

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

Problem

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

Background

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

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

Discussion

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

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

most interested in managing are lost in the sheer volume of clauses. In the other two situations, opportunities are lost because only certain small or innovative nontraditional companies will have the capital to expend on lawyers or consultants that can interpret what the contract requires.

Instead of addressing requirements on a contract-by-contract basis, the government has taken a blanket approach to requirements, imposing compliance requirements that may not meet the intended purpose under the circumstances of the procurement, or may be altogether unnecessary for a particular procurement. DoD does not have a system for directing risk mitigation requirements across the enterprise, except through the DFARS. Certain organizations within DoD, like the Air Force Installation and Mission Support Center, have developed standardized performance work statements for services acquired across the agency. In addition, procurement of certain products has been centralized through organizations like the Defense Logistics Agency and Defense Information Systems Agency. These organizations have the capacity and experience in developing and implementing policies applicable to requirements for the entire enterprise.

Conclusions

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

Implementation

Legislative Branch

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

Executive Branch

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

Implications for Other Agencies

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

RECOMMENDED REPORT LANGUAGE

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

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

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

1 **SEC. ____ . SUPPLY CHAIN RISK MITIGATION POLICIES TO BE IMPLEMENTED**
2 **THROUGH REQUIREMENTS GENERATION PROCESS.**

3 (a) PROCESS FOR ENHANCED SUPPLY CHAIN SCRUTINY.—Subsection (b) of section 807 of
4 the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C.
5 2302 note) is amended—

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

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

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

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

14 (c) EFFECTIVE DATE.—Not later than the end of the 90-day period beginning on the date
15 of the enactment of this Act, the Secretary of Defense shall revise the process established under
16 section 807 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91;
17 10 U.S.C. 2302 note) to implement paragraph (5) of subsection (b) of that section, as added by
18 subsection (a)(2).

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

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

SEC. 807. PROCESS FOR ENHANCED SUPPLY CHAIN SCRUTINY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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