

Defense Department's Updated Procurement Process Allows Quicker Access to Private Sector AI Products

August 2023

[**Editor's note:* Humans wrote this article without using ChatGPT. Recent news events, of which we hope all attorneys are aware, suggested this was the better course.]

Artificial Intelligence (AI) seems to be infiltrating all aspects of everyday life. It should come as no surprise, then, that the Federal Government, particularly the U.S. Department of Defense (DOD), is taking notice of the ways in which AI can improve its warfighting capabilities. To compete with—and surpass—our near peers, including China and Russia, DOD is rethinking the ways it procures technology and systems that use AI to support weapons systems, other vital military equipment, and internal operations.

As part of its efforts to streamline and improve its acquisition processes for advanced technologies like AI, DOD is making a concerted push to work with industry leaders to address specific needs with solutions that would previously have sounded like science fiction. This creates an opportunity for government contractors to play a role in shaping DOD's AI policies and procurement processes for acquiring AI-enabled solutions. Two leading aspects of DOD's AI procurement overhaul are the Chief Digital and Artificial Intelligence Office (CDAO) and the Tradewind Solutions Marketplace (Marketplace). Through those initiatives, DOD is seeking to accomplish the following AI goals:

1. Accelerate the delivery and adoption of AI;
2. Establish a common foundation for scaling AI's impact across DOD;

Authors

Tracye Winfrey Howard
Partner
202.719.7452
twhoward@wiley.law

Kara M. Sacilotto
Partner
202.719.7107
ksacilotto@wiley.law

Practice Areas

Artificial Intelligence (AI)
Federal Policy and Regulation
Government Contracts
Government Contracts
National Security
Privacy, Cyber & Data Governance
Telecom, Media & Technology

3. Enable decentralized development and experimentation;
4. Evolve partnerships with industry, academia, allies, and partners;
5. Cultivate a leading AI workforce; and
6. Lead in military AI ethics and safety.

U.S. Department of Defense, *SPOTLIGHT Artificial Intelligence*, <https://www.defense.gov/Spotlights/Artificial-Intelligence/>. Contractors in this space should familiarize themselves with these overarching goals and DOD's specific initiatives to improve its procurement processes for AI solutions. We review some of DOD's efforts below.

Chief Digital and Artificial Intelligence Office

Previously, DOD approached AI in a decentralized manner: each military branch had one or more offices focused on AI procurements, projects, or oversight. This led to disjointed and often duplicative efforts because each office was essentially reinventing the wheel instead of learning from others' mistakes and successes.

DOD recognized that to move quickly and be a leader in AI, it needed to consolidate its efforts into a single office: CDAO. DOD created CDAO in 2022 by integrating the Joint Artificial Intelligence Center, Defense Digital Services, the Chief Data Officer, and the enterprise platform Advana under one umbrella led by DOD's Chief Digital and Artificial Intelligence Officer. Although the military branches, and even specific installations, are still involved in individual AI procurements and projects, CDAO is the lead office for the acceleration of DOD's adoption of data, analytics, and AI solutions, bridging the divide between the battlefield and the boardroom. See *Chief Digital and Artificial Intelligence Office*, www.AI.mil.

The National Defense Authorization Act (NDAA) for Fiscal Year 2023, Pub. L. No. 117-263, directed organizations within DOD to support CDAO's efforts to reform DOD's AI procurement processes, cementing CDAO's role as DOD's leader in AI. In that role, it aims to perform several critical functions:

1. Lead DOD's strategy and policy on data, analytics, and AI adoption;
2. Oversee and govern AI efforts across DOD;
3. Enable the development of digital and AI solutions across DOD;
4. Scale proven AI solutions for enterprise and joint use cases; and
5. Harness the talent of technical experts that can serve as a data and digital response force capable of addressing urgent crises and emerging challenges with state-of-the-art digital solutions.

Over the past year, CDAO has established the CDAO Governing Council, which is a "4-star" level governance body that replaced the former "3-star" AI Executive Steering Group governance body. CDAO has also taken significant steps to ensure the responsible use of AI within DOD. For example, CDAO took a leading role in creating the Responsible AI (RAI) Strategy and Implementation Pathway, which established the roles and responsibilities for implementing DOD's 2020 Ethical Principles for AI. CDAO has also focused on creating RAI resources for AI developers and practitioners so the products and services they create and ultimately provide

to the Government have ethical standards embedded in them.

Tradewind Solutions Marketplace

One of the major initiatives from the CDAO is the Marketplace. Although the concept of the Marketplace predates the establishment of CDAO, the new office streamlined the Marketplace and made it more user friendly.

The Marketplace is one of the ways DOD has started to move away from the standard government contracting processes that make the rapid procurement and delivery of goods and services challenging. Rather than submit a bid directly to a government customer as they would in a traditional procurement, companies, academics, and individuals upload five-minute video pitches to the Marketplace. DOD organizations can then review and compare videos to determine which technological solution best fits their current needs. This process stands in stark contrast to the traditional procurement process, which the U.S. Government Accountability Office (GAO) has deemed "incompatible with the fast speed at which AI technology is developed." GAO, *Artificial Intelligence: Status of Developing and Acquiring Capabilities for Weapon Systems*, GAO-22-104765, Feb. 17, 2022, <https://www.gao.gov/products/gao-22-104765>, at page 23. GAO also found that DOD's acquisition processes "can be a potential barrier for small and nontraditional companies who may be less familiar with DOD-specific requirements than large companies." *Id.* Small and nontraditional companies may not have the resources—both time and money—to become acquainted with government procurement processes, and might instead choose to abandon their plans to engage with DOD.

Thus, part of what makes the Marketplace a novel approach is that it moves away from the lengthy processes that have long been the cornerstone of government procurement. The Marketplace's streamlined processes will make it easier for small businesses and nontraditional defense contractors to identify and participate in contracting opportunities with DOD for AI and other innovative technology solutions. DOD customers can now procure directly from the vendor whose solution they believe will best solve their problem, without having to prepare a sole source justification and approval.

Instead of issuing individual solicitations, the Marketplace posts procurement announcements that list DOD's broad strategic focus areas. For example, the focus areas in a recent Marketplace announcement included improving situational awareness and decision-making; implementing predictive maintenance and supply; streamlining business processes; assuring cybersecurity; and discovering blue sky/other technology applications. The Marketplace's procurement focus areas will change as the customer base and mission priorities supported by the Marketplace evolve. Accordingly, CDAO encourages companies and research entities that are interested in selling their AI products or services to DOD to regularly check the Marketplace website for new announcements.

Each announcement includes the submission guidelines with tips, basic eligibility requirements, and the video submission scoring rubric. Each video must include four major elements: identification of the problem(s) addressed; a description of the solution and its application to the problem; the potential impact of the solution if DOD adopts it; and how the solution differs from other, similar solutions. Price is generally not

addressed in the video submission because the agreed-upon price will depend on the scope of the final effort. Interested entities can create a free account and begin uploading video pitches. Each video may contain only one solution, but entities can pitch multiple solutions in response to an announcement by uploading separate videos for each solution.

A new submission/collection period opens each month, and an assessment panel of experts from academia, industry, and government evaluates the videos uploaded during that period based on the announcement's scoring rubric. The panel determines whether each submission is awardable or non-awardable and the appropriate contract types for awardable submissions. The assessment panel's decisions are available thirty days after the end of the relevant collection period. Submissions deemed awardable are made available on the Marketplace. Then, rather than starting the acquisition process from scratch, interested DOD customers can contact an awardable entity directly to negotiate the terms of the contract, including the price, scope of the effort, project milestones, project deliverables, period of performance, and a definition of successful completion of the solution.

For submissions deemed non-awardable, the evaluation panel provides feedback to the submitting entity, which can resubmit its solution after addressing the recommendations. Submitters have unlimited opportunities to continue to refine and resubmit their video pitches.

The Way Ahead for DOD's AI Procurements

DOD's AI procurement efforts have shown no indication of slowing down, and we can expect this trend to continue. DOD will need to continue to rely on its industry counterparts to fuel its growth in this area, or risk lagging behind other countries. To achieve those goals, we expect CDAO to continue building relationships within DOD, with other agencies across the Government, and with industry.

Now that the Marketplace is established as a means to quickly procure AI programs and services, CDAO may focus its attention on ensuring that the AI it acquires meets DOD's Ethical Principles. This will include implementing the goals and procedures established in the RAI Strategy and Implementation Pathway in DOD's procurements of AI solutions. CDAO is considering tools that could facilitate implementation of the Pathway's concepts, such as bias mitigation or explainability, machine learning operations, and continuous integration/delivery. It is also planning to expand the range of tools it releases to AI developers within the Government and the private sector so the developers can incorporate RAI from the outset of the development process.

We expect CDAO to continue casting a wide net in terms of the types and uses of AI that it addresses. The office is also seeking to foster AI development and innovation outside DOD, including starting an academic consortium to encourage more basic research, expose students to DOD problems, jumpstart innovation, and develop a cadre of experienced RAI practitioners. To that end, CDAO continues to engage with interested parties at industry days and international events on future data collection and policy initiatives to allow DOD to take advantage of private sector expertise.

Grace Moore, a Wiley 2023 Summer Associate, contributed to this alert.