

Section 809 Panel Recommends Major Changes to Department of Defense Acquisitions

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On January 15, 2019, the Section 809 Panel (the Panel) released the two-part Volume Three of its Final Report on streamlining acquisition by the Department of Defense (DOD or the Department). Volume Three contains 58 new recommendations for “reduc[ing] the burden and increas[e] the functioning” of the DOD acquisition system. Several of these recommendations would drastically change the way the DOD acquires products and services, notably Recommendation 35, which calls for replacing commercial buying and the existing simplified acquisition procedures with a “Dynamic Marketplace.” The Panel also makes several recommendations aimed at streamlining compliance requirements for DOD contractors, particularly for commercial suppliers and lower-dollar procurements.

Altogether, these recommendations are designed to change the way the DOD acquisition system functions to make it more “responsive to 21st century market practices” and to value time more than the current system. The emphasis on valuing time is a theme throughout the recommendations; the Panel repeatedly stresses the need for the acquisition process to change so that meeting the mission and accessing innovation are prioritized over strict adherence to processes and procedures.

The recommendations, if implemented, would result in substantial changes to the way DOD does business. But the Panel’s recommendations are just that. Most would require Congress to revise relevant statutes, and the remainder would have to be implemented through changes to the DFARS or other regulations. Whether and how Congress chooses to enact the Panel’s recommendations remains to

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be seen. Although Congress has been focused on acquisition reform in recent years, the DOD oversight committees in both the House and Senate have new leadership who have not signaled whether such reforms will continue to be a priority. It is also worth noting that, consistent with the Panel's charter, the recommendations relate only to DOD procurements. As a result, any statutory changes are likely to apply only to the DOD procurement system—creating an ever-larger divergence between the rules for defense and civilian procurements and potentially increasing the compliance burden for contractors that choose to participate in both systems. Contractors that participate in public contracting are urged to stay informed about these potential changes and Congress's reaction to the Panel's recommendations. We summarize here some of the recommendations with the most significant potential impacts on contractors.

The Dynamic Marketplace Framework

One of the more sweeping recommendations with far-reaching implications, Recommendation 35, would replace the current DOD commercial buying framework and the existing simplified acquisition procedures and thresholds with simplified procedures for buying "readily-available" products without issuing requests for proposals or holding competitions. The Panel estimates that approximately 80% of the goods and services DOD purchases could be acquired through these procedures.

According to the Panel, the current acquisition process is inefficient and does not allow DOD to take advantage of rapidly changing technologies or diverse markets. The Dynamic Marketplace Framework would change this by dividing DOD acquisitions into three categories and regulating how products and services are acquired based on which category they fall into. The goal is to allow DOD to acquire the most up-to-date products and services in the least amount of time possible from the open marketplace. Although the Panel introduced this marketplace concept in its Volume 1 and Volume 2 Reports, the Volume 3 Report provides much more detailed explanations and recommendations for implementation.

The first category in the new framework would be "Defense-unique Development," which would include products and services that are purchased or developed solely for DOD. These procurements would be the most similar to the current DOD acquisition procedures. Because the products and services are unique to DOD, the Department would be able to dictate terms, and there would be little or no competition. The Panel's recommendations build on previous recommendations for "incremental" improvements for acquisitions in the defense-unique market and propose more sweeping changes to simplify these types of acquisitions, including pulling back on compliance burdens and empowering contracting officers with more flexibility.

The second category of product and services would be "Readily Available," which is defined as "any product or service that requires no customization by the vendor and can be ordered directly by customers, to include products and services that only governments buy." This category would replace the current "commercial item" and simplified acquisition regimes, which the Panel believes is too focused on whether an item is "commercial," with a system that would allow DOD buyers to make purchases just as commercial buyers do. The Panel recommends using these procedures for all procurements under \$15 million and allowing contracting officers to request authorization to use the procedures for procurements over that threshold when appropriate. The Panel recommends removing the current requirement for public advertising, and instead

having DOD rely on market research and market-based competition (e.g., internet searches). Contracting officers could rely on standing price quotes and direct solicitations of specific vendors, and they would have the authority to waive many socioeconomic requirements, including mandatory small business set-asides and domestic sourcing restrictions such as the Buy American Act and Berry Amendment. Contract awards, but not solicitations, would be posted online, and only limited grounds of protest could be filed with the contracting agency. There would be no protests of Readily Available procurements to the Government Accountability Office or Court of Federal Claims. (See the companion article in this issue for a more detailed discussion of the Marketplace's potential effects on protests and the Panel's other protest-related recommendations.) All purchases would be firm fixed priced through individual contracts, purchase orders under a larger contract or government purchase card transactions.

The final category in the marketplace framework would be "Readily Available with Customization." This category would be used for acquisitions of more \$15 million and include "the products and services that are sold in the private sector, including to other private-sector customers, for which customization or manufacturing that is consistent with existing private-sector practices is necessary to meet DOD's needs." For procurements below the \$15 million threshold, contracting officers would have discretion to decide whether to issue a public solicitation or acquire the product or service through market-based competition as in the Readily Available category. Again, the Panel recommends removing the small business set-aside requirements, as well as Buy American Act and Berry Amendment restrictions. Pre- and post- award protests would be allowed for procurements in this category with publicly-posted solicitations.

In the Panel's own words, this marketplace recommendation would "revolutionize the existing procurement system." In addition to the impact on protests, the recommendation gives considerable discretion to contracting officers in deciding how to proceed in a procurement and opens the door to direct procurements without a public bidding process. These changes would diminish transparency and competition—the bedrock principles of the current DOD procurement system—in favor of speed, innovation and attracting new entrants to the DOD system. The Panel believes this tradeoff is worthwhile and necessary to keep pace with other nations, but Congress will have to decide where to strike the balance.

Portfolio Management and Portfolio Acquisition Executives

In the Panel's view, DOD's program-centric execution model (i.e. using specific funds and authority to purchase individual products and services) has led to a "compliance heavy culture driven by fear of failure" and long coordination processes that result in "unacceptable timelines, program delays, and administrative inefficiencies." The Panel instead proposed a portfolio execution model, as described in Recommendation 36. The Panel recommends creating "Portfolio Acquisition Executives" (PAEs) who would have substantial authority to make decisions about acquisitions, requirements, and the movement of funds within their organization.

This recommendation advocates that DOD gradually transfer to the PAEs a substantial amount of authority and discretion, at every step of the acquisition process from procurement into contract performance. PAEs could be empowered to make decisions that could alter an acquisition or reallocate resources very quickly and without many impediments to doing so.

Removing Administrative Burdens: Domestic Sourcing, Supply Chain and Socioeconomic Issues

As another innovation in streamlining the acquisition process, the Panel recommended that Congress exempt some DOD acquisitions from the requirements of the Buy American Act (BAA) and the Berry Amendment. The BAA and the Berry Amendment were enacted to give preference to domestic products to foster the American economy and to protect national security interests. Despite this noble purpose, the Panel concluded that these two statutes can undermine DOD's ability to field the most innovative technologies to the warfighter in a rapid, costly, and efficient manner.

In Recommendation 64, the Panel recommended that DOD have discretion to grant public interest exceptions to the Berry Amendment, identical to the current public interest exceptions and procedures in the BAA. The Panel also recommended that these domestic purchasing preference requirements not apply to Readily Available and Readily Available with Customization procurements.

The Panel also addressed the current FAR and DFARS requirements for supply chain security that must be flowed down from prime contractors to lower-tier subcontractors and concluded that these government-specific requirements created a barrier to entry for commercial companies interested in doing business with the Government. The Panel reiterated its previous recommendation to significantly limit the number of flow-down clauses in contracts with commercial suppliers to attract more nontraditional contractors. The panel nonetheless recognized the importance of mitigating supply chain risk and recommended that those risks be addressed in the requirements process rather than through contract clauses.

Like the domestic sourcing restrictions, the Panel found that labor and wage requirements in the Davis-Bacon Act, Walsh-Healey Act and Service Contract Act impose significant administrative and compliance burdens on contractors, increase the costs of federal contracts and ultimately lead to less competition for those contracts. The Panel recommended that Congress increase the acquisition thresholds for each of those laws to \$2 million. According to the Panel, this change would exempt more than 90% of contract actions, but less than 20% of contract dollars, from these labor laws. Again, the goal is to encourage more companies to do business with DOD while maintaining socioeconomic policies for the largest procurements.

Expansion of Other Transaction Agreements

Finally, the Panel recommended, in Recommendation 81, that Congress expand DOD's authority to use Other Transaction Agreements (OTAs). Currently, DOD can use OTAs to carry out prototype projects and follow-on production, but only in limited circumstances. The Panel suggests removing barriers for OTA use for follow-on production transactions. The Panel further recommends giving Service acquisition executives discretion to authorize OTAs, rather than using standard procurement procedures, for follow-on production of prototypes built under a prior OTA. The Panel suggests reserving this authority for only exceptional circumstances.

This recommendation will potentially give DOD more leeway and discretion in deciding to use OTA procedures for follow-on production and after prototype projects. As the Panel hints in the Report, more and more of these types of products will be acquired in the future as technology changes rapidly. Indeed, DOD's use of OTAs has already increased in recent years following congressional encouragement and statutory changes. In

light of these changes, combined with the Panel's recommendations and predictions about expanded OTA use, contractors should continue to learn more about OTAs to be better prepared to meet future DOD needs.