

THE JOURNAL OF FEDERAL AGENCY ACTION

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Department of Defense Mandates Use of Software Acquisition Pathway for Software Development Procurements

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Teresita Regelbrugge, and Vaibhavi Patria*

In this article, the authors review a memorandum issued by Department of Defense (DOD) Secretary Pete Hegseth titled “Directing Modern Software Acquisition to Maximize Lethality” that is intended to reform DOD’s procurement involving software development.

A memorandum issued by Department of Defense (DOD) Secretary Pete Hegseth directs all DOD components to adopt the Software Acquisition Pathway (SWP) as the preferred acquisition method for all software development components of business and weapon system programs. The memorandum also directs DOD components to use Commercial Solutions Openings and Other Transactions by default when acquiring capabilities under the SWP.

Although the SWP is not new, the memorandum mandates its use whenever possible.

As the memorandum took effect upon release, industry will likely see DOD software development acquisitions shift to follow procedures for Other Transactions and Commercial Solutions Openings in lieu of the traditional procurement process. In addition to procurements moving more quickly, DOD’s emphasis on doing business with nontraditional defense contractors also may increase.

Background

DOD intends for the SWP to “facilitate rapid and iterative delivery of software capability to the user.” To do so, the SWP prescribes an acquisition process that integrates modern software development

practices such as Agile Software Development, DevSecOps, and Lean Practices; capitalizes on active user engagement and leverages enterprise services; rapidly and iteratively delivers software to meet the highest-priority user needs; and leverages mission-focused government-industry software teams. DOD implements these requirements through a series of Department of Defense Instructions (DODI). DODI 5000.02, which was issued in 2022, sets forth a process by which DOD would leverage an Adaptive Acquisition Framework (AAF) to promote using acquisition strategies and processes specific to the capability being acquired, rather than using all applicable traditional procurement processes. The Software Acquisition Pathway is one of six AAFs identified in DODI 5000.02.¹

Congress directed DOD to create software acquisition pathways in Section 800 of the FY2020 National Defense Authorization Act (NDAA). The NDAA directed that programs implemented under DOD software acquisition pathways:

- Shall not be treated as major defense acquisition programs;
- Are not subject to Joint Capabilities Integration and Development System until the Vice Chair of the Joint Chiefs of Staff, Under Secretary of Defense for Acquisition and Sustainment, and military services agree on a new approach to software requirements;
- Shall follow streamlined software requirements, budget, and acquisition processes; and
- Must demonstrate viability and effectiveness of capabilities for operational use within one year after funds are first obligated.

The 2025 memorandum's directive relies on existing authorities set forth in 10 U.S.C. § 3458 (for Commercial Solutions Offerings) and 10 U.S.C. § 4022 (for Other Transactions). It seeks to "align contracting strategies and maximize the use of existing authorities" such as 10 U.S.C. § 3458 and 10 U.S.C. § 4022.

For Commercial Solutions Offerings, 10 U.S.C. § 3458(a) authorizes (but does not require) DOD to award fixed-price contracts or fixed-price incentive contracts to "acquire innovative commercial products and commercial services" using a "competitive selection of proposals resulting from a general solicitation and the peer review of such proposals." This includes "any technology, process, [] method" or application that "is new as of the date of submission

of a proposal.” If the award of a contract will exceed \$100 million, DOD may not execute the contract without “a written determination from the Under Secretary of Defense for Acquisition and Sustainment 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.” DOD must then notify the congressional defense committees of the award within 45 days and provide the following information:

- Description of the innovative commercial product or commercial service acquired;
- Description of the requirement, capability gap, or potential technological advancement with respect to which the innovative commercial product or commercial service acquired provides a solution or a potential new capability;
- Amount of the contract awarded; and
- Identification of the contractor awarded the contract.

For Other Transactions, 10 U.S.C. § 4022 authorizes the Director of the Defense Advanced Research Projects Agency, the Director of the Defense Innovation Unit, the Secretary of a military department, or any other official designated by the Secretary of Defense to “carry out prototype projects that are directly relevant to enhancing the mission effectiveness of personnel of the Department of Defense or improving platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.”

Before executing an award over \$100 million, however, the director of the agency must obtain a written determination from specified agency officials that it will meet one of the four specific conditions and is “essential to meet critical national security objectives.” For awards exceeding \$500 million, the director of the agency must also notify the congressional defense committees in writing at least 30 days before the authority is exercised.

Software Development Acquisition Process Through the SWP

Programs using the SWP are expected to move quickly to demonstrate the viability and effectiveness of capabilities for operational

use not later than one year after funds are first obligated to develop the new software capability. The SWP² lays out a procurement process that begins with a planning phase during which the respective DOD components would evaluate and define capability needs and strategies to set a roadmap for the next phase. In the ensuing execution phase, the SWP projects an iterative process based on a roadmap that tests strategies and user engagement and assesses the value of the evolving software product. The software's design architecture is to be continually defined and reiterated throughout.

The SWP also highlights aspects of secure software development that are essential, including:

- The SWP requires that cybersecurity and program protection be addressed from program inception in accordance with applicable cybersecurity policies and issuances. The SWP emphasizes that a risk-based management approach will be an integral part of the program's strategies, processes, designs, infrastructure, development, testing, integration, delivery, and operations.
- Intellectual property (IP). The SWP requires that IP rights be addressed from program inception in accordance with DODI 5010.44.

DOD's Current Vision for Software Development Procurements Through the SWP

The DOD memorandum describes the shift from a mix of traditional and adaptive acquisition to the mandated use of adaptive acquisition, such as Other Transactions and Commercial Solutions Openings, as necessary to allow DOD to keep pace with commercial technology advancements, leverage the entire commercial ecosystem for defense systems, rapidly deliver scaled digital capabilities, and evolve DOD systems faster than adversaries can adapt to them on the battlefield. DOD's press release on the memorandum referenced DOD's previous success in implementing the SWP in the Defense Innovation Unit, which awarded more than 500 Other Transactions using the Commercial Solutions Openings process. Nontraditional defense contractors—defined as entities that have not performed any contracts subject to full coverage under the cost accounting standards for at least the past year—received 88 percent

of these awards. 10 U.S.C. § 3014. DOD intends for software development through the SWP to move more swiftly and to “tap into commercial innovation,” in addition to “cutting red tape.”

DOD is working on an implementation plan for using the SWP across DOD components. Implementation plans will include direction for training DOD employees on the SWP and using adaptive procurement processes, such as those for Other Transactions and Commercial Solutions Openings. To ensure that DOD uses the SWP, Other Transactions, and Commercial Solutions Openings to the maximum extent possible, the memorandum prohibits DOD entities “from implementing further guidance . . . that would set out restrictive measures, guidelines, frameworks, directives, or policies other than required by statute.”

Conclusion

Although some DOD entities are already using the SWP, we expect DOD software development procurements Department-wide to soon shift to using adaptive methods instead of traditional pathways. Without many of the standard clauses that are usually incorporated in traditional contracting vehicles by default, flexible contracting provides contractors with greater bargaining power to negotiate licensing terms, obligations, and remedies during the formation of their contract. As a result, contractors should consider preparing their procurement teams to identify and respond to these less traditional procurement vehicles and shifting expectations for software development to use iterative exchanges throughout the stages of development. Setting clear expectations on contracting terms now will reduce the risk of disputes—and the associated costs to resolve them—arising during the performance of the contract.

Notes

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1. <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/500002p.pdf?rnd=26243>.

2. <https://aaf.dau.edu/aaf/software/>.