20 or 30 days for quotes or proposals is not going to increase competition or the potential supply sources. Publishing a justification and approval would not increase competition either. An RFP sent directly to each of the known, through market research, suppliers would ensure each is aware of the opportunity to submit a proposal. The same holds true, for example, when only prequalified vendors or original equipment manufacturers (OEMs) may supply a product or provide repair services.

This recommendation establishes a \$15 million threshold under which contracting officers may determine when a public solicitation is advantageous to an acquisition or when market-based competition and direct solicitation is most advantageous. The threshold also includes a time factor. The contract's period of performance must not exceed 12 months, for the contracting officer to have discretion in publicly posting the requirement. A chief of a contracting office may authorize a contracting officer to use direct solicitation and market-based competition for procurements that exceed this threshold, when doing so is justified by the nature of the acquisition.

Empowering contracting officers to determine whether publicly posting a solicitation is in the best interests of the government and in the best interest of competition would eliminate process, where process does not add value. It would also make the contracting officers and the requirement owners responsible for seeking out the best solutions from the most capable sources, thus creating a demand for the acquisition workforce to develop the requisite market research and market intelligence skills. These skills are necessary for DoD's acquisition workforce to ensure DoD is benefitting from the most

⁷⁴ See Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 2 of 3*, 20 (2018). This recommendation would expand the commercial products and services definition to enable DoD to utilize commercial additive manufacturing much more efficiently.

effective form of competition, obtaining greater access to the marketplace, and getting the best value for the taxpayer.

Applicable Laws

Readily available products and services should be included under the umbrella of statutory relief currently provided for COTS items, and readily available with customization needs the same statutory relief or at a minimum the same statutory relief currently afforded to commercial products and services. This statutory relief is necessary to conform the way DoD buys with the way the private sector sells. The domestic preferences found in BAA and the Berry Amendment threaten DoD's access to innovative products at reasonable prices due to the prevalence of private-sector reliance on non-U.S., or mixed U.S.–foreign supply chains by much of the private sector, even with customized products or services.⁷⁵ The labor rate protections of the Service Contract Act, Davis–Bacon Act, and Public Contracts Act (formerly Walsh–Healey Act) pose the same problems as well, and actually have minimal effect on labor rates in today's market as compared to the market when they were enacted.⁷⁶ Today unemployment is at a historical low and there is a shortage nationwide of skilled labor.

It may be even more critical in the world of customized readily available products and services, for small and nontraditional businesses, unable to source U.S.-made components for readily available products, to be able to compete for DoD contracts. DoD has a number of legacy systems with electronic, and other types of parts, that OEMs no longer produce or are willing to repair at a competitive price, yet they could be replaced or repaired by a larger pool of available small and nontraditional sources in the marketplace. To take advantage of this opportunity, DoD would need to assess which parts, for strategic national security or industrial base purposes, require certain elements to be sourced domestically, rather than a blanket application of the domestic sourcing statutes, alleviating the need to pursue waivers when the products are not available domestically. This would shorten the time it takes to get capability to warfighters.

Because almost all services DoD procures, to include construction, would meet the definition of customized readily available products and services, this recommendation would effectively relieve DoD of enforcing compliance with the Davis–Bacon and Service Contract Acts through government contracts/transactions. Yet, as noted above, the safety and wage standards required by OSHA and FLSA would continue to apply without including them as specific terms and conditions in each transaction. Using the readily available with customization buying vehicle should also expand opportunities for small businesses to compete for projects for which Davis–Bacon or Service Contract Act wages are out of synch with actual private-sector rates.⁷⁷ Maintaining accurate wage rate determinations has proven almost impossible for the Department of Labor; the last DoD IG review found that 46 percent of nonunion-provided data used in establishing Davis–Bacon wage

⁷⁵ Buy American Act, 41 U.S.C. §§ 8301-8305. Requirement to Buy Certain Articles from American Sources; Exceptions, 10 U.S.C. § 2533a.

⁷⁶ Service Contract Labor Standards, 41 U.S.C. §§ 6701-6707. Rate of Wages for Laborers and Mechanics, 41 U.S.C. § 3142. Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$10,000, 41 U.S.C. §§ 6501–6511.

⁷⁷ GAO also found that in 2010, about 63 percent of DOL's published wage rates were effectively the union-prevailing rate, but only 14 percent of construction workers nationwide were represented by unions. See, GAO, *Davis–Bacon Act: Methodological Change Needed to Improve Wage Survey*, GAO-11-152, March 22, 2011, 18, accessed November 2, 2018, www.gao.gov/products/GAO-11-152.

determinations were decades old.⁷⁸ It is difficult for small businesses to pay wages competitive in a private-sector market on private-sector projects, while also paying, tracking, and reporting inflated wages on public projects.

Small business reservations and set-asides pose the same problems for DoD and the market regardless of whether DoD is procuring readily available or readily available with customization products and services. There are no data to evaluate the price preference DoD pays due to reservations or set-asides, making it impossible to compare the effect of the 5 percent price preference recommended by the Section 809 Panel. The current set-aside practice limits competition to only those vendors who qualify for the set-aside; therefore, DoD has no reference as to what a large or midsize company might have proposed for a given procurement.

The Section 809 Panel is not recommending readily available products and services be exempt from mandatory sourcing required by FAR Part 8. This recommendation would not affect the government's requirement to use sources of supply like AbilityOne and Federal Prison Industries.

Pricing and Value

Many stakeholders inside and outside of DoD observed that DoD has never developed expertise in how the public sector determines pricing. The absence of expertise in the government results in requests for certified cost or pricing data, and information other than cost or pricing data that closely resembles certified cost or pricing data. The desire for cost or pricing data to help justify a price reasonableness determination appears to be one of the factors contributing to reduced use of commercial buying procedures. This recommendation would prohibit requesting any cost or pricing data from suppliers of readily available products and services, including those being customized for DoD. Successful implementation would require improved pricing, market research, and market intelligence training for acquisition personnel in the contracting and program management communities.

Elements that contracting officers should consider when pricing readily available and customized readily available products and services are included in the recommended DFARS 213. These elements are very similar to those listed in the existing FAR Part 13, and approximate commercial or private-sector means for accomplishing price analysis. Rather than relying on suppliers to validate their price for a product or service with cost, pricing, or sales data, DoD is capable of using available market intelligence, technical analysis provided by the requirement owner, and data collected from similar previous procurement actions to make price reasonableness determinations. Requirement owners must be involved with contracting officers in determining at what price certain capabilities represent value to the mission. Understanding the value and capability provided by a customized, readily available product or service is more determinative of a fair and reasonable price than a cost build-up. Cost build-ups required by cost reimbursement contracts are complex and expensive, and those costs are passed on to DoD and taxpayers. Given DoD's general inability to determine whether direct costs and indirect costs are fair, these exercises devolve to a determination of whether the profit being earned is appropriate. In the world of readily available, the government should not expect to tell a seller that its

⁷⁸ GAO, *Davis–Bacon Act: Methodological Change Needed to Improve Wage Survey*, GAO-11-152, March 22, 2011, 18, accessed November 2, 2018, www.gao.gov/products/GAO-11-152.

profit is too high. DoD's focus on limiting profit margins—an odd focus in a capitalist society—creates a barrier to doing business with DoD according to many of the companies with which the Section 809 Panel spoke.

Across the DoD acquisition enterprise, there are organizations that have implemented advanced market intelligence practices in procuring readily available products and services, with or without customization. The Air Force Installation Contracting Agency (AFICA), for example, has invested in commercially available market intelligence reports and developed the Air Force Business Intelligence Tool to better understand private-sector markets and the government's buying practices.⁷⁹ Using market intelligence and understanding of the Air Force's existing buying practices to inform AFICA's category management project, AFICA claims to have saved more than \$1 billion.⁸⁰ The savings that could be realized across DoD with the expansion of market-intelligence-driven initiatives like AFICA's, combined with the streamlined procedures in this proposal, would not only improve DoD's ability to access customized private-sector technology, but also free up resources for allocation to more complex weapon systems.

Under these simplified procedures, contracting officers would be encouraged to bargain with vendors for a better price, additional features, more favorable delivery terms, or for other terms that provide value to the acquisition. DoD may be more interested in obtaining or bargaining for IP and data rights for products and services customized for a DoD purpose than for readily available products and services that are purchased as offered. In the July 2017 GAO report on military acquisition, nine of 12 nontraditional companies identified IP rights as a barrier to seeking business opportunities with DoD.⁸¹ DoD must better understand the value of IP associated with readily available products and services and the customization DoD might require and develop greater sophistication in how it contracts for and intends to use that IP.

Transaction Methods

Expanding on the transaction methods prescribed for readily available products and services, customized products and services would more often than not require written RFPs or RFQs to articulate requirements and terms and conditions. A contract or possibly a simple purchase order would document the transaction. This practice is not inconsistent with the private sector. Private-sector buying practices deviate from DoD's in the selection of sources. Companies only solicit from the sources they choose to solicit. This proposal expands the use of direct solicitation and reliance on market-based competition to ensure that DoD considers the entire marketplace, not just those who already understand how to do business with DoD. Procurements above \$15 million dollars, or when

⁷⁹ "The AFICA Business Intelligence Competency Cell: 'Bringing Life' to Mission Innovation," Brian Ripple, Wright-Patterson AFB, January 9, 2017, accessed September 14, 2018, <https://www.wpafb.af.mil/News/Article-Display/Article/1044960/the-afica-business-intelligence-competency-cell-bringing-life-to-mission-innova/>.

⁸⁰ "AFICA Hosts 2018 Enterprise Sourcing Summit, Aims to Save \$2B," John Herrington, Wright-Patterson AFB, July 19, 2018, accessed September 14, 2018, <https://www.wpafb.af.mil/News/Article-Display/Article/1579241/afica-hosts-2018-enterprise-sourcing-summit-aims-to-save-2b/>.

⁸¹ GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, July 2017, 18, accessed October 31, 2018, <https://www.gao.gov/assets/690/686012.pdf>.

the period of performance exceeds 12 months, contracting activities would be required to publicly post RFPs and RFQs for a minimum of 10 days.

Many procurements that do not exceed this threshold would also result in publicly posted solicitations, when contracting officers determine that doing so is in the best interest of the government. These RFPs must be simpler and more straightforward than what DoD currently employs. The Section 809 Panel's efforts in the *Volume 1 Report* to minimize the commercial terms and conditions included in commercial solicitations and the resulting contracts are being expanded for use in procuring readily available products and services with customization. No clauses included in contracts for readily available products and services should be flowed down to the private-sector supply chains these vendors rely on, otherwise DoD will remain excluded from accessing certain companies and the capabilities they offer. For instance, one company that participated in the 2017 GAO study stated that a supplier turned down a \$20 million performance-based logistics contract because of the difficulty in managing all the unique federal contract clauses.⁸²

Even though the products and services are customized for DoD, the customization is being accomplished using private-sector equipment and processes, and the products or services being customized are readily available in the market. Customization of these products and services is contracted for daily in the marketplace and buyers and sellers are able to sufficiently manage risk, agree on price, and ensure delivery of the agreed on outcome without some of the unique hurdles presented by DoD's acquisition process. As discussed above, DoD does not need cost reimbursement contracts to determine price reasonableness, and there are other contracting options available for those situations for which a requirement is not well defined.

When buying readily available products and services, like the current commercial buying policies, the preferred contract type is a firm-fixed-price contract or fixed-price with economic price adjustment contract.⁸³ The FAR allows for use of a time and materials contract for procuring certain commercial services.⁸⁴ This recommendation would apply similar limits on the contract types that may be used to procure customized readily available products and services. The available contract types are firm-fixed price; fixed-price with economic price adjustment; firm-fixed price level-of-effort; and time and materials.⁸⁵ DoD procures a substantial portion of its services as noncommercial, outside of FAR Part 12, and uses cost-reimbursement contracts. To behave more like the private sector, eliminate additional costs and complexity, and to ultimately reduce barriers to entry, DoD must shift its preference for cost reimbursement contracts to a preference for time and materials contracts for which fixed-price contracts are not possible.⁸⁶ Time and materials contracts may also be appropriate when a readily available product requires further development that is of a commercial, not defense-unique, nature.

⁸² Ibid, 16.

⁸³ See, Acquisition of Commercial Items – Contract Types, FAR 12.207(a).

⁸⁴ Ibid.

⁸⁵ See, Types of Contract, FAR Part 16.

⁸⁶ Most of the 12 non-traditional companies interviewed by GAO for its July 2017 report, stated that DoD had expressed interest in further developing a commercial product they offered for sale, but they did not enter into contract with DoD to do so. They cited to unique government accounting systems as one of the primary reasons for making that decision. GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, July 2017, 16, accessed October 31, 2018, <https://www.gao.gov/assets/690/686012.pdf>.

There is flexibility within these contract types that would allow contracting officers to incorporate performance incentives that do not involve complex equations and cost reporting, and this recommendation does not prevent awarding indefinite-quantity contracts or blanket purchase agreements in cases for which they would be advantageous.⁸⁷

The GPC should also be considered as a flexible method for procuring customized readily available products and services. The Undersecretary of the Air Force for Acquisition, Technology, and Logistics, Dr. William Roper, has recognized that the GPC presents DoD with the unique ability to contract for products and services while providing immediate payment, which is critical for transacting with start-ups that may offer innovative solutions to DoD problems but have immediate cash flow requirements.⁸⁸ This initiative is an attempt to solve the same problems the Section 809 Panel identified with the existing commercial buying structure and problems this proposal would solve on a broader scale. In many cases, contracting officers should have the discretion to use their GPC, up to their warrant, or other administrative threshold provided by the agency, to procure customized products and services after issuing an RFP or an RFQ and selecting the proposal or quote that represents the best value to the government. Along with the streamlining of terms and conditions and broader outreach as a result of market research, providing notice in the RFP or RFQ that the contracting officer intends to use a GPC to complete the transaction and provide immediate payment, may incentivize vendors to submit an offer.

Transparency and Accountability

Although the simplified procedures do not allow for protests to GAO or the Court of Federal Claims, the simplified procedures for acquiring readily available with customization provides for transparency either through the protest process or as a result of publicly posting the results of a procurement. In situations for which the contracting officer would publicly post an RFP or RFQ, GAO and the Court would have jurisdiction over any preaward protest that might be filed, and any postaward protest as a result of the contract award.⁸⁹ The process described above for readily available procurements would apply in situations for which the contracting officer is authorized to use market-based competition. In addition, if the contracting officer issues an RFP or RFQ, even directly to a limited number of vendors, those in receipt of the solicitation maintain a right as an interested party to file a postaward protest.

The postaward publication of the contract award, the market research documentation, and a redacted SSDD would be required any time a solicitation is not publicly posted. This process would ensure adequate transparency into the government's actions in situations for which time is a critical factor or a publicly posted solicitation adds no value to the procurement, and the contracting officer is authorized to use market-based competition. Procurement actions that are not adequately supported by the publicly posted documentation, would undoubtedly draw scrutiny from industry, public interest

⁸⁷ The complicated fixed-price incentive contracts found in FAR 16.403 are not what is contemplated here. Instead, contracting officers should be able to offer and negotiate performance or delivery incentives where certain performance characteristics or delivery timelines would provide added value, but there is also added risk for the contractor.

⁸⁸ "Air Force Busts Out Credit Cards to Buy High Tech Gear," Paul Mcleary, Breaking Defense, September 19, 2018, accessed September 21, 2018, https://breakingdefense.com/2018/09/air-force-busts-out-credit-cards-to-buy-high-tech-gear/?utm_source=Sailthru&utm_medium=email&utm_campaign=ebb%2009.20.18&utm_term=Editorial%20-%20Early%20Bird%20Brief.

⁸⁹ Recommendations 66–69 are critical to ensuring protests meet their intended purpose, and is how the Panel envisions protests being adjudicated in this framework.

groups, the agencies, and Congress. This proposal would allow for greater transparency than is present in the existing acquisition system, while also providing DoD the discretion necessary to rapidly acquire and field customized private-sector products and services that fill DoD capability gaps.

Conclusions: Readily Available With Customization

The ability to effectively procure readily available products and services and leverage actual market-based competition will thrust DoD procurement into the information age and have it poised to make the next leap into the artificial intelligence age. If DoD's procurement system is going to achieve the outcomes required of it by the national security challenges the nation faces, certain long-held institutional perceptions of public procurement must be completely reimagined. This proposal reduces or eliminates barriers to entry, provides for flexibility and agility, values time, and eliminates processes that do not add value to the system. These are bold changes, which will not be welcomed by those who benefit from the idiosyncrasies of the existing system and those who view this proposed approach as an abandonment of socioeconomic and domestic preference programs. But defense acquisition is the business of providing lethality to a Joint force responsible for conducting full-spectrum combat and noncombat operations.

These changes are necessary to ensure DoD is able to efficiently access the extraordinary advances in technology and innovation present in the private sector that is led by small businesses and nontraditional sources and enables DoD to shift resources to its more complex procurements. These recommendations would achieve the goal of allowing DoD to behave the way buyers in the private sector behave, increasing access to and speeding delivery of readily available capabilities, and improving the lethality of the Joint force. A revolution of this scale is necessary to remain at the cutting edge of technology and innovation. The Section 809 Panel's recommendations would allow DoD to employ innovation in defense instead of being the victim of that innovation employed by others.

Implementation

Legislative Branch

- Amend Title 10 by creating a statutory authority for DoD to procure readily available products and services and readily available products and services with customization via the simplified readily available procedures outlined in this recommendation.
- Amend Title 10 Competition in Contracting Act provisions to include market-based competition as the preferred method for achieving competition when DoD is procuring readily available products and services and readily available products and services with customization.
- Amend Title 10 Competition in Contracting Act provisions to include merit-based selection as a means of satisfying competition requirements.
- Repeal Title 10 provisions related to procurement of commercial products and services.
- Revise Title 10 provisions to remove the terms commercial products, commercial services, and nondevelopmental items and replace them with readily available products and services and readily available products and services with customization.

Executive Branch

- Amend DFARS Part 205 to implement procedures for market-based competition.
- Amend DFARS Part 213 and repeal DFARS Part 212 to implement procedures for acquiring readily available products and services and readily available products and services with customization.
- Publish a DFARS clause for use as the standard terms and conditions for procuring readily available products and services.

Implications for Other Agencies

- This proposal will likely reduce DoD reliance on GSA and other governmentwide contract vehicles to procure readily available products and services.
- The Director of OMB and the U.S. Trade Representative will need to renegotiate the public procurement portion of applicable trade agreements to include the concept of readily available products and services and the use of market-based competition for procuring readily available products and services.

RECOMMENDED REPORT LANGUAGE

SEC. ___01. ACQUISITION OF READILY AVAILABLE PRODUCTS AND SERVICES.

This section would amend title 10, United States Code by inserting a new chapter 247 to facilitate the acquisition of readily available products and services for the Department of Defense (DoD) and would establish a preference for the acquisition of readily available products and services to meet DoD requirements. This section would introduce market-based competition as the preferred method for acquiring readily available products and services, which would enable the Department to function more like other buyers in the private-sector marketplace. To do so, this section would limit the application of certain government-wide and defense specific procurement related statutes to buying readily available products and services, and would require the Secretary of Defense to focus more on the price and value of these products and services than on cost.

The committee recognizes that the current DoD acquisition system, built for a 20th century defense-industrial market, is best suited for developing and procuring conventional products to be used in defined missions against known adversaries. This system has focused on mitigating risk through multiple layers of procedural contract compliance protocols, unlike those found in normal market place transactions. As a result, the barriers to entry for innovative and non-traditional suppliers, in many cases, are insurmountable. The committee is aware that in today's complex security environment, with rapidly changing private-sector developed technology, the Department must be able to deliver a wide variety of warfighting and combat support capabilities as efficiently as possible. Since not all capabilities are acquired in the same way, the Department must adjust its acquisition processes to meet the demands of the diverse markets in which it operates.

This section would address the statutory and regulatory changes necessary to modernize and simplify the Department's acquisition of products and services readily available in the private-sector to ensure the defense acquisition system is agile, efficient, and effective at procuring such products and services offered for sale to the public or other government agencies. It would require the Department to implement new readily available acquisition procedures to be used in place of the existing commercial buying and simplified acquisition procedures. The committee notes that the amendments made by this section are based on recommendations for a new defense dynamic marketplace outlined in Volume 2 (dated June 28, 2018) and Volume 3 (dated January 15, 2019) reports of the acquisition advisory panel established under Section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92).

SEC. ___02. IMPLEMENTATION OF DEPARTMENT OF DEFENSE READILY AVAILABLE ACQUISITION AUTHORITIES.

This section would make a number of conforming amendments to title 10, United States Code to replace the existing commercial buying and simplified acquisition procedures and thresholds with simplified readily available acquisition procedures for procuring readily available products and services and readily available products and services with customization for the Department of Defense. In addition to incorporating market-based competition into the competition requirements for the Department, this section would also establish merit-based selection processes as an acceptable method for achieving competition. This would enable the Department to compete dissimilar readily available products and services as well as products and technologies that require further development. This section would facilitate the implementation of such readily available procedures which would be set out in the new chapter 247 created by section ___01.

For the NDAA provision:

Implementation—These **2 sections** will be implemented in the Defense Federal Acquisition Regulation Supplement and will replace existing simplified acquisition procedures and commercial buying procedures for the Department of Defense.

1 **SEC. __01. ACQUISITION OF READILY AVAILABLE PRODUCTS AND SERVICES.**

2 **(a) CHAPTER IN NEW PART V.—**

3 (1) NEW CHAPTER.—Part V of subtitle A of title 10, United States Code, as added
4 by section 801 of the John S. McCain National Defense Authorization Act for Fiscal
5 Year 2019 (Public Law 115-232), is amended by striking chapter 247 and inserting the
6 following:

7 **“CHAPTER 247—ACQUISITION OF READILY AVAILABLE PRODUCTS**
8 **AND SERVICES**

Sec.

3451. Definitions.

3452. Acquisition of readily available products and services: preference.

3453. Readily available acquisition procedures: thresholds.

3454. Readily available acquisition procedures: use of.

3455. Procurement of major weapon systems as readily available products: prior determination by
Secretary of Defense and notification to Congress.

3456. Acquisition of readily available products and services: inapplicability of procurement related
provisions of law and executive orders.

9 **§3451. Definitions**

10 In this chapter:

11 (1) The term “readily available”, with respect to a product or service, means a
12 product or service that requires no customization by the vendor and can be put on order
13 by customers. Such term includes optional, priced features of products and services in a
14 form that is offered for sale in the normal course of business.

15 (2) The term “customization” means—

- 1 (A) with respect to a product—
- 2 (i) a change, beyond an optional, priced product feature, that is
- 3 made to a readily available product to meet a Department of Defense need
- 4 using commercial processes and equipment; or
- 5 (ii) the manufacturing of a product based on a specification using
- 6 only commercial processes and equipment; and
- 7 (B) with respect to a service, that a performance work statement, statement
- 8 of objectives, or other form of direction about how to perform the service is
- 9 necessary to identify the service to be performed.
- 10 (3) The term “defense-unique development” means a Department of Defense-
- 11 financed development, either to repurpose a readily available product or solution or to
- 12 develop a new product or solution, to provide a defense-unique capability.
- 13 (4) The term “market-based competition” means the consideration of sources that
- 14 offer readily available products and services at prices available to any potential buyer,
- 15 resulting in competition being established through market forces.
- 16 (5) The term “market research” means obtaining information about capabilities,
- 17 products, and services available in the private sector through a variety of means, which
- 18 may include—
- 19 (A) contacting knowledgeable individuals in government and industry;
- 20 (B) interactive communication among industry, acquisition personnel, and
- 21 customers; and
- 22 (C) interchange meetings or pre-solicitation conferences with potential
- 23 offerors.

1 (6) The term “component acquisition executive” means—

2 (A) in the case of a military department, the service acquisition executive
3 of that military department; and

4 (B) in the case of a component of the Department of Defense other than a
5 military department, the authority performing for that component the functions
6 that a service acquisition executive performs for a military department.

7 (7) The term “value assessment” means an assessment by a requiring activity or
8 program office of the value of a product or service to the requiring activity or program
9 office’s mission relative to the price offered that is provided to the contracting officer to
10 aid in determining that a price is fair and reasonable.

11 **§3452. Acquisition of readily available products and services: preference**

12 (a) Relationship to Commercial and Non-Commercial Products and Services.—The
13 Secretary of Defense may not use the term “commercial products and services” or the term
14 “nondevelopmental item”, as those terms are defined in title 41, or the authorities associated with
15 those terms, except as described in in this chapter or chapter 137 of this title as applying to—

16 (1) readily available products and services;

17 (2) readily available products and services with customization; or

18 (3) defense-unique development.

19 (b) Preference.—The Secretary of Defense shall ensure that, to the maximum extent
20 practicable—

21 (1) requirements of the Department of Defense with respect to a procurement of
22 products or services are stated in terms of—

23 (A) functions to be performed;

1 (B) outcome required; or

2 (C) essential physical characteristics;

3 (2) such requirements are defined so that readily available products and services
4 may be procured to meet such requirements; and

5 (3) when offers are publicly solicited, vendors of readily available products and
6 services are provided an opportunity to compete in any procurement to meet such
7 requirements.

8 (c) Determination to develop or procure defense-unique products.—(1) A defense-unique
9 development product may not be procured if there is a readily available product, with or without
10 customization, that meets the basic requirements of the Department of Defense.

11 (2) A determination to develop or purchase a defense-unique product shall be made in
12 writing and signed by the program manager and the contracting officer. If there is no program
13 manager, the contracting officer and the head of the requiring activity shall sign the
14 determination.

15 (d) Readily Available Services.—A service purchased by the Secretary of Defense
16 shall be considered readily available, with or without customization, unless the head of the
17 contracting activity, for a contract valued at \$15,000,000 or less, or the component acquisition
18 executive, or the Under Secretary of Defense for Acquisition and Sustainment (as applicable) for
19 a contract valued in excess of \$15,000,000—

20 (1) makes a written determination that the service does not meet the definition of
21 readily available, with or without customization; and

22 (2) for a contract with an anticipated value of \$15,000,000 or less, makes a
23 written determination that the use of procedures other than the readily available

1 acquisition procedures under section 3454 of this title are more appropriate due to the
2 defense-unique nature of the requirement.

3 (e) Preliminary Market Research.—(1) The Secretary of Defense shall conduct market
4 research appropriate to the nature of the requirement—

5 (A) before developing new specifications for a procurement by the Department of
6 Defense;

7 (B) before soliciting bids or proposals in a case in which a solicitation is required
8 or a determination has been made that solicitations should be used,; and

9 (C) before awarding a task order or delivery order.

10 (2) The Secretary of Defense shall use the results of market research to determine
11 whether there are readily available products and services, with or without customization, that—

12 (A) meet the requirements of the Department of Defense; or

13 (B) could meet those requirements if those requirements were modified to a
14 reasonable extent.

15 (3) In conducting market research, the Secretary may not request potential sources to
16 submit more than the minimum information that is necessary to make the determinations
17 required in paragraph (2).

18 (4) The Secretary of Defense shall ensure that any prime contractor of a contract (or task
19 order or delivery order) in an amount in excess of \$5,000,000 for the procurement of items other
20 than readily available products and services engages in such market research as may be
21 necessary to carry out the requirements of subsection (b)(2) unless the prime contractor already
22 has established commercial supply chains in place.

1 (f) Market Research for Price Analysis.—The Secretary of Defense shall ensure that
2 procurement officials in the Department of Defense conduct or obtain market research to support
3 the determination of the reasonableness of prices for readily available products and services
4 contained in any bid or offer submitted in response to a solicitation. To the extent necessary to
5 support such market research, the procurement official for a solicitation—

6 (1) in the case of a product or service acquired under section 3455 of this title,
7 shall use information submitted under subsection (d) of that section; and

8 (2) in the case of other products or services, may require the offeror to submit
9 relevant information only if market research, available market intelligence resources, and
10 a value assessment by the requiring activity is not sufficient to support the price analysis.

11 (g) Market Research Training and Tools Required.—The Secretary of Defense shall
12 provide mandatory training and tools for members of the armed forces and employees of the
13 Department of Defense responsible for the conduct of market research required under
14 subsections (e) and (f).

15 (h) Pricing Training and Tools Required.—The Secretary of Defense shall provide
16 mandatory training and tools for the procurement officials responsible for price analysis and
17 value-based assessments under subsection (d) for situations in which competitive price
18 comparison (through comparison of publicly available prices, prior sales data, or prices
19 submitted in response to a solicitation) is not available. Such training shall—

20 (1) provide comprehensive information on private sector pricing practices and the
21 role intellectual capital and innovation play in private sector pricing;

22 (2) teach best practices for conducting and documenting price analysis; and

1 (3) provide means for collecting and sharing prices paid for readily available
2 products and services across the Department.

3 (i) Implementation.—The Secretary of Defense shall ensure that procurement officials in
4 the Department of Defense, to the maximum extent practicable—

5 (1) acquire readily available products and services, with or without customization,
6 to meet the needs of the Department;

7 (2) require prime contractors and subcontractors at all levels under Department of
8 Defense contracts to incorporate readily available products and services, with or without
9 customization, as components of products and services supplied to the Department of
10 Defense;

11 (3) modify requirements in appropriate cases to ensure that the requirements can
12 be met by readily available products and services, with or without customization;

13 (4) state specifications in terms that enable and encourage bidders and offerors to
14 supply readily available products and services, with or without customization, in response
15 to Department of Defense solicitations;

16 (5) revise the procurement policies, practices, and procedures of the Department
17 of Defense not required by law to reduce any impediments in those policies, practices,
18 and procedures to the acquisition of readily available products and services, with or
19 without customization; and

20 (6) require training of all personnel involved in the acquisition of readily available
21 products and services.

22 **§3453. Readily available acquisition procedures: thresholds**

1 (a) Threshold for the Use of Readily Available Acquisition Procedures.—A procurement
2 official of the Department of Defense shall use the readily available acquisition procedures under
3 section 3454(a) of this title to acquire readily available products and services, with or without
4 customization, in a case in which the value, or anticipated value, of the acquisition is
5 \$15,000,000 or less, unless the head of the contracting activity determines in writing that the use
6 of procedures other than the procedures under section 3454(a) of this title is necessary to manage
7 an unusually high risk acquisition.

8 (b) Threshold for the Use of Market Based Competition.—A procurement official of the
9 Department of Defense may use market based competition and is not required to publicly post a
10 notice of solicitation, notwithstanding the requirements in section 1708 of title 41 and section
11 8(e) of the Small Business Act (15 U.S.C. 637(e)), when acquiring a readily available product or
12 service, with or without customization, if the value, or anticipated value, of the acquisition is
13 \$15,000,000 or less and, in the case of a service contract, if the period of performance does not
14 exceed 12 months.

15 (c) Authority to Exceed Threshold.—The chief of the contracting office—

16 (1) may make a determination that readily available acquisition procedures under
17 section 3454 of this title are appropriate for a given acquisition of readily available
18 products or services, with or without customization, when the value, or anticipated value,
19 of the acquisition exceeds \$15,000,000; and

20 (2) may make a determination that market-based competition is appropriate for a
21 given acquisition of readily available products and services, with or without
22 customization, when the value, or anticipated value, of the acquisition exceeds
23 \$15,000,000 or the period of performance of a service contract exceeds 12 months.

1 **§3454. Readily available acquisition procedures: use of**

2 (a) When Procedures Are To Be Used.—To promote efficiency and economy in
3 contracting, take advantage of competitive forces in the marketplace, and increase access by the
4 Department of Defense to private sector markets by using procedures that are more consistent
5 with the private sector, the Defense Federal Acquisition Regulation Supplement shall provide for
6 simplified procedures for purchases of readily available products and services subject to the
7 thresholds established in section 3453 of this title. Additional procedures under subsection (h) of
8 this section apply to the acquisition of readily available products and services with
9 customization.

10 (b) Prohibition on Dividing Purchases.—A proposed purchase or contract for an amount
11 in excess of the threshold specified in section 3453(a) of this title may not be divided into several
12 purchases or contracts in order to use the acquisition procedures provided under subsection (a).

13 (c) Promotion of Competition Required.—(1) When using the acquisition procedures
14 provided under subsection (a), the Secretary of Defense, to the maximum extent practicable,
15 shall promote competition through the use of market-based competition pursuant to sections
16 3453(b) and 2304(a)(2)(C) of this title by—

17 (A) requiring contracting activities to periodically post widespread electronic
18 public notices of anticipated requirements for readily available products and services; and

(B) considering vendors not registered with the Government’s award management system
provided the contracting officer determines that the vendor is responsible.

19 (2) In a case in which a contracting officer conducting an acquisition of a readily
20 available product or service expects that competition will be significantly enhanced by
21 solicitation of competitive proposals, the contracting officer may solicit such proposals by—

1 (A) direct solicitation of sources identified through market research; or

2 (B) widespread electronic public notice of the solicitation.

3 (3) When a contracting officer solicits competitive proposals under paragraph (2)(A), the
4 contracting officer may require offerors to respond to the solicitation electronically and may
5 establish a deadline for the submission of proposals in response to the solicitation without regard
6 to any deadline that may otherwise be applicable under another provision of law. Any such
7 deadline for the submission of offers shall afford potential offerors a reasonable opportunity to
8 respond.

9 (d) Consideration of Offers Timely Received.—The readily available acquisition
10 procedures provided in the Defense Federal Acquisition Regulation Supplement under
11 subsection (a) shall include a requirement that, when a solicitation of competitive proposals is
12 used, the contracting officer shall consider each responsive offer timely received from a
13 responsible offeror.

14 (e) Evaluation of Prices for Small Businesses.—

15 (1) A small business concern (within the meaning of section 3 of the Small
16 Business Act (15 U.S.C. 632)) that offers a product or service that meets a requirement of
17 the Department of Defense shall be provided a 5 percent price preference in the
18 evaluation of offers or in comparing publicly available pricing from sources of readily
19 available products and services.

20 (2) In procuring readily available products and services, the Secretary of Defense
21 shall apply the requirements of this section in preference to applying section 15(j) of the
22 Small Business Act (15 U.S.C. 644(j)).

1 (f) Commercially Acceptable Transaction and Payment Methods.—(1) In the case of
2 contracts entered into using the readily available acquisition procedures provided in the Defense
3 Federal Acquisition Regulation Supplement under subsection (a), procurement officials of the
4 Department of Defense shall use the most efficient, expeditious, and commercially acceptable
5 transaction and payment methods practicable.

6 (2) In the case of an acquisition of readily available products and services up to the
7 threshold established in 3453(a) of this title, a procurement official—

8 (1) may use the Government purchase card as a transaction and payment method
9 subject to the limitations of the contracting officer’s warrant and Department of Defense
10 purchase card procedures and limitations; and

11 (2) may not use flexibly priced contracts that require the application of the
12 Government’s cost accounting standards or cost principles.

13 (g) Equitable Distribution.—The Secretary of Defense, in acquiring readily available
14 products and services, with or without customization, as a result of market-based competition
15 shall, to the extent practicable, ensure purchases are distributed equitably among responsible
16 vendors if the products or services they offer provide the same or similar value to the Department
17 of Defense.

18 (h) Additional Requirements for Acquiring Readily Available Products and Services
19 Valued in Excess of \$15 Million.—When a contract is to be awarded for the acquisition of
20 readily available products and services and readily available products and services with
21 customization for an amount in excess of \$15,000,000, the contracting officer shall—

1 (1) publish a notice in accordance with section 1708 of title 41 and, as provided
2 in section 1708(c)(4) of title 41, permit all responsible sources to submit a bid, proposal,
3 or quotation (as appropriate) that the Department of Defense shall consider;

4 (2) use simplified evaluation factors for award; and

5 (3) include in the contract file a written description of the procedures used in
6 awarding the contract and the number of offers received.

7 (i) Transparency and Accountability.—(1) In the case of an acquisition awarded as a
8 result of market-based competition, notice of the award shall be publicly posted within a
9 reasonable period of time after the award is made, taking into consideration operational security.

10 The notice of award shall include—

11 (A) the purchase order or other record of the transaction that includes quantities
12 and prices of the products or services being acquired;

13 (B) documentation of market research results, including prices offered by each
14 vendor considered for the award; and

15 (C) if the award decision is based on factors other than price, a brief description of
16 how the contracting officer made the award decision.

17 (2) The Comptroller General, notwithstanding sections 3551-3557 of title 31, and the
18 United States Court of Federal Claims, notwithstanding section 1491 of title 28, shall not have
19 jurisdiction to review protests or actions filed in relation to pre-award matters or award decisions
20 resulting from market-based competitions.

21 (3) Protests may be filed with the competition advocate at the contracting activity. The
22 basis for a protest shall be limited to assertions that—

1 (A) the product or service procured using readily available procedures was not a
2 readily available product or service, with or without customization, or

3 (B) the contracting officer failed to conduct market research pursuant to the
4 readily available procedures.

5 (4) In adjudicating a protest, the competition advocate shall make recommendations to
6 the chief of the contracting office to cancel a procurement made under these procedures and re-
7 procure the readily available products and services when it is in the best interest of the
8 Department of Defense.

9 (5) The competition advocate shall be responsible for ensuring that the contracting
10 activity—

11 (A) is performing adequate market research;

12 (B) considers an appropriate number of vendors; and

13 (C) meets the requirements of subsection (g).

14 (j) Micro-Purchase Procedures.—Nothing in this chapter shall affect the ability of the
15 Department of Defense to use micro-purchase procedures for acquisitions below the micro-
16 purchase threshold under section 1902 of title 41.

17 **§3455. Procurement of major weapon systems as readily available products and services:**

18 **prior determination by Secretary of Defense and notification to Congress**

19 (a) Requirement for Determination and Notification.—A major weapon system of the
20 Department of Defense may be treated as a readily available product or service, or purchased
21 under procedures established for the procurement of readily available products and services, only
22 if—

23 (1) the Secretary of Defense determines that—

1 (A) the major weapon system is a readily available product or service; and

2 (B) such treatment is necessary to meet national security objectives; and

3 (2) the congressional defense committees are notified at least 30 days before such
4 treatment or purchase occurs.

5 (b) Treatment of Subsystems as Readily Available Products and Services.—A subsystem
6 of a major weapon system shall be treated as a readily available product or service and purchased
7 under the readily available acquisition procedures under section 3454 of this title if the
8 subsystem meets the definition of a readily available product or service, with or without
9 customization, unless the head of the contracting activity determines in writing that it is in the
10 best interest of the Government not to treat the product or service as readily available.

11 (c) Treatment of Components and Spare Parts as Readily Available Products and
12 Services.—(1) A component or spare part for a major weapon system shall be treated as a readily
13 available product or service for the purposes of section 2306a of this title if the subsystem meets
14 the definition of a readily available product or service, with or without customization, unless the
15 head of the contracting activity determines in writing that it is in the best interest of the
16 Department of Defense not to treat the product or service as readily available.

17 (2) This subsection shall apply only to components and spare parts that are acquired by
18 the Department of Defense through a prime contract or a modification to a prime contract (or
19 through a subcontract under a prime contract or modification to a prime contract on which the
20 prime contractor adds no, or negligible, value).

21 (d) Information Submitted.—(1)(A) To the extent necessary to determine the
22 reasonableness of the price for items acquired under this section, the contracting officer shall
23 require the offeror to submit prices actually paid by other buyers, during the previous six months,

1 for the same or similar readily available products or services under comparable terms and
2 conditions by both Government and commercial customers.

3 (B) However, if the contracting officer determines that the offeror does not have access to
4 and cannot provide sufficient information described in subparagraph (A) to determine the
5 reasonableness of price, the contracting officer shall require the offeror to submit information
6 on—

7 (i) prices for the same or similar items sold under different terms and conditions;

8 (ii) prices for similar levels of work or effort on related products or services;

9 (iii) prices for alternative solutions or approaches; and

10 (iv) other relevant information that can serve as the basis for a price assessment.

11 (2) An offeror may submit information or analysis relating to the value of a readily
12 available product or service to aid in the determination of the reasonableness of the price of such
13 item. A contracting officer may consider such information or analysis in addition to the
14 information submitted pursuant to paragraph (1).

15 (e) Value assessment.—In addition to information provided by an offeror under
16 subsection (d), the contracting officer may request and rely on a value assessment provided by
17 the requiring activity or program office to aid in determining the reasonableness of the price of a
18 readily available product or service.

19 (f) Delegation.—The authority of the Secretary of Defense to make a determination
20 under subsection (a) may be delegated only to the Chief Management Officer, without further
21 redelegation.

1 (g) Major Weapon System Defined.—In this section, the term "major weapon system"
2 means a weapon system acquired pursuant to a major defense acquisition program (as that term
3 is defined in section 2430 of this title).

4 **§3456. Acquisition of readily available products and services: inapplicability of**
5 **procurement related provisions of law and executive orders**

6 (a) Inapplicability of Procurement-Related Statutes and Contract Clause Requirements to
7 Contracts for Readily Available Products and Services.— (1) A provision of law that sets forth
8 policies, procedures, requirements, or restrictions for the procurement of property or services by
9 the Federal Government or the Department of Defense shall not apply to a contract by the
10 Department of Defense for the procurement of readily available products and services, with or
11 without customization, unless that provision expressly refers to this section and expressly states
12 that the provision is applicable to such a contract.

13 (2) The provisions of law that are inapplicable to the procurement of readily available
14 products and services, with or without customization, by the Department of Defense pursuant to
15 paragraph (1) include the following:

16 (A) Chapter 83 of title 41.

17 (B) Section 2533a of this title.

18 (C) Chapter 67 of title 41.

19 (D) Sections 3141-3144, 3146, and 3147 of title 40.

20 (E) Chapter 65 of title 41.

21 (3) A contract clause requirement based on a Government-wide or Defense-specific
22 acquisition regulation, policy, or executive order, not expressly required in law, shall not apply to
23 a contract by the Department of Defense for the procurement of readily available products and

1 services, with or without customization, unless the acquisition regulation, policy, or executive
2 order expressly refers to this section and expressly states that the acquisition regulation, policy,
3 or executive order is applicable to such a contract.

4 (4) The Defense Federal Acquisition Regulation Supplement shall include a list of the
5 Government-wide and Defense-specific provisions of law and contract clause requirements
6 described in paragraphs (1) and (3) that are applicable to contracts for the procurement of readily
7 available products and services, with or without with customization. A provision of law or
8 contract clause requirement that is not included on that list shall not be applicable to the
9 procurement of readily available products and services, with or without customization, by the
10 Department of Defense.

11 (b) Contract Clauses Applicable to the Acquisition of Readily Available Products and
12 Services.—(1) The Defense Federal Acquisition Regulation Supplement shall provide that, for
13 any contract for the acquisition of readily available products and services, with or without
14 customization, entered into using readily available acquisition procedures, all contract clause
15 requirements shall be stated in a single contract clause. No additional Federal Acquisition
16 Regulation or Defense Federal Acquisition Regulation Supplement contract clause or provision
17 may be included in such a contract unless the chief of the contracting office determines that an
18 additional clause is required due to the nature of any customization that is required and that the
19 additional clause is consistent with existing private-sector practices.

20 (2) No Federal Acquisition Regulation contract clause or provision or Defense Federal
21 Acquisition Regulation Supplement contract clause or provision may be required in a subcontract
22 for the acquisition of readily available products and services under a Department of Defense
23 contract.

1 (3) In this subsection, the term "subcontract" includes a transfer of readily available
2 products or services, with or without customization, between divisions, subsidiaries, or affiliates
3 of a contractor or subcontractor. The term does not include agreements entered into by a
4 contractor for the supply of commodities that are intended for use in the performance of multiple
5 contracts with the Department of Defense and other parties and are not identifiable to any
6 particular contract.”.

7 (2) **TABLES OF CHAPTERS.**—The tables of chapters at the beginning of subtitle A,
8 and at the beginning of part V of subtitle A, of title 10, United States Code, are amended
9 by striking the items relating to chapter 247 and inserting the following:

“247. Acquisition of Readily Available Products and Services..... 3451”.

10 (b) **CONTINUATION OF APPLICABILITY OF CHAPTER 140 TO NON-DOD AGENCIES.**—

11 (1) **COVERED AGENCIES.**—Paragraphs (2) and (3) of section 2376 of title 10,
12 United States Code, are amended to read as follows:

13 “(2) The term ‘head of an agency’ means the Secretary of Homeland Security and
14 the Administrator of the National Aeronautics and Space Administration.

15 “(3) The term ‘agency’ means the Coast Guard and the National Aeronautics and
16 Space Administration.”.

17 (2) **REPEAL OF DOD-SPECIFIC PROVISIONS.**—Chapter 140 of title 10, United States
18 Code, is amended as follows:

19 (A) Section 2375 is amended by striking subsections (b), (c), (d), and (e).

20 (B) Section 2377 is amended by subsections (d) and (e).

21 (C) Section 2379 is repealed.

22 (D) Section 2380 is repealed.

23 (E) Section 2380B is repealed.

1 **SEC. __02. IMPLEMENTATION OF DEPARTMENT OF DEFENSE READILY**
2 **AVAILABLE ACQUISITION AUTHORITIES.**

3 (a) DEFINITIONS.—Section 2302 of title 10, United States Code, is amended—

4 (1) in paragraph (2)—

5 (A) in subparagraph (C)(ii), by striking “lowest overall cost alternative”
6 and inserting “best value”;

7 (B) by striking “and” at the end of subparagraph (D);

8 (C) by striking the period at the end of subparagraph (E) and inserting a
9 semicolon; and

10 (D) by adding at the end the following new subparagraphs:

11 “(F) the procurement of readily available products and services, with or
12 without customization, by the Department of Defense through market-based
13 competition under the procedures for acquiring readily available products and
14 services pursuant to sections 3454 and 2304 of this title; and

15 “(G) merit-based processes for considering innovative technologies, new
16 capabilities, and existing products and proven technologies proposed as a result of
17 a general solicitation.”; and

18 (2) by adding at the end the following new paragraph:

19 “(10) The following terms have the meanings provided such terms in section 3451
20 of this title:

21 “(A) The term ‘readily available’.

22 “(B) The term ‘customization’.

23 “(C) The term ‘defense-unique development’.

1 “(D) The term ‘market-based competition’.”

2 (b) SIMPLIFIED ACQUISITION PROCEDURES.—Sections 2302a(a) and 2302b of such title
3 are amended by inserting “paragraphs (5) and (6) of” after “named in”.

4 (c) COMPETITION REQUIREMENTS.—Section 2304 of such title is amended—

5 (1) in subsection (a)(2)—

6 (A) by striking “and” at the end of subparagraph (A);

7 (B) by striking the period at the end of subparagraph (B) and inserting a
8 semicolon; and

9 (C) by adding at the end the following new subparagraphs:

10 “(C) shall, to the maximum extent practicable, rely on market-based competition
11 to determine sources when—

12 “(i) the Department of Defense is procuring readily available products and
13 services, with or without customization, with a value, or a period of performance,
14 that does not exceed the threshold specified in section 3453(b) of this title, unless
15 the contracting officer determines that requesting competitive proposals is in the
16 best interest of the Government; or

17 “(ii) the Department of Defense is procuring readily available products
18 and services, with or without customization, with a value, or a period of
19 performance, in excess of the threshold specified in section 3453(b) of this title, if
20 authorized by the chief of the contracting office; and

21 “(D) shall use merit-based selection processes or peer reviews when appropriate
22 to identify and acquire innovative, developmental, and existing or proven products and

1 services through a general solicitation, such as a problem statement, statement of
2 objectives, or broad agency announcement.”;

3 (2) in subsection (d)(3)(B), by inserting before the period at the end the following:
4 “or, in the case of an agency named in paragraphs (1)-(4) of section 2302(a) of this title,
5 when entered into using procedures other than readily available acquisition procedures
6 under section 3454 of this title”;

7 (3) in subsection (g)—

8 (A) in paragraph (2), by inserting “or the readily available threshold
9 specified in section 3453 of this title” after “simplified acquisition threshold”; and

10 (B) by adding at the end the following new paragraphs:

11 “(5) To promote efficiency and economy in contracting, take advantage of competitive
12 forces in the marketplace, and enable the Department of Defense to use business practices that
13 are more consistent with the private sector, the Defense Federal Acquisition Regulation
14 Supplement shall provide for special simplified procedures for purchases of readily available
15 products and services, with or without customization, pursuant to the thresholds specified in
16 section 3453 of this title.

17 “(6) When using readily available acquisition procedures, the Secretary of Defense shall
18 promote competition by relying, to the maximum extent practicable, on market-based
19 competition pursuant to section 3453(b) of this title.”; and

20 (4) in subsection (i)(3), by striking “an item of supply” and all that follows and
21 inserting “a readily available product or service, with or without customization, acquired
22 using readily available acquisition procedures.”.

1 (d) CONTRACT EVALUATION AND AWARD PROCEDURES.—Section 2305(a) of such title is
2 amended—

3 (1) in paragraph (1)—

4 (A) by striking “In preparing” and all that follows through “head of an
5 agency” and inserting “Except as provided in subparagraph (D), the head of an
6 agency, in preparing for the procurement of property or services,”; and

7 (B) by adding at the end the following new subparagraph:

8 “(D) Subparagraph (A) does not apply in the case of a procurement by the
9 Department of Defense using either market-based competition or merit-based selection.”;
10 and

11 (2) in paragraph (2), by inserting “, a procurement by an agency named in
12 paragraphs (1)-(4) of section 2302(a) of this title using readily available acquisition
13 procedures,” after “simplified procedures” in the matter preceding subparagraph (A).

14 (e) COST OR PRICING DATA.—Section 2306a of such title is amended as follows:

15 (1) Subsection (b) is amended—

16 (A) in paragraph (1)—

17 (i) by striking “or” at the end of subparagraph (C);

18 (ii) by striking the period at the end of subparagraph (D) and
19 inserting “; or”; and

20 (iii) by adding at the end the following new subparagraph:

21 “(E) when an agency named in paragraphs (1)-(4) of section 2302(a) of
22 this title is acquiring readily available products and services, with or without
23 customization.”;

1 (B) by striking paragraph (2) and inserting the following:

2 “(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS
3 AND DEPARTMENT OF DEFENSE CONTRACTS OR SUBCONTRACTS FOR READILY AVAILABLE
4 PRODUCTS OR SERVICES, WITH OR WITHOUT CUSTOMIZATION.—In the case of a
5 modification of a contract or subcontract for a commercial item that is not covered by the
6 exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B),
7 and in the case of a Department of Defense contract for a readily available product or
8 service, with or without customization, that is not covered by the exception to the
9 submission of certified cost or pricing data in paragraph (1)(A) or (1)(E), submission of
10 certified cost or pricing data shall not be required under subsection (a) if—

11 “(A) the contract or subcontract being modified is a contract or
12 subcontract for which submission of certified cost or pricing data may not be
13 required by reason of paragraph (1)(A), (1)(B), or (1)(E); and

14 “(B) the modification would not change the contract or subcontract, as the
15 case may be—

16 “(i) from a contract or subcontract for the acquisition of a
17 commercial item to a contract or subcontract for the acquisition of a
18 product or service other than a commercial item;

19 “(ii) from a contract or subcontract for the acquisition of a readily
20 available product or service to a contract or subcontract for the acquisition
21 of a product or service other than a readily available product or service; or

22 “(iii) from a contract or subcontract for the acquisition of a readily
23 available product or service with customization to a contract or

1 subcontract for the acquisition of a product or service other than a readily
2 available product and services with customization.”;

3 (C) in paragraph (3)—

4 (i) by striking “NONCOMMERCIAL MODIFICATIONS” in the
5 paragraph heading and all that follows through “expected to cost” in
6 subparagraph (A) and inserting “NONCOMMERCIAL MODIFICATIONS OF
7 COMMERCIAL ITEMS AND READILY AVAILABLE PRODUCTS AND SERVICES
8 FURTHER DEVELOPED FOR A DEFENSEUNIQUE PURPOSE.—(A) The
9 exceptions in paragraph (1)(B) and (1)(E) do not apply to cost or pricing
10 data on noncommercial modifications of a commercial item, or
11 modifications that require further development of a readily available
12 product or service such that it is repurposed in a defense-unique way for
13 the Department of Defense inconsistent with private sector practices, that
14 are expected to cost”; and

15 (ii) in subparagraph (C)—

16 (I) in clause (i), by inserting “or a readily available product
17 or service further developed for a defense-unique purpose by the
18 Department of Defense” before the semicolon at the end; and

19 (II) in clause (ii), by striking “acquisition of” and all that
20 follows and inserting “acquisition of a commercial item or readily
21 available product or service other than the cost and pricing of
22 noncommercial modifications of such item or defense-unique

1 development of such product or service for the Department of
2 Defense.”;

3 (D) in paragraph (4)—

4 (i) by inserting “AND DEFENSE-UNIQUE” in the paragraph
5 heading after “COMMERCIAL ITEM”;

6 (ii) by striking “a military department, a Defense Agency,
7 or another component of the Department of Defense” in
8 subparagraph (A) and inserting “an agency”; and

9 (iii) by adding at the end the following new subparagraph:

10 “(D) For purposes of applying the readily available exception under paragraph
11 (1)(E) to the required submission of certified cost or pricing data for the Department of
12 Defense, a product or service that is offered for sale, with or without customization, and
13 that does not require any defense-unique development shall be presumed to be readily
14 available unless the contracting officer makes a written determination that the product or
15 service is not readily available or readily available with customization.”; and

16 (E) in paragraph (5), by striking “recent purchase prices” and all that
17 follows through “in establishing” and inserting “recent actual net prices paid by
18 the Government or any other buyer for the same or similar commercial items or
19 readily available products or services in establishing”.

20 (2) Subsection (c) is amended—

21 (A) in paragraph (2), by striking “subparagraph (A) or (B)” and inserting
22 “subparagraph (A), (B), or (E)”; and

1 (B) in paragraph (3), by striking “this paragraph” and inserting “this
2 subsection”.

3 (3) Subsection (d) is amended—

4 (A) in paragraph (2), by inserting “FOR COMMERCIAL ITEMS” in the
5 paragraph heading after “AUTHORITY”; and

6 (B) by adding at the end the following new paragraph:

7 “(3) LIMITATIONS ON AUTHORITY FOR READILY AVAILABLE PRODUCTS AND
8 SERVICES, WITH OR WITHOUT CUSTOMIZATION.—The Defense Federal Acquisition
9 Regulation Supplement shall include the following provisions regarding the types of
10 information that contracting officers may require under paragraph (1):

11 “(A) A reasonable limitation on requests for sales data relating to readily
12 available products and services, with or without customization.

13 “(B) A requirement that a contracting officer limit, to the maximum extent
14 practicable, the scope of any request for information relating to readily available
15 products and services, with or without customization, from an offeror to only that
16 information that is in the form regularly maintained by the offeror in private
17 sector business operations.

18 “(C) A statement that any information received relating to readily
19 available products and services, with or without customization, that is exempt
20 from disclosure under section 552(b) of title 5 shall not be disclosed by the
21 Federal Government.”.

22 (4) Subsection (h)(2) is amended by inserting “, readily available products or
23 services, with or without customization,” after “commercial items”.

1 (f) CONTRACT FINANCING.—Section 2307(f) of such title is amended—

2 (1) in the subsection heading, by inserting “, READILY AVAILABLE PRODUCTS AND
3 SERVICES, WITH OR WITHOUT CUSTOMIZATION” after “COMMERCIAL ITEMS”;

4 (2) in paragraph (1), by inserting “, readily available products and services, with
5 or without customization,” after “commercial items”;

6 (3) in paragraph (2), by inserting “, readily available products and services, with
7 or without customization,” after “items”; and

8 (4) in paragraph (3), by inserting “or private sector” after “commercial”.

9 (g) TECHNICAL DATA RIGHTS.—Section 2320(b) of such title is amended—

10 (1) in paragraph (1), by striking “commercial item, the item” and inserting
11 “commercial item or readily available product or service, with or without customization,
12 the item, product, or service”; and

13 (2) in paragraph (9)—

14 (A) in subparagraph (A), by inserting “, nonreadily available product or
15 service, with or without customization,” after “noncommercial item”; and

16 (B) in subparagraph (B)(i), by inserting “, product, service,” after “item”.

17 (h) PROPRIETARY DATA RESTRICTIONS.—Section 2321(f) of such title is amended by
18 inserting “or readily available products or services, with or without customization,” after
19 “commercial items”.

20 (i) ACQUISITION OF COMPUTER SOFTWARE.—

21 (1) Section 2322a of such title is amended—

22 (A) in subsection (a)—

1 (i) by striking “noncommercial computer software” the first place
2 it appears and inserting “computer software and software that meets the
3 definition of defense-unique development under section 2302 of this title”;

4 and

5 (ii) by striking “noncommercial computer” after “life-cycle of the”;

6 and

7 (B) in subsection (b), by striking “noncommercial computer software” and
8 inserting “defense-unique developmental computer software”.

9 (2) The heading of such section is amended to read as follows:

10 **“§2322a. Requirement for consideration of certain matters during acquisition of defense-
11 unique developmental computer software”.**

12 (j) ALLOWABLE COSTS.—Section 2324(l)(1)(A) of such title is amended by striking
13 “commercial items” and inserting “readily available products and services, with or without
14 customization,”.

15 (k) PROHIBITION ON COLLECTION OF POLITICAL INFORMATION.—Section 2335(b) of such
16 title is amended—

17 (1) by striking “the procurement” and all that follows through “manufactured
18 items,” and inserting “all agency procurement actions”; and

19 (2) by striking “and basic ordering agreements” and inserting “basic ordering
20 agreements, and other transactions”.

21 (l) FISCAL YEAR 2019 NDAA.—The John S. McCain National Defense Authorization
22 Act for Fiscal Year 2019 (Public Law 115-232) is amended as follows:

1 (1) Section 226(b)(3)(C) (10 U.S.C. 2302 note) is amended by inserting “, readily
2 available products or services, with or without customization,” after “commercial-off-the-
3 shelf”.

4 (2) Section 866(d) (10 U.S.C. 2321 note) is amended by striking “noncommercial
5 software” and inserting “software that meets the definition of defense-unique
6 development under section 3451 of title 10, United States Code”.

7 (m) FISCAL YEAR 2018 NDAA.—Section 1698 of the National Defense Authorization
8 Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 2302 note) is amended—

9 (1) in subsections (a) and (b), by striking “section 2377” and inserting “section
10 3453”;

11 (2) by redesignating subsection (c) as subsection (d);

12 (3) by inserting after subsection (b) the following new subsection (c):

13 “(c) READILY AVAILABLE PRODUCTS AND SERVICES, WITH OR WITHOUT
14 CUSTOMIZATION.—Not later than 30 days after the implementation of the acquisition procedures
15 for acquiring readily available products and services, with or without customization, under
16 section 3453 of title 10, United States Code, the service acquisition executive responsible for
17 each covered Distributed Common Ground System shall certify to the appropriate congressional
18 committees that the procurement process for increments of the system procured after the date of
19 the enactment of this subsection will be carried out in accordance with section 3452 of title 10,
20 United States Code.”; and

21 (4) by amending the section heading to read as follows:

1 **“SEC. 1698. USE OF READILY AVAILABLE PRODUCTS AND SERVICES, WITH OR**
2 **WITHOUT CUSTOMIZATION, IN DISTRIBUTED COMMON GROUND**
3 **SYSTEMS.”.**

4 (n) FISCAL YEAR 2017 NDAA.—

5 (1) REVISION TO PILOT PROGRAM.—Section 879 of the National Defense
6 Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 2302 note) is
7 amended—

8 (A) in the section heading, by striking **“COMMERCIAL ITEMS, AND**
9 **TECHNOLOGIES,”** and inserting **“TECHNOLOGIES”**;

10 (B) in subsection (a)—

11 (i) by striking “defense commercial solutions opening pilot
12 program” and inserting “defense innovative solutions pilot program”;

13 (ii) by striking “innovative commercial items, technologies, and
14 services” and inserting “innovative products, technologies, and services”;
15 and

16 (iii) by inserting “pursuant to section 2304(a)(2)(D) of title 10,
17 United States Code” before the period at the end;

18 (C) by striking subsection (b);

19 (D) by redesignating subsection (c) as subsection (b) and in that
20 subsection—

21 (i) in paragraph (2), by striking “including fixed-price incentive fee
22 contracts”; and

23 (ii) by striking paragraph (3) and inserting the following:

1 "(3) TREATMENT AS READILY AVAILABLE PRODUCTS AND SERVICES, WITH
2 OR WITHOUT CUSTOMIZATION.—Notwithstanding section 3451(1) of title 10,
3 United States Code, products, technologies, and services acquired under the pilot
4 program shall be treated as readily available products and services, with or
5 without customization.”;

6 (E) by striking subsection (d);

7 (F) by redesignating subsection (e) as subsection (c) and in paragraph (2)
8 of that subsection—

9 (i) in subparagraph (A), by striking “commercial item, technology,
10 or service” and inserting “readily available products or services, with or
11 without customization,”; and

12 (ii) in subparagraph (B), by striking “commercial item, technology,
13 or service” and inserting “product or service”;

14 (G) by redesignating subsection (f) as subsection (d) and in that
15 subsection—

16 (A) in paragraph (1), by striking “that is new” and inserting “that
17 uniquely meets a requirement, fills a capability gap, or presents a potential
18 technological advancement or is new”; and

19 (B) in paragraph (2), by striking “that is new” and inserting “that
20 uniquely meets a requirement, fills a capability gap, or presents a potential
21 technological advancement or is new”; and

22 (H) by redesignating subsection (g) as subsection (e).

1 (2) GUIDANCE.—Not later than six months after the date of the enactment of this
2 Act, the Secretary of Defense shall issue guidance for the implementation of the pilot
3 program under section 879 of the National Defense Authorization Act for Fiscal Year
4 2017 (Public Law 114-328; 10 U.S.C. 2302 note), as amended by paragraph (1), within
5 the Department of Defense. Such guidance shall be posted for access by the public.

6 (o) FISCAL YEAR 2015 NDAA.—Section 843(3) of the Carl Levin and Howard P. “Buck”
7 McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291; 10
8 U.S.C. 2302 note) is amended by striking “includes” and all that follows and inserting “includes
9 a contract for commercial items or readily available products and services, with or without
10 customization, but is not limited to a contract for commercial items or readily available products
11 and services, with or without customization.”.

12 (p) FISCAL YEAR 2009 NDAA.—Section 254 of the Duncan Hunter National Defense
13 Authorization Act for Fiscal Year 2009 (Public Law 110-417; 10 U.S.C. 2302 note) is
14 amended—

15 (1) in subsection (b), by striking “commercial sources” and inserting “private
16 sector sources”; and

17 (2) in subsection (c)(2)(D), by striking “commercially acquired systems” and
18 inserting “readily available products and services, with or without customization or
19 private sector acquired systems”.

20 (q) FISCAL YEAR 2008 NDAA.—Section 805 of the National Defense Authorization Act
21 for Fiscal Year 2008 (Public Law 110-181; 10 U.S.C. 2330 note) is repealed.

22 (r) FISCAL YEAR 2007 NDAA.—Section 852(b)(2)(A)(ii) of the John Warner National
23 Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364; 10 U.S.C. 2324 note) is

1 amended by striking “commercial item, as defined in section 103 of title 41,” and inserting
2 “readily available products and services, with or without customization, as defined in section
3 3451 of title 10,”.

4 (s) FISCAL YEAR 1996 NDAA.—Section 822(g)(2) of the National Defense Authorization
5 Act for Fiscal Year 1996 (Public Law 104-106; 10 U.S.C. 2302 note) is amended by striking
6 “procurement of items other than commercial items” and inserting “procurement of products or
7 services other than readily available products and services, with or without customization,”.

8 (t) FISCAL YEAR 1992/1993 NDAA.—Section 806(b) of the National Defense
9 Authorization Act for Fiscal Years 1992 and 1993 (Public Law 102-190; 10 U.S.C. 2302 note) is
10 amended by inserting “or readily available products and services, with or without customization,
11 (as defined in section 3451 of title 10, United States Code)” before the period at the end.

SECTIONS AFFECTED BY THE PROPOSAL

[The material below shows changes proposed to be made by the legislative text above to the text of existing statutes. Matter proposed to be deleted is shown in ~~stricken through text~~; matter proposed to be inserted is shown in *bold italic*.]

TITLE 10, UNITED STATES CODE

§2302. Definitions

(2) ***

(C) the procedures established by the Administrator of General Services for the multiple award schedule program of the General Services Administration if—

(i) participation in the program has been open to all responsible sources; and

(ii) orders and contracts under such program result in the ~~lowest overall cost alternative~~ *best value* to meet the needs of the United States;

(D) procurements conducted in furtherance of section 15 of the Small Business Act (15 U.S.C. 644) as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete; ~~and~~

(E) a competitive selection of research proposals resulting from a general solicitation and peer review or scientific review (as appropriate) solicited pursuant to section 9 of the Small Business Act (15 U.S.C. 638);

(F) the procurement of readily available products and services, with or without customization, by the Department of Defense through market-based competition under the procedures for acquiring readily available products and services pursuant to section 3454 and 2304 of this title; and

(G) merit-based processes for considering innovative technologies, new capabilities, and existing products and proven technologies proposed as a result of a general solicitation.

(3) ***

(10) The following terms have the meanings provided such terms in section 3451 of this title:

(A) The term “readily available”.

(B) The term “customization”.

(C) The term “defense-unique development”.

(D) The term “market-based competition”.

§2302a. Simplified acquisition threshold

(a) SIMPLIFIED ACQUISITION THRESHOLD.—For purposes of acquisitions by agencies named in *paragraphs (5) and (6) of* section 2303 of this title, the simplified acquisition threshold is as specified in section 134 of title 41.

§2302b. Implementation of simplified acquisition procedures

The simplified acquisition procedures contained in the Federal Acquisition Regulation pursuant to section 1901 of title 41 shall apply as provided in such section to the agencies named in *paragraphs (5) and (6) of* section 2303(a) of this title.

§2304. Contracts: competition requirements

(a)(1) Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services-

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation; and

(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedure appropriate under the circumstances, the head of an agency-

(A) shall solicit sealed bids if-

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; ~~and~~

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A)-;

(C) shall rely on market-based competition to the maximum extent practicable to determine sources when-

(i) the Department of Defense is procuring readily available products and services, with or without customization, with a value, or a period of performance, that does not exceed the threshold established under section 3453(b), unless the contracting officer determines that requesting competitive proposals is in the best interest of the government;

(ii) the Department of Defense is procuring readily available products and services or readily available products and services, with or without customization, with a value, or period of performance, in excess of the threshold established under section 3453(b) when authorized by the chief of the contracting office; and

(D) shall utilize merit-based selection processes or peer reviews when appropriate to identify and acquire innovative, developmental, and existing or proven products and services through a general solicitation, such as a problem statement, statement of objectives, or broad agency announcement.

(b)***

(d)***

(3)(A) The contract period of a contract described in subparagraph (B) that is entered into by an agency pursuant to the authority provided under subsection (c)(2)-

(i) may not exceed the time necessary-

(I) to meet the unusual and compelling requirements of the work to be performed under the contract; and

(II) for the agency to enter into another contract for the required goods or services through the use of competitive procedures; and

(ii) may not exceed one year unless the head of the agency entering into such contract determines that exceptional circumstances apply.

(B) This paragraph applies to any contract in an amount greater than the simplified acquisition threshold ***or, in the case of an agency named in paragraphs (1)-(4) of section 2302(a) of this title, when entered into under procedures other than readily available acquisition procedures.***

(e)***

(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for-

(A) special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold; and

(B) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000 with respect to which the contracting officer reasonably expects, based on the nature of the property or service sought and on market research, that offers will include only commercial items.

(2) A proposed purchase or contract for an amount above the simplified acquisition ***or the readily available threshold found in section 3453 of this title*** may not be divided into several purchases or contracts for lesser amounts in order to use the simplified procedures required by paragraph (1).

(3) In using simplified procedures, the head of an agency shall promote competition to the maximum extent practicable.

(4) The head of an agency shall comply with the Federal Acquisition Regulation provisions referred to in section 1901(e) of title 41.

(5) To promote efficiency and economy in contracting, take advantage of competitive forces in the marketplace, and enable the Department of Defense to use business practices that are more consistent with the private sector, the Defense Federal Acquisition Regulation Supplement shall provide for special simplified procedures for purchases of readily available products and services and readily available products and services with customization pursuant to the thresholds established in section 3453 of this title.

(6) When using readily available acquisition procedures, the Secretary of Defense shall promote competition, by relying, to the maximum extent practicable, on market-based competition pursuant to section 3453(b) of this title.

(h) For the purposes of the following, purchases or contracts awarded after using procedures other than sealed-bid procedures shall be treated as if they were made with sealed-bid procedures:

(1) Chapter 65 of title 41.

(2) Sections 3141–3144, 3146, and 3147 of title 40.

(i)(1) The Secretary of Defense shall prescribe by regulation the manner in which the Department of Defense negotiates prices for supplies to be obtained through the use of procedures other than competitive procedures, as defined in section 2302(2) of this title.

(2) The regulations required by paragraph (1) shall-

(A) specify the incurred overhead a contractor may appropriately allocate to supplies referred to in that paragraph; and

(B) require the contractor to identify those supplies which it did not manufacture or to which it did not contribute significant value.

(3) Such regulations shall not apply to ~~an item of supply included in a contract or subcontract for which the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public~~ ***a readily available product or service, with or without customization, acquired using readily available acquisition procedures.***

(j) ***

§2305. Contracts: planning, solicitation, evaluation, and award procedures

~~(a)(1)(A) In preparing for the procurement of property or services, the head of an agency shall~~ ***Except as provided in subparagraph (D), the head of an agency, in preparing for the procurement of property or services-***

(i) specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(ii) use advance procurement planning and market research; and

(iii) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(B) ***

(D) Subparagraph (A) does not apply in the case of a procurement by the Department of Defense using either market-based competition or merit-based selection.

(2) In addition to the specifications described in paragraph (1), a solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures, *procurement by the an agency named in paragraphs (1)-(4) of section 2302a of this title using readily available acquisition procedures*, or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include-

(A)***

§2306a. Cost or pricing data: truth in negotiations

(a) ***

(b) EXCEPTIONS.—

(1) IN GENERAL.—Submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract—

(A) for which the price agreed upon is based on—

(i) adequate competition that results in at least two or more responsive and viable competing bids; or

(ii) prices set by law or regulation;

(B) for the acquisition of a commercial item;

(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination; or

(D) to the extent such data—

(i) relates to an offset agreement in connection with a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm; and

(ii) does not relate to a contract or subcontract under the offset agreement for work performed in such foreign country or by such foreign firm that is directly related to the weapon system or defense-related item being purchased under the contract; or

(E) when an agency named in paragraphs (1)-(4) of section 2302(a) of this title is acquiring readily available products and services, with or without customization.

~~(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.— In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B), submission of certified cost or pricing data shall not be required under subsection (a) if-~~

~~(A) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and~~

~~(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.~~

(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS AND DEPARTMENT OF DEFENSE CONTRACTS OR SUBCONTRACTS FOR

READILY AVAILABLE PRODUCTS OR SERVICES, WITH OR WITHOUT CUSTOMIZATION.—*In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B), and in the case of a Department of Defense contract for a readily available product or service, with or without customization, that is not covered by the exception to the submission of certified cost or pricing data in paragraph in (1)(A) or (1)(E), submission of certified cost or pricing data shall not be required under subsection (a) if—*

(A) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1)(A), (1)(B), or (1)(E); and

(B) the modification would not change the contract or subcontract, as the case may be—

(i) from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of a product or service other than a commercial item;

(ii) from a contractor or subcontractor for the acquisition of a readily available product or service to a contract or subcontract for the acquisition of a product or service other than a readily available product or service; or

(iii) from a contractor or subcontract for the acquisition of a readily available product or service with customization to a contract or subcontract for the acquisition of a product or service other than a readily available product

(3) NONCOMMERCIAL MODIFICATIONS OF COMMERCIAL ITEMS.—~~(A) The exception in paragraph (1)(B) does not apply to cost or pricing data on noncommercial modifications of a commercial item that are expected to cost~~ **NONCOMMERCIAL MODIFICATIONS OF COMMERCIAL ITEMS AND READILY AVAILABLE PRODUCTS AND SERVICES FURTHER DEVELOPED FOR A DEFENSE-UNIQUE PURPOSE.**—*(A) The exceptions in paragraph (1)(B) and (1)(E) do not apply to cost or pricing data on noncommercial modifications of a commercial item, or modifications that require further development of a readily available product or service such that it is repurposed in a defense-unique way for the Department of Defense inconsistent with private sector practices, that are expected to cost, in the aggregate, more than the amount specified in subsection (a)(1)(A)(i), as adjusted from time to time under subsection (a)(7), or 5 percent of the total price of the contract (at the time of contract award), whichever is greater.*

(B) In this paragraph, the term "noncommercial modification", with respect to a commercial item, means a modification of such item that is not a modification described in section 103(3)(A) of title 41.

(C) Nothing in subparagraph (A) shall be construed—

*(i) to limit the applicability of the exception in subparagraph (A) or (C) of paragraph (1) to cost or pricing data on a noncommercial modification of a commercial item **or a readily available product or service further developed for a defense-unique purpose by the Department of Defense**; or*

*(ii) to require the submission of cost or pricing data on any aspect of an ~~acquisition of a commercial item other than the cost and pricing of noncommercial modifications of such item~~ **acquisition of a commercial item or readily available product or service other than the cost and pricing of noncommercial modifications of such item or defense-unique development of such***

product or service for the Department of Defense.

(4) **COMMERCIAL ITEM *AND DEFENSE-UNIQUE* DETERMINATION.**—(A) For purposes of applying the commercial item exception under paragraph (1)(B) to the required submission of certified cost or pricing data, the contracting officer may presume that a prior commercial item determination made by a ~~military department, a Defense Agency, or another component of the Department of Defense~~ *an agency* shall serve as a determination for subsequent procurements of such item.

(B) If the contracting officer does not make the presumption described in subparagraph (A) and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than the procedures authorized for the procurement of a commercial item, the contracting officer shall request a review of the commercial item determination by the head of the contracting activity.

(C) Not later than 30 days after receiving a request for review of a commercial item determination under subparagraph (B), the head of a contracting activity shall—

- (i) confirm that the prior determination was appropriate and still applicable; or
- (ii) issue a revised determination with a written explanation of the basis for the revision.

(D) *For purposes of applying the readily available exception under paragraph (1)(E) to the required submission of certified cost or pricing data for the Department of Defense, a product or service that is offered for sale, with or without customization, and that does not require any defense-unique development shall be presumed to be readily available unless the contracting officer makes a written determination that the product or service is not readily available or readily available with customization.*

(5) A contracting officer shall consider evidence provided by an offeror of ~~recent purchase prices paid by the Government for the same or similar commercial items in establishing~~ *recent actual net prices paid by the Government or any other buyer for the same or similar commercial items or readily available products or services in establishing* price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison after considering the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased or applicable terms and conditions.

(6) **DETERMINATION BY PRIME CONTRACTOR.**—A prime contractor required to submit certified cost or pricing data under subsection (a) with respect to a prime contract shall be responsible for determining whether a subcontract under such contract qualifies for an exception under paragraph (1)(A) from such requirement.

(c) **COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.**—

(1) **AUTHORITY TO REQUIRE SUBMISSION.**—Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

(2) EXCEPTION.—The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in ~~subparagraph (A), or (B),~~ **subparagraph (A), (B), or (E)** of subsection (b)(1).

(3) DELEGATION OF AUTHORITY PROHIBITED.—The head of a procuring activity may not delegate functions under ~~this paragraph~~ **this subsection**.

(d)***

(2) LIMITATIONS ON AUTHORITY **FOR COMMERCIAL ITEMS**.—The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):

(A) Reasonable limitations on requests for sales data relating to commercial items.

(B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

(C) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

(3) LIMITATIONS ON AUTHORITY FOR READILY AVAILABLE PRODUCTS AND SERVICES, WITH OR CUSTOMIZATION.—*The Defense Federal Acquisition Regulation Supplement shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):*

(A) A reasonable limitations on requests for sales data relating to readily available products and services and readily available products and services with customization.

(B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to readily available products, with or without customization, from an offeror to only that information that is in the form regularly maintained by the offeror in private sector operations.

(C) A statement that any information received relating to readily available products and services and readily available products and services with customization that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

(e)***

(h) DEFINITIONS.—In this section:

(1) Cost or pricing data.—The term "cost or pricing data" means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or, if applicable consistent with subsection (e)(1)(B), another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

(2) Subcontract.—The term "subcontract" includes a transfer of commercial items, **readily available products or services, with or without customization**, between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

(3)***

§2307. Contract financing

(a)***

(f) CONDITIONS FOR PAYMENTS FOR COMMERCIAL ITEMS, **READILY AVAILABLE PRODUCTS AND SERVICES, WITH OR WITHOUT CUSTOMIZATION**.—(1) Payments under subsection (a) for commercial items, **readily available products and services, with or without customization**, may be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States. The head of the agency shall obtain adequate security for such payments. If the security is in the form of a lien in favor of the United States, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) Advance payments made under subsection (a) for commercial items, **readily available products and services, with or without customization**, may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract.

(3) The conditions of subsections (d) and (e) need not be applied if they would be inconsistent, as determined by the head of the agency, with commercial **or private sector** terms and conditions pursuant to paragraphs (1) and (2).

§2320. Rights in technical data

(a)***

(b) Regulations prescribed under subsection (a) shall require that, whenever practicable, a contract for supplies or services entered into by an agency named in section 2303 of this title contain appropriate provisions relating to technical data, including provisions—

(1) defining the respective rights of the United States and the contractor or subcontractor (at any tier) regarding any technical data to be delivered under the contract and providing that, in the case of contract for a ~~commercial item, the item~~ **commercial item or readily available product or service, with or without customization, the item, product, or service** shall be presumed to be developed at private expense unless shown otherwise in accordance with section 2321(f);

(2) ***

(9) providing that, in addition to technical data that is already subject to a contract delivery requirement, the United States may require, until the date occurring six years after acceptance of the last item (other than technical data) under a contract or the date of contract termination, whichever is later, the delivery of technical data that has been generated in the performance of the contract, and compensate the contractor only for reasonable costs incurred for having converted and delivered the data in the required form, upon a determination that—

(A) the technical data is needed for the purpose of procurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a

weapon system or subsystem thereof, or any noncommercial item, ***nonreadily available product or service, with or without customization***, or process; and

(B) the technical data—

(i) pertains to an item, ***product, service***, or process developed in whole or in part with Federal funds; or

(ii) is described in subparagraphs (D)(i)(II), (F), and (G) of subsection (a)(2); and

(10) providing that the United States is not foreclosed from requiring the delivery of the technical data by a failure to challenge, in accordance with the requirements of section 2321(d) of this title, the contractor's assertion of a use or release restriction on the technical data.

§2321. Validation of proprietary data restrictions

(a)***

(f) PRESUMPTION OF DEVELOPMENT EXCLUSIVELY AT PRIVATE EXPENSE.—In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor under a contract for commercial items ***or readily available products or services, with or without customization***, the contracting officer shall presume that the contractor or subcontractor has justified the restriction on the basis that the item was developed exclusively at private expense, whether or not the contractor or subcontractor submits a justification in response to the notice provided pursuant to subsection (d)(3). In such a case, the challenge to the use or release restriction may be sustained only if information provided by the Department of Defense demonstrates that the item was not developed exclusively at private expense.

§2322a. Requirement for consideration of certain matters during acquisition of ~~noncommercial~~ ***defense-unique developmental computer software***

(a) CONSIDERATION REQUIRED.—As part of any negotiation for the acquisition of ~~noncommercial computer software~~ ***computer software that meets the definition of defense-unique development under section 2302 of this title***, the Secretary of Defense shall ensure that such negotiations consider, to the maximum extent practicable, acquisition, at the appropriate time in the life cycle of the ~~noncommercial computer~~ software, of all software and related materials necessary—

(1) to reproduce, build, or recompile the software from original source code and required libraries;

(2) to conduct required computer software testing; and

(3) to deploy working computer software system binary files on relevant system hardware.

(b) DELIVERY OF SOFTWARE AND RELATED MATERIALS.—Any ~~noncommercial computer software~~ ***defense-unique developmental computer software*** or related materials required to be delivered as a result of considerations in subsection (a) shall, to the extent appropriate as determined by the Secretary—

§2324. Allowable costs under defense contracts

(a)***

(1) DEFINITIONS.—In this section:

(1)(A) The term "covered contract" means a contract for an amount in excess of \$500,000 that is entered into by the head of an agency, except that such term does not include a fixed-price contract without cost incentives or any firm fixed-price contract for the purchase of ~~commercial items~~ **readily available products and services, with or without customization.**

§2335. Prohibition on collection of political information

(a)***

(b) SCOPE.—The prohibition under this section applies to ~~the procurement of commercial items, the procurement of commercial off-the-shelf items, and the non-commercial procurement of supplies, property, services, and manufactured items~~ **all agency procurement actions**, irrespective of contract vehicle, including contracts, purchase orders, task or deliver orders under indefinite delivery/indefinite quantity contracts, blanket purchase agreements, ~~and basic ordering agreements,~~ **basic ordering agreements, and other transactions.**

(c) ***

National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-223)

“SEC. 226. ACTIVITIES ON IDENTIFICATION AND DEVELOPMENT OF ENHANCED PERSONAL PROTECTIVE EQUIPMENT AGAINST BLAST INJURY. (10 U.S.C. 2302 note)

"(b) ***

"(3) PARTNERSHIPS FOR CERTAIN ASSESSMENTS.—As part of the activities, the Secretary should continue to establish partnerships with appropriate academic institutions for purposes of assessing the following:

"(A) The ability of various forms of personal protective equipment to protect against common blast injuries, including traumatic brain injuries.

"(B) The value of real-time data analytics to track the effectiveness of various forms of personal protective equipment to protect against common blast injuries, including traumatic brain injuries.

"(C) The availability of commercial-off the-shelf, *readily available products or services, with or without customization*, personal protective technology to protect against traumatic brain injury resulting from blasts.

"(D) ***

**“SEC. 866(d). GUIDANCE ON TECHNICAL DATA RIGHT NEGOTIATION
(10 U.S.C. 2321 note)**

"The Secretary of Defense shall develop policies on the negotiation of technical data rights for ~~noncommercial software~~ *software that meets the definition of defense-unique development under section 3451 of Title 10, United States Code* that reflects the Department of Defense's needs for technical data rights in the event of a protest or replacement of incumbent contractor to meet defense requirements in the most cost effective manner."

**National Defense Authorization Act for Fiscal Year 2018
(Pub. L. 115-91)**

“SEC. 1698. USE OF ~~COMMERCIAL ITEMS~~ *READILY AVAILABLE PRODUCTS AND SERVICES, WITH OR WITHOUT, CUSTOMIZATION* IN DISTRIBUTED COMMON GROUND SYSTEMS. (10 U.S.C. 2302 note)

"(a) IN GENERAL.—The procurement process for each covered Distributed Common Ground System shall be carried out in accordance with ~~section 2377~~ *section 3543* of title 10, United States Code.

"(b) CERTIFICATION.—Not later than 30 days after the date of the enactment of this Act [Dec. 12, 2017], the service acquisition executive responsible for each covered Distributed Common Ground System shall certify to the appropriate congressional committees that the procurement process for increments of the system procured after the date of the enactment of this Act will be carried out in accordance with ~~section 2377~~ *Section 3543* of title 10, United States Code.

(c) READILY AVAILABLE PRODUCTS AND SERVICES, WITH OR WITHOUT CUSTOMIZATION.—Not later than 30 days after the implementation of the acquisition procedures for acquiring readily available products and services, with or without customization, under section 3453 of title 10, United States Code, the service acquisition executive responsible for each covered Distributed Common Ground System shall certify to the appropriate congressional committees that the procurement process for increments of the

system procured after the date of the enactment of this Act will be carried out in accordance with section 3452 of title 10, United States Code.

"(e*d*) DEFINITIONS.—In this section:

"(1) The term 'appropriate congressional committees' means—

"(A) the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives]; and

"(B) the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives.

"(2) The term 'covered Distributed Common Ground System' includes the following:

"(A) The Distributed Common Ground System of the Army.

"(B) The Distributed Common Ground System of the Navy.

"(C) The Distributed Common Ground System of the Marine Corps.

"(D) The Distributed Common Ground System of the Air Force.

"(E) The Distributed Common Ground System of the Special Operations Forces."

National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328)

“SEC. 879. DEFENSE PILOT PROGRAM FOR AUTHORITY TO ACQUIRE INNOVATIVE ~~COMMERCIAL ITEMS, TECHNOLOGIES,~~ *TECHNOLOGIES* AND SERVICES USING GENERAL SOLICITATION COMPETITIVE PROCEDURES. (10 U.S.C. 2302 note)

"(a) AUTHORITY.—The Secretary of Defense and the Secretaries of the military departments may carry out a pilot program, to be known as the '~~defense commercial solutions opening pilot program~~ *defense innovative solutions opening pilot program*', under which the Secretary may acquire ~~innovative commercial items, technologies, and services~~ *innovative products, technologies, and services* through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals *pursuant to section 2304(a)(2)(D) of title 10, United States Code.*

"(b) ~~TREATMENT AS COMPETITIVE PROCEDURES.—Use of general solicitation competitive procedures for the pilot program under subsection (a) shall be considered to be use of competitive procedures for purposes of chapter 137 of title 10, United States Code.~~

"(e*b*) LIMITATIONS.—

"(1) IN GENERAL.—The Secretary may not enter into a contract or agreement under the pilot program for an amount in excess of \$100,000,000 without a written determination from the Under Secretary for Acquisition, Logistics, and Technology or the relevant service

acquisition executive of the efficacy of the effort to meet mission needs of the Department of Defense or the relevant military department.

"(2) FIXED-PRICE REQUIREMENT.—Contracts or agreements entered into under the program shall be fixed-price, ~~including fixed-price incentive fee contracts.~~

~~"(3) TREATMENT AS COMMERCIAL ITEMS.— Notwithstanding section 2376(1) of title 10, United States Code, items, technologies, and services acquired under the pilot program shall be treated as commercial items. (3) Treatment as readily available products and services, with or without customization.—Notwithstanding section 3451(1) of Title 10, United States Code, products, technologies, and services acquired under the pilot program shall be treated as readily available products and services, with or without customization.~~

~~"(d) GUIDANCE.— Not later than six months after the date of the enactment of this Act [Dec. 23, 2016], the Secretary shall issue guidance for the implementation of the pilot program under this section within the Department of Defense. Such guidance shall be issued in consultation with the Director of the Office of Management and Budget and shall be posted for access by the public.~~

"(e) CONGRESSIONAL NOTIFICATION REQUIRED.—

"(1) IN GENERAL.—Not later than 45 days after the award of a contract for an amount exceeding \$100,000,000 using the authority in subsection (a), the Secretary of Defense shall notify the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] of such award.

"(2) ELEMENTS.—Notice of an award under paragraph (1) shall include the following:

"(A) Description of the innovative ~~commercial item, technology, or service~~ **readily available products or services, with or without customization**, acquired.

"(B) Description of the requirement, capability gap, or potential technological advancement with respect to which the innovative ~~commercial item, technology, or service~~ **product or service** acquired provides a solution or a potential new capability.

"(C) Amount of the contract awarded.

"(D) Identification of contractor awarded the contract.

"(f) DEFINITION.—In this section, the term 'innovative' means—

"(1) any technology, process, or method, including research and development, ~~that is new~~ **that uniquely meets a requirement, fills a capability gap, presents a potential technological advancement or is new** as of the date of submission of a proposal; or

"(2) any application ~~that is new~~ **that uniquely meets a requirement, fills a capability gap, presents a potential technological advancement or is new** as of the date of submission of a proposal of a technology, process, or method existing as of such date.

"(g) SUNSET.—The authority to enter into contracts under the pilot program shall expire on September 30, 2022.

"(f) GUIDANCE.—Not later than six months after the date of the enactment of this Act, the Secretary of Defense shall issue guidance for the implementation of the pilot program under section 879 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-

328; 10 U.S.C. 2302 note), as amended by paragraph (1), within the Department of Defense. Such guidance shall be posted for access by the public.”

National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291)

"SEC. 843. DEFINITIONS. (10 U.S.C. 2302 note)

"(1)***

"(3) CONTRACT.—The term 'contract' ~~includes a contract for commercial items but is not limited to a contract for commercial items~~ *includes a contract for commercial items, readily available products and services, with or without customization, but is not limited to a contract for commercial items or readily available products and services, with or without customization.*

"(4) ***

National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)

"SEC. 254. TRUSTED DEFENSE SYSTEMS. (10 U.S.C. 2302 note)

"(a) ***

"(b) ASSESSMENT OF METHODS FOR VERIFYING THE TRUST OF SEMICONDUCTORS PROCURED FROM COMMERCIAL SOURCES.—The Under Secretary of Defense for Acquisition, Technology, and Logistics, in consultation with appropriate elements of the Department of Defense, the intelligence community, private industry, and academia, shall conduct an assessment of various methods of verifying the trust of semiconductors procured by the Department of Defense from ~~commercial sources~~ *private sector sources* for use in mission-critical components of potentially vulnerable defense systems. The assessment shall include the following:

"(1) ***

"(c) ***

"(2) REQUIREMENTS.—At a minimum, the strategy shall—

"(A) address the vulnerabilities identified by the assessment under subsection (a);

"(B) reflect the priorities identified by such assessment;

"(C) provide guidance for the planning, programming, budgeting, and execution process in order to ensure that covered acquisition programs have the necessary resources to implement all appropriate elements of the strategy;

"(D) promote the use of verification tools, as appropriate, for ensuring trust of ~~commercially acquired systems~~ ***readily available products and services, with or without customization or private sector systems***;

"(E) increase use of trusted foundry services, as appropriate; and

"(F) ensure sufficient oversight in implementation of the plan.

National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364)

"SEC. 852. REPORT AND REGULATIONS ON EXCESSIVE PASS-THROUGH CHARGES. (10 U.S.C. 2324 note)

"(a) ***

"(b) REGULATIONS REQUIRED.—

"(1) IN GENERAL.—Not later than May 1, 2007, the Secretary of Defense shall prescribe regulations to ensure that pass-through charges on contracts or subcontracts (or task or delivery orders) that are entered into for or on behalf of the Department of Defense are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor.

"(2) SCOPE OF REGULATIONS.—The regulations prescribed under this subsection—

"(A) shall not apply to any firm, fixed-price contract or subcontract (or task or delivery order) that is—

"(i) awarded on the basis of adequate price competition; or

"(ii) for the acquisition of a ~~commercial item, as defined in section 103 of title 41~~ ***readily available produce or service, with or without customization, as defined in section 3451 of title 10***, United States Code; and

"(B) may include such additional exceptions as the Secretary determines to be necessary in the interest of the national defense.

"(3) ***

National Defense Authorization Act for Fiscal Year 1996 (Pub. L. 104-106)

"SEC. 822. DEFENSE FACILITY-WIDE PILOT PROGRAM. (10 U.S.C. 2302 note)

“(a)***

"(g) SPECIAL AUTHORITY.—The authority provided under subsection (a) includes authority for the Secretary of Defense—

"(1) to apply any amendment or repeal of a provision of law made in this Act [see Tables for classification] to the pilot program before the effective date of such amendment or repeal; and

"(2) to apply to a ~~procurement of items other than commercial items~~ *procurement of products or services other than readily available products and services, with or without customization*, under such program—

"(A) the authority provided in section 34 of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 430) [now 41 U.S.C. 1906] to waive a provision of law in the case of commercial items, and

"(B) any exception applicable under this Act or the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355) [see Tables for classification] (or an amendment made by a provision of either Act) in the case of commercial items, before the effective date of such provision (or amendment) to the extent that the Secretary determines necessary to test the application of such waiver or exception to procurements of items other than commercial items.

National Defense Authorization Act for Fiscal Year 1992/1993 (Pub. L. 102-190)

"SEC. 806. PAYMENT PROTECTIONS FOR SUBCONTRACTORS AND SUPPLIERS. (10 U.S.C. 2302 note)

“(a)***

"(b) INAPPLICABILITY TO CERTAIN CONTRACTS.—Regulations prescribed under this section shall not apply to a contract for the acquisition of commercial items (as defined in section

103 of title 41, United States Code) or *readily available products and services, with or without customization (as defined by section 3451 of title 10, United States Code)*.

“(c) ***

RECOMMENDED REGULATORY REVISIONS

SUBPART 205.2--SYNOPSIS OF PROPOSED CONTRACT ACTIONS

205.202 -- Exceptions

(a)(13) When using market-based competition to acquire readily available products and services pursuant to 10 U.S.C. 3453, the notice required in FAR [5.201](#) is not required.

205.203 Publicizing and response time.

(b) Allow at least 45 days response time when requested by a qualifying or designated country source (as these terms are used in Part [225](#)) and the request is consistent with the Government's requirement.

(1) When using readily available acquisition procedures found in part [213](#) there is no minimum response time required. When a solicitation is used, the contracting officer will provide a response time that is reasonable based on the nature of the acquisition.

(2) The contracting officer will use a combined synopsis/solicitation in all cases where the Department of Defense is using readily available acquisition procedures and a solicitation is being issued.

(S-70) When using competitive procedures, if a solicitation allowed fewer than 30 days for receipt of offers and resulted in only one offer, the contracting officer shall resolicit, allowing an additional period of at least 30 days for receipt of offers, except as provided in [215.371-4](#) and [215.371-5](#).

[The following would create a new DFARS Subpart 213.0 and replace Subpart 213.1.]

PART 213—Readily Available Acquisition and Micro-Purchase Procedures

213.000 -- Scope of Part.

This part prescribes policies and procedures for the acquisition of readily available products and services and readily available products and services with customization. These policies and procedures replace policies and procedures found in part [12](#) and subparts [13.0](#) and [13.1](#), for the Department of Defense pursuant to 10 U.S.C. 3454. The remainder of this part supplements part 13 to implement the statutorily authorized readily available acquisition procedures. See [36.602-5](#) for simplified procedures to be used when acquiring architect-engineer services. These procedures may be used to procure readily available products and services, the aggregate amount of which does not exceed \$15 million. This part establishes acquisition policies and procedures that much more closely resemble those of the private sector or commercial marketplace and encourages the acquisition of readily available products and services as directed by 10 U.S.C. 3454. A contract awarded using these procedures is not required to be set-aside for small

business, or any subset of small business concerns, but small business concerns will receive a five percent price preference in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644).

213.001 -- Definitions.

As used in this part --

“Authorized individual” means a person who has been granted authority, in accordance with agency procedures, to acquire supplies and services in accordance with this part.

“Customization” means:

(1) With respect to products:

- (a) changes, beyond optional, priced product features, made to a readily available product to meet a DoD need using commercial processes and equipment; or
- (b) the manufacturing of a product based on a specification using only commercial processes and equipment.

(2) With respect to services means:

- (c) Services are considered customized when a performance work statement, statement of objectives, or other form direction about how to perform the services is necessary to identify the services to be performed.

“Defense-Unique Development” means DoD financed development, either to repurpose a readily available product or service or to develop a new product or service, to provide a defense unique capability.

“Governmentwide commercial purchase card” means a purchase card, similar in nature to a commercial credit card, issued to authorized agency personnel to use to acquire and to pay for products and services.

“Imprest fund” means a cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts.

“Market-based competition” means the consideration of sources that offer readily available products, services, and solutions at prices available to any potential buyer, resulting in competition being established through market forces.

“Readily available” means any product or service that requires no customization by the vendor and can be put on order by customers. Optional, priced features of products and services in a form that is offered for sale in the normal course of business, fall within the definition of readily available.

“Third party draft” means an agency bank draft, similar to a check, that is used to acquire and to pay for supplies and services. (See Treasury Financial Management Manual, Section 3040.70.)

“Value Assessment” means an assessment by a requiring activity or program office of the value of a product or service to the requiring activity or program office’s mission relative to the price offered provided to the contracting officer to aid in determining a price fair and reasonable.

213.002 -- Purpose.

The purpose of this part is to prescribe simplified readily available acquisition procedures in order to --

- (a) Ensure timely delivery of lethality, technical dominance and the maintenance of that dominance to the warfighter;
- (b) Provide integrity in the contracting process;
- (c) Obtain value for money when acquiring readily available products and services and readily available products and services with customization;
- (d) Reduce the administrative costs and burdens for agencies and contractors;
- (e) Take advantage of market-based competition and market pricing; and
- (f) Reduce barriers for small and non-traditional companies.

213.003 -- Policy.

(a) Agencies shall use market-based competition for acquiring readily available products and services, with or without customization, not exceeding \$15 million and will use these readily available acquisition procedures for the acquisition of all readily available products and services, with or without customization, below that threshold. This policy does not apply if an agency can meet its requirement using required sources of supply under [part 8](#) except for those found in [part 8.4](#). Contracting officers should consider Federal Supply Schedules as part of their market research.

(b) Agencies shall—

- (1) Conduct market research to determine whether readily available products and services are available that meet the agency’s requirements;
- (2) Acquire readily available products and services when they meet the needs of the agency;
- (3) Acquire the development of a defense-unique product or service, when a readily available product or service, with or without customization, meets the needs of an agency only when a written determination to do so is made by the contracting officer and the program manager or head of the requiring activity;
- (4) Consider all services procured by the agency to be readily available, either with or without customization, unless the appropriate authority, pursuant to 10 U.S.C. 3452(d).
- (5) Require prime contractors and subcontractors at all tiers to incorporate readily available products and services as components of products and services supplied to the agency, to the maximum extent practicable; and

(6) Use these readily available acquisition procedures to acquire all readily available products and services with an anticipated value of \$15 million or less, and a period of performance of less than 12 months in the case of service contracts, unless the head of the contracting activity determines that more complex procedures found in [part 15](#) are necessary to manage an unusually high risk acquisition.

(c) Acquisitions using these procedures shall not be set-aside for small business. Purchases from small businesses using these procedures may be counted towards DoD's small business goals. If a small business concern is identified during market research or responds to a solicitation the following procedure applies:

(1) Small business offerors will be given a five (5) percent price preference for evaluation purposes. (d) (1) The chief of the contracting office may authorize use of these procedures to acquire readily available products and services if the anticipated award will exceed \$15 million.

(2) Do not break down requirements aggregating more than the \$15 million threshold or the micro-purchase threshold into several purchases that are less than the applicable threshold merely to –

(i) Permit use of readily available procedures; or

(ii) Avoid any requirement that applies to purchases exceeding the micro-purchase threshold.

(e) Agencies shall use the Governmentwide commercial purchase card and electronic purchasing techniques to the maximum extent practicable in conducting readily available acquisitions (but see [32.1108\(b\)\(2\)](#)). (f) Agencies shall maximize the use of electronic commerce when practicable (see [Subpart 4.5](#)). Drawings and lengthy specifications can be provided off-line in hard copy or through other appropriate means.

(g) Authorized individuals shall make purchases using the readily available acquisition procedures that are most suitable, efficient, and economical based on the circumstances of each acquisition.

(h) In addition to other considerations, contracting officers shall --

(1) Use market-based competition to the maximum extent practicable (see [213.103-1](#));

(2) Conduct market research commensurate with the complexity and dollar value of the acquisition. Presolicitation communication is encouraged, including, for example, the use of industry days, presolicitation conferences, market surveillance, requests for sources (RFS) and requests for information (RFIs).

(3) Establish deadlines for the submission of responses, when using solicitations that afford suppliers a reasonable opportunity to respond (see [205.203](#));

(4) When a solicitation is issued, consider all quotations or offers that are timely received. For evaluation of quotations or offers received (see [213.103-5](#)); and

(5) Use innovative and private sector accepted approaches, to the maximum extent practicable, in awarding contracts using readily available acquisition procedures.

213.004 -- Legal Effect of Quotations.

(a) A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. Issuance by the Government of an order, either a purchase order or Governmentwide purchase card order, in response to a supplier's quotation does not establish a contract. A contract is established when the supplier accepts the offer by signing the purchase order, performing, or charging the Governmentwide purchase card.

(b) If the Government issues an order resulting from a quotation, the Government may (by notice to the supplier, at any time before acceptance occurs) withdraw, amend, or cancel its offer. (See [13.302-4](#) for procedures on termination or cancellation of purchase orders.)

213.005 – List of Laws, Executive Orders, and Regulations Applicable to Contracts and Subcontracts for Readily Available Products and Services.

(a) The following list includes all Federal procurement related laws applicable to all contracts and subcontracts (if otherwise applicable to subcontracts) for the procurement of readily available products and services, with or without customization, pursuant to 10 U.S.C. 3456(a):

(1) [Include those laws amended by Congress to refer to 10 U.S.C. 3456 be applicable to contracts for readily available products and services and readily available products and services with customization.]

(b) The following list includes all Federal procurement related executive orders, regulations and policies applicable to all contracts and subcontracts (if otherwise applicable to subcontracts) for the procurement of readily available products and services, with or without customization, pursuant to 10 U.S.C. 3456(a):

(1) [Include those executive orders, regulations, and policies that refer to 10 U.S.C. 3456 as being applicable to contracts for the procurement of readily available products and services and readily available products and services with customization.]

(c) The Defense Acquisition Regulatory (DAR) Council will include in the lists set forth in paragraph (a) and (b) only those laws, executive orders, regulations, and policies that set forth policies, procedures, requirements, or restrictions for the acquisition of property or services, and specifically state that the law, executive order, regulation or policy will be applicable to contracts or subcontracts for readily available products and services.

(d) Any individual may petition the Deputy Director for Defense Acquisition Regulation Systems (DARS), Defense Procurement and Acquisition Policy (DPAP), to include any applicable provision of law not included on the list set forth in paragraph (a) of this section.

(e) Nothing in this subpart renders a law of general applicability such as the Fair Labor Standards Act (29 U.S.C. 203) or criminal statutes found in title 18 inapplicable.

213.006 -- Required Provisions and Clauses.

The following clause is the only clause applicable to contracts and subcontracts awarded using readily available acquisition procedures, regardless of the method of procurement (e.g. governmentwide purchase card, purchase order, e-commerce portal):

(a) [252.213-1](#), Contract Terms and Conditions – Readily Available Products and Services.

Subpart 213.1 – Readily Available Acquisition Procedures

213.101 -- General.

(a) In making purchases, contracting officers shall --

(1) Comply with the policy in [7.202](#) relating to economic purchase quantities, when practicable;

(2) Include only the Readily Available Products and Services Clause ([252.213-1](#)) in purchase orders for readily available products and services and provide for the inspection of supplies or services as prescribed in such clause.

(3) Procure the product or service that presents the best value to the agency; considering mission requirements, price, quality, delivery schedule, etc.

(4) Utilize market-based competition to the maximum extent practicable for all proposed contract actions with an anticipated value of \$15 million or less, unless the contracting officer determines that posting a solicitation to the GPE or distributing a solicitation directly to potential suppliers would significantly increase competition relative to the value of the procurement. (see [205.202](#))

(b) In making purchases, contracting officers should --

(1) Make maximum effort to obtain quantity, preferred customer, prompt payment, or other regularly offered discounts (see [14.408-3](#)). Prompt payment discounts shall not be considered in the evaluation of quotations; and

213.102 -- Use of Standing Price Quotations.

Authorized individuals will utilize standing price quotations as part of the competitive procedures for purchasing --

(a) Readily available products and services with an anticipated value of \$15 million or less. These lists should be considered in the contracting officer's market research as a source of market-based pricing. As long as--

- (1) The pricing information is current; and
- (2) The Government obtains the benefit of maximum discounts before award.

213.103 -- Competition, Evaluation of Quotations or Offers, Award and Documentation.

213.103-1 -- Leveraging Competition.

(a) *Considerations.* In determining how to best leverage competition when using readily available acquisition procedures, the contracting officer shall consider the following:

- (1) (i) The nature of the product or service to be purchased and whether the product or service is generally sold through the internet, a catalogue, or other source of published pricing and seller terms and conditions; and
 - (ii) The urgency of the proposed purchase;
 - (iii) The dollar value of the proposed purchase;
 - (iv) Past experience acquiring the specific product or service and experience working with specific vendors; and
 - (v) The likelihood of receiving significantly more advantageous pricing or contract terms and conditions through a public or direct solicitation process, relative to the value of the purchase.

(b) The contracting officer shall use market-based competition to the maximum extent practicable when acquiring readily available products and services with an anticipated contract value of \$15 million or less. The contracting officer must purchase from the source, identified through market research, whose offer presents the best value to the agency. The contracting officer must not --

- (1) Solicit quotations based on personal preference; or
- (2) Restrict market research or solicitation to suppliers of well-known and widely distributed makes or brands.

(c) When a contracting officer does not make an award based on market-based competition and issues a solicitation, the contracting officer shall notify potential quoters or offerors of the basis

on which the award will be made (price alone or price and other factors, *e.g.*, past performance and quality). Contracting officers shall use best value. Solicitations are not required to state the relative importance assigned to each evaluation factor and should avoid the use of subfactors.

(d) Contracting officers may utilize general solicitation procedures, similar to broad agency announcements, to solicit readily available products and services. The solicitation may use a problem statement or statement of a desired end-state to describe a particular problem to be solved or operational capability to be achieved in order to incentivize dissimilar competition of products and services.

(e) The contracting officer shall ensure that sources of readily available products and services resulting from market-based competition are rotated, to the extent that the products or services offered by the sources being rotated represent the same or similar value to the agency.

213.103-2 – Market Research.

(a) *Market-based Competition.* Contracting officers will utilize market-based competition and conduct market research commensurate with the value and complexity of the procurement to identify potential sources of readily available products and services and procure those products and services with an anticipated value of \$15 million or less using the most efficient means necessary. When utilizing market-based competition, authorized individuals may directly solicit sources of readily available products and services identified through market research either orally, electronically, or in writing when necessary to ensure the agency receives the benefit of available discounts or other preferential terms and conditions not included in a vendor's online or catalogue-based marketing.

(b) *Communication.* An agency should respond to questions or requests for information regarding current solicitations or potential future acquisitions received through any medium (including electronic commerce) if doing so would not interfere with the efficient conduct of the acquisition.

213.103-3 – Public Posting of Anticipated Requirements.

Contracting offices will publicly post notices of anticipated readily available products and services to be acquired using these procedures on at least a semi-annual basis. These notices should be published by the contracting office that will be responsible for the anticipated purchases. The notices will indicate that the contracting office intends to utilize market-based competition for the acquisition of all readily available products and services with an anticipated value of \$15 million or less.

213.103-4 – Solicitation of Sources.

(a) *Public posting of solicitations*

(1) When a contracting officer is acquiring readily available products and services with an anticipated value in excess of \$15 million, a service contract with a period of

performance in excess of 12 months, or determines that public notice of a proposed procurement will significantly increase competition and add value to the procurement, a combined synopsis and solicitation may be used to provide such notice. A separate synopsis is not required. The contracting officer must include, in the solicitation, enough information to permit suppliers to develop quotations or offers. Contracting officers who post such notices to the GPE are encouraged to distribute the notice of the solicitation through relevant mediums likely to reach the most potential offerors.

(2) The contracting officer will comply with the public notice requirements for commercial items when procuring readily available products and services with an expected contract value in excess of \$15 million and for service contracts with a period of performance in excess of 12 months. (see [5.203\(b\)](#)) The chief of the contracting office may authorize in writing the use of market-based competition, with no public notice requirement, for a procurement of readily available products and services that exceeds this threshold.

(b) *Direct Solicitation.*

(1) Contracting officer may directly solicit a source or sources identified during market research. The contracting officer must include, in the solicitation, enough information to permit suppliers to develop quotations or offers. Solicitation may be oral or in writing and shall be used to secure pricing discounts and/or more favorable terms and conditions than what is offered as part of a publicly available standing price quotation.

(c) *Written solicitations.* If obtaining electronic or oral quotations is uneconomical or impracticable a written solicitation may be used.

(d) *Use of general solicitations.* Contracting officers may use a general solicitation, when using merit-based selection processes to solicit readily available solutions to problem statements or to solicit capabilities based on a desired outcome. Contracting officers may also solicit readily available products and services that might fit into broad categories of technology or capabilities similar to a broad agency announcement.

213.103-5 -- Evaluation of Market-based Pricing, Quotations, or Offers.

(a) *General.*

(1) The contracting officer shall evaluate market-based pricing, quotations or offers --

(i) In an impartial manner; and

(ii) Inclusive of transportation charges from the shipping point of the supplier to the delivery destination.

(2) When a solicitation is used, quotations or offers shall be evaluated on the basis established in the solicitation.

(3) When a solicitation is used, all quotations or offers submitted in response to a solicitation shall be considered (see paragraph (b) of this subsection).

(b) Evaluation procedures.

(1) The contracting officer has broad discretion in fashioning suitable evaluation procedures to determine the offer that represents the best value. The procedures prescribed in parts 14 and 15 are generally not applicable.

(2) Contracting officers shall describe how price will be evaluated in the solicitation. Prices can be considered on a line item or total evaluated price basis. All qualifying quotes will be ordered from lowest to highest price.

(i) Prices quotes or proposals provided by verified small businesses will be decremented by 5% for evaluation purposes.

(3) When evaluating quotes, contracting officers may communicate with all some or none of the bidders to gain a better understanding of the features of the quoted product or service. The communications need not be conducted with any or all bidders and may result in a revised quote by a particular bidder. The objective of communications is to provide additional information to the contracting officer to inform the best value decision.

(4) If using price and other factors, ensure that quotations or offers can be evaluated in an efficient and minimally burdensome fashion. Formal evaluation plans and establishing a competitive range, conducting discussions, and scoring quotations or offers are not required or encouraged. Contracting offices may conduct comparative evaluations of offers. Evaluation of other factors, such as past performance --

(i) Does not require the creation or existence of a formal data base; and

(ii) May be based on one or more of the following:

(A) The contracting officer's knowledge of and previous experience with the supply or service being acquired;

(B) Customer surveys, publicly available reviews of products or suppliers, and past performance questionnaire replies;

(C) The Governmentwide Past Performance Information Retrieval System (PPIRS) at www.ppirs.gov; or

(D) Any other reasonable basis.

(5) If using merit-based selection procedures, contracting officers will facilitate peer reviews of each proposed solution to determine if the proposed solution meets the

solicitation's objective for consideration. Proposed solutions need not be evaluated against each other. Multiple solutions may be selected for award based on a single solicitation.

213.103-6 -- Award and Documentation.

(a) *Basis for award.* Before making award, the contracting officer must determine that the proposed price is fair and reasonable.

(1) Whenever possible, base price reasonableness on market-based competition or competitive quotations or offers if competitive quotations or offers are solicited.

(2) If only one response is received or one offeror is identified during market-based competition, include a statement of price reasonableness in the contract file. The contracting officer may base the statement on --

(i) Market research;

(ii) Comparison of the proposed price with prices found reasonable on previous purchases;

(iii) Current price lists, catalogs, or advertisements. However, inclusion of a price in a price list, catalog, or advertisement does not, in and of itself, establish fairness and reasonableness of the price;

(iv) A comparison with similar items in a related industry, taking into account additional capabilities the item being procured may provide;

(v) The contracting officer's personal knowledge of the item being purchased;

(vi) Comparison to an independent Government estimate;

(vii) A value assessment provided by the requiring activity or program office; or

(vii) Any other reasonable basis.

(3) Registration in the System of Award Management is not required in order to make an award to a supplier found as a result of market research-based competition or direct solicitation as long as the contracting officer can determine the supplier responsible.

(b) *File documentation and retention.* Keep documentation to a minimum. Purchasing offices shall retain data supporting purchases (to the maximum extent practicable electronically) to the minimum extent and duration necessary for management review purposes (in lieu of the requirements in [Subpart 4.8](#)). The following illustrate the extent to which quotation or offer information should be recorded:

(1) *Market-based Competition.* For acquisitions conducted using market-based competition, document is limited to a record of the extent of the market research conducted, an abstract of prices offered by sources identified during market research, and if award was made based on factors other than price, a brief explanation of the best value determination.

(2) *Oral solicitations.* The contracting office should establish and maintain records of oral price quotations in order to reflect clearly the propriety of placing the order at the price paid with the supplier concerned. In most cases, this will consist merely of showing the names of the suppliers contacted and the prices and other terms and conditions quoted by each.

(3) *Written solicitations.* For acquisitions made using these readily available acquisition procedures, limit written records of solicitations or offers to notes or abstracts to show prices, delivery, references to printed price lists used, the supplier or suppliers contacted, and other pertinent data.

(4) *Special situations.* Include additional statements --

(i) Explaining the limitation of sources considered or solicited, if only one source is solicited or considered (does not apply to an acquisition of utility services available from only one source);

(ii) When a value assessment from the program office or requiring activity is relied upon in making the price reasonableness determination; or

(iii) To document peer reviews of solutions offered as part of a merit-based process using a general solicitation.

(c) *Contract award.* The Governmentwide commercial purchase card or fixed price purchase orders are the preferred methods for procuring readily available products and services using these procedures. For a procurement under these procedures, a contracting officer may use a Governmentwide commercial purchase card as the contract vehicle without the need for an accompanying purchase order, subject to the limitations of the contracting officer's warrant. No flexibly priced contracts may be used under these procedures.

(d) *Notification.* For acquisitions that do not exceed \$15 million and for which a solicitation is issued and automatic notification is not provided through an electronic commerce method that employs widespread electronic public notice, notification to unsuccessful suppliers shall be given only if requested or required by [5.301](#). For procurements that exceed the micro-purchase threshold, and are accomplished using market-based competition, contracting activities will publish on a weekly basis, each contract awarded along with the documentation described in 213.105-3(b)(1), subject to operational security considerations.

(e) *Request for information.* If a supplier requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the contract award decision

shall be provided. The documentation posted pursuant to paragraph (d) will satisfy this requirement.

(f) *Taxpayer Identification Number*. If an oral solicitation is used or market-based competition with no solicitation is used, the contracting officer shall ensure, to the maximum extent practicable, that the copy of the award document sent to the payment office, or documentation of a Governmentwide commercial purchase card transaction, is annotated with the contractor's Taxpayer Identification Number (TIN) and type of organization (see 4.203), unless this information will be obtained from some other source (e.g., centralized database). The contracting officer shall disclose to the contractor that the TIN may be used by the Government to collect and report on any delinquent amounts arising out of the contractor's relationship with the Government (31 U.S.C. 7701 (c)(3)).

213.104 – Additional Policy for the Procurement Readily Available Products and Services with Customization.

213.104-1 – Limitation on Additional Procedures and Terms and Conditions

(a) Purchases of readily available products and services with customization, with an anticipated value of \$15 million or less will be accomplished using the procedures outlined in subpart [213.1](#) to the maximum extent practicable. Additional procedures and terms and conditions may be necessary due to --

- (1) Increased need for solicitations; and
- (2) Longer term contractual relationships associated with customized service contracts.

(b) Any additional terms and conditions shall be --

- (1) Limited to those necessary to ensure effective competition,
- (2) Consistent with private sector practices, and
- (3) Implemented in a manner that minimizes the requirement for additional review by senior procurement officials or higher headquarters and prioritizes the timely delivery of capabilities.
- (4) Inclusion of additional FAR and DFARS clauses may be required

(c) In addition to fixed price purchase orders and Governmentwide commercial purchase card transactions, contracting officers may utilize any other contract type that does not require the submission of certified cost or pricing data and the application of Government cost accounting standards or cost principles. Time and materials contracts shall be preferred over a cost-type contract.

(d) Use of market-based competition for service contracts with a period of performance that exceeds 12 months is prohibited, unless authorized in writing by the Chief of the Contracting Office pursuant to 10 U.S.C 3453.

(e) The following clauses and provisions may be utilized in solicitations and contracts for the acquisition of readily available products and services with customization, but the application of any additional FAR or DFARS clauses or provisions must be approved by the head of the contracting activity on a procurement by procurement bases:

(1) *The provision at [52.212-1, Instructions to Offerors -- Commercial Items](#). This provision provides a single, streamlined set of instructions to be used when soliciting offers for commercial items and is incorporated in the solicitation by reference (see Block 27a, SF 1449). The contracting officer may tailor these instructions or provide additional instructions tailored to the specific acquisition in accordance with [12.302](#).*

(2) *The provision at [52.212-3, Offeror Representations and Certifications -- Commercial Items](#). This provision provides a single, consolidated list of representations and certifications for the acquisition of commercial items and is attached to the solicitation for offerors to complete. This provision may not be tailored except in accordance with [Subpart 1.4](#). Use the provision with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard.*

(3) *The clause at [52.212-4, Contract Terms and Conditions -- Commercial Items](#). This clause includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices and is incorporated in the solicitation and contract by reference (see Block 27, SF 1449). Use this clause with its Alternate I when a time-and-materials or labor-hour contract will be awarded. The contracting officer may tailor this clause in accordance with [12.302](#)*

213.105 – Adoption of Private Sector Practices.

It is a common practice in the marketplace for both the buyer and seller to propose terms and conditions written from their particular perspectives. The terms and conditions prescribed in this part seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. However, market research may indicate other private sector practices that are appropriate for the acquisition of the particular item. These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive order.

213.106 -- Technical Data.

Except as provided by agency-specific statutes, the Government shall acquire only the technical data and the rights in that data customarily provided to the public with a readily available product or service, with or without customization. Readily available products and services are by definition developed exclusively at private expense. When a contract for readily available

products and services, with or without customization, requires the delivery of technical data, the contracting officer may need to include additional provisions and clauses.

213.107 -- Computer Software.

(a) Readily available computer software, with or without customization, or readily available computer software documentation, with or without customization, shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs. Generally, offerors and contractors shall not be required to --

(1) Furnish technical information related to readily available computer software or computer software documentation, with or without customization, that is not customarily provided to the public; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose readily available computer software or computer software documentation, with or without customization, except as mutually agreed to by the parties.

(b) With regard to readily available computer software and computer software documentation, with or without customization, the Government shall have only those rights specified in the license contained in any addendum to the contract. For additional guidance regarding the use and negotiation of license agreements for commercial computer software, see [27.405-3](#).

SUBPART 213.2--ACTIONS AT OR BELOW THE MICRO-PURCHASE THRESHOLD

(Revised August 11, 2016)

213.201 ***

SUBPART 213.3--SIMPLIFIED ACQUISITION METHODS

(Revised September 19, 2014)

213.301 Governmentwide commercial purchase card.

Follow the procedures at [PGI 213.301](#) for authorizing, establishing, and operating a Governmentwide commercial purchase card program.

(1) "United States," as used in this section, means the 50 States and the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Commonwealth of

the Northern Mariana Islands, Guam, American Samoa, Wake Island, Johnston Island, Canton Island, the outer Continental Shelf, and any other place subject to the jurisdiction of the United States (but not including leased bases).

(2) An individual appointed in accordance with [201.603-3\(a\)](#) also may use the Governmentwide commercial purchase card to make a purchase that exceeds the micro-purchase threshold but does not exceed \$25,000, if—

(i) The purchase—

(A) Is made outside the United States for use outside the United States; and

(B) Is for a commercial item; but

(C) Is not for work to be performed by employees recruited within the United States;

(D) Is not for supplies or services originating from, or transported from or through, sources identified in FAR Subpart 25.7;

(E) Is not for ball or roller bearings as end items;

(F) Does not require access to classified or Privacy Act information; and

(G) Does not require transportation of supplies by sea; and

(ii) The individual making the purchase—

(A) Is authorized and trained in accordance with agency procedures;

(B) Complies with the requirements of FAR 8.002 in making the purchase; and

(C) Seeks maximum practicable competition for the purchase in accordance with FAR 13.104(b).

(3) A contracting officer may use the Governmentwide commercial purchase card to purchase readily available products and services, with or without customization, with an aggregate value of \$15 million or less, subject to the limitations of the contracting officer's warrant and agency purchase card use limitations. No accompanying purchase order is required, but the Governmentwide commercial purchase card may be used as the payment method for purchase orders of readily available products and services.

(4) Guidance on DoD purchase, travel, and fuel card programs is available in the "Department of Defense Government Charge Card Guidebook for Establishing and

Managing Purchase, Travel, and Fuel Card Programs”
at http://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html. Additional guidance on the fuel card programs is available at <http://www.energy.dla.mil>.

213.302 Purchase orders.

213.302-3 Obtaining contractor acceptance and modifying purchase orders.

- (1) Require written acceptance of purchase orders for classified acquisitions.
- (2) See [PGI 213.302-3](#) for guidance on the use of unilateral modifications.
- (3) A supplemental agreement converts a unilateral purchase order to a bilateral agreement. If not previously included in the purchase order, incorporate the clause at [252.243-7001](#), Pricing of Contract Modifications, in the Standard Form 30, and obtain the contractor’s acceptance by signature on the Standard Form 30.

213.302-5 Clauses.

- (a) Use the clause at 252.213-1 ~~252.243-7001, Pricing of Contract Modifications, in all bilateral purchase orders.~~
- (d) ~~When using the clause at FAR 52.213-4, delete the reference to the clause at FAR 52.225-1, Buy American—Supplies. Instead, if the Buy American statute applies to the acquisition, use the clause at—~~
 - (i) ~~252.225-7001, Buy American and Balance of Payments Program, as prescribed at 225.1101(2); or~~
 - (ii) ~~252.225-7036, Buy American—Free Trade Agreements—Balance of Payments Program, as prescribed at 225.1101(10).~~

213.303 Blanket purchase agreements (BPAs).

213.303-5 Purchases under BPAs.

- (b) ***

213.306 SF 44, Purchase Order-Invoice-Voucher.

(a)(1) The micro-purchase limitation applies to all purchases, except that purchases not exceeding the ~~simplified acquisition threshold~~ threshold for the use of readily available acquisition procedures (see 10 U.S.C. 3453) may be made for—

(A) Fuel and oil. U.S. Government fuel cards may be used in lieu of an SF 44 for fuel, oil, and authorized refueling-related items (see [PGI 213.306](#) for procedures on use of fuel cards);

(B) Overseas transactions by contracting officers in support of a contingency operation as defined in 10 U.S.C. 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8); and

(C) Transactions in support of intelligence and other specialized activities addressed by Part 2.7 of Executive Order 12333.

213.307 Forms.

See [PGI 213.307](#) for procedures on use of forms for purchases made using simplified acquisition procedures.

SUBPART 213.4--FAST PAYMENT PROCEDURE

(Revised January 15, 1999)

213.402 Conditions for use.

(a) Individual orders may exceed the ~~simplified~~ readily available acquisition threshold for—

(i) Brand-name commissary resale subsistence; and

(ii) Medical supplies for direct shipment overseas.

~~SUBPART 213.5—SIMPLIFIED PROCEDURES FOR CERTAIN~~

~~COMMERCIAL ITEMS~~

~~(Revised September 21, 2015)~~

~~213.500-70 Only one offer.~~

~~If only one offer is received in response to a competitive solicitation issued using simplified acquisition procedures authorized under FAR subpart 13.5, follow the procedures at [215.371-2](#).~~

~~213.501 Special documentation requirements.~~

~~(a) Sole source (including brand name) acquisitions. For non-competitive follow-on acquisitions of supplies or services previously awarded on a non-competitive basis, include the additional documentation required by [206.303-2\(b\)\(i\)](#) and follow the procedures at [PGI 206.304\(a\)\(S-70\)](#).~~

252.213-1 -- Contract Terms and Conditions – Readily Available Products and Services.

As prescribed in [213.006](#), insert the following clause:

Contract Terms and Conditions – Readily Available Products and Services (Oct 2018)

(a) *Inspection/Acceptance.* The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post-acceptance rights --

(1) Within a reasonable time after the defect was discovered or should have been discovered; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) *Assignment.* The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C.3727). However, when a third party makes payment (e.g., use of the Governmentwide commercial purchase card), the Contractor may not assign its rights to receive payment under this contract.

(c) *Changes.* Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) *Disputes.* This contract is subject to 41 U.S.C. chapter 71, Contract Disputes. Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance

with FAR Part 33. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(e) *Definitions*. The definitions, found in FAR Part 2, DFARS Parts 202 and 213 apply to this contract.

(f) *Excusable delays*. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

(g) *Invoice*.

(1) The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized) to the address designated in the contract to receive invoices. An invoice must include --

- (i) Name and address of the Contractor;
- (ii) Invoice date and number;
- (iii) Contract number, line item number and, if applicable, the order number;
- (iv) Description, quantity, unit of measure, unit price and extended price of the items delivered;
- (v) Shipping number and date of shipment, including the bill of lading number and weight of shipment if shipped on Government bill of lading;
- (vi) Terms of any discount for prompt payment offered;
- (vii) Name and address of official to whom payment is to be sent;
- (viii) Name, title, and phone number of person to notify in event of defective invoice; and
- (ix) Taxpayer Identification Number (TIN). The Contractor shall include its TIN on the invoice only if required elsewhere in this contract.
- (x) Electronic funds transfer (EFT) banking information.

(A) The Contractor shall include EFT banking information on the invoice only if required elsewhere in this contract.

(B) If EFT banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the Contractor shall have submitted correct EFT banking information in accordance with the applicable solicitation provision, contract clause (*e.g.*, 52.232-33, Payment by Electronic Funds Transfer— System for Award Management, or 52.232-34, Payment by Electronic Funds Transfer—Other Than System for Award Management), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(2) Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) prompt payment regulations at 5 CFR part 1315.

(h) *Patent indemnity.* The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) Payment.

(1) Items accepted. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract.

(2) Prompt Payment. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR Part 1315.

(3) Electronic Funds Transfer (EFT). If the Government makes payment by EFT, see 52.212-5(b) for the appropriate EFT clause.

(4) *Discount.* In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(5) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall—

(i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(A) Circumstances of the overpayment (*e.g.*, duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(B) Affected contract number and delivery order number, if applicable;

(C) Affected line item or subline item, if applicable; and

(D) Contractor point of contact.

(ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(6) Interest.

(i) All amounts that become payable by the Contractor to the Government under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in 41 U.S.C. 7109, which is applicable to the period in which the amount becomes due, as provided in (i)(6)(v) of this clause, and then at the rate applicable for each six-month period at fixed by the Secretary until the amount is paid.

(ii) The Government may issue a demand for payment to the Contractor upon finding a debt is due under the contract.

(iii) Final decisions. The Contracting Officer will issue a final decision as required by 33.211 if—

(A) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt within 30 days;

(B) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(C) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer (see 32.607-2).

(iv) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision shall identify the same due date as the original demand for payment.

(v) Amounts shall be due at the earliest of the following dates:

(A) The date fixed under this contract.

(B) The date of the first written demand for payment, including any demand for payment resulting from a default termination.

(vi) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on—

(A) The date on which the designated office receives payment from the Contractor;

(B) The date of issuance of a Government check to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or

(C) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(vii) The interest charge made under this clause may be reduced under the procedures prescribed in 32.608-2 of the Federal Acquisition Regulation in effect on the date of this contract.

(j) *Risk of loss.* Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(k) *Taxes.* The contract price includes all applicable Federal, State, and local taxes and duties.

(l) *Termination for the Government's convenience.* The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(n) *Title.* Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon acceptance, regardless of when or where the Government takes physical possession.

(o) *Warranty.* The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

(p) *Limitation of liability.* Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

(q) *Other compliances.* The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

(r) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards; 41 U.S.C. chapter 87, Kickbacks; 41 U.S.C. 4712 and 10 U.S.C. 2409 relating to whistleblower protections; 49 U.S.C. 40118, Fly American; and 41 U.S.C. chapter 21 relating to procurement integrity.

(s) *Order of precedence.* Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

- (1) The schedule of supplies/services.
- (2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause.
- (3) The clause at 52.212-5.
- (4) Addenda to this solicitation or contract, including any license agreements for computer software.
- (5) Solicitation provisions if this is a solicitation.

- (6) Other paragraphs of this clause.
- (7) The Standard Form 1449.
- (8) Other documents, exhibits, and attachments.
- (9) The specification.
- (t) Reserved
- (u) Unauthorized Obligations.
 - (1) Except as stated in paragraph (u)(2) of this clause, when any supply or service acquired under this contract is subject to any End Use License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement, that includes any clause requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:
 - (i) Any such clause is unenforceable against the Government.
 - (ii) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement is invoked through an “I agree” click box or other comparable mechanism (e.g., “click-wrap” or “browse-wrap” agreements), execution does not bind the Government or any Government authorized end user to such clause.
 - (iii) Any such clause is deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.
 - (2) Paragraph (u)(1) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.
- (v) *Incorporation by reference.* The Contractor’s representations and certifications, including those completed electronically via the System for Award Management (SAM), are incorporated by reference into the contract.