

Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations

Volume 2 of 3
June 2018



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From its inception, the Section 809 Panel agreed to focus its recommendations to improve DoD acquisition on delivering lethality and maintaining technical dominance inside the turn of DoD's near-peer competitors and nonstate actors, none of which must comply with the DoD acquisition system's voluminous statutes, regulations, and policies.

The Section 809 Panel published an *Interim Report* on May 17, 2017, in which it recommended modifying or eliminating statutory and regulatory requirements to reduce the burden and improve the functioning of DoD's acquisition process. Congress adopted all of the statutory recommendations made in the *Interim Report* in the FY 2018 NDAA.

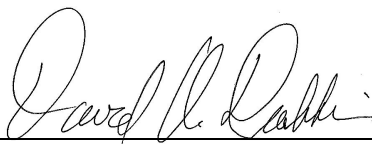
The Section 809 Panel published *Volume 1* of the *Final Report* January 31, 2018. The *Volume 1 Report* contains recommendations to update the process by which DoD acquires IT business systems, streamline and realign DoD's cumbersome auditing requirements, reduce barriers to entry into the DoD market space for small businesses and redirect DoD's use of small businesses to focus on mission accomplishment, update commercial buying processes, clarify the definitions of personal and nonpersonal services, remove statutory requirements for acquisition-related DoD offices, and repeal acquisition-related statutory reporting requirements. Many of these recommendations were included in the House-passed FY 2019 NDAA, H.R. 5515.

The *Volume 2 Report* builds on the panel's commitment to making actionable recommendations and providing the language necessary to implement them. *Volume 2* contains recommendations addressing the acquisition workforce, commercial source selection, the Cost Accounting Standards Board, and services contracting. *Volume 2* introduces a proposal to move DoD to an enterprisewide portfolio management structure aimed at improving the existing, over-managed system and continues discussion of the Dynamic Marketplace concept.

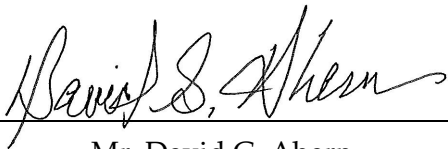
Even as the Section 809 Panel has been wrapping up its work on *Volume 2*, it has already begun research and writing for *Volume 3*, the last installment of its *Final Report*. The Section 809 Panel appreciates the support it has received to date from Congress, DoD, the DoD acquisition community, and industry, and it is committed to compiling a final volume of recommendations aimed at making the defense acquisition process simpler for all stakeholders. Again, as stated above, the ultimate goals are delivering lethality, maintaining technical dominance, and sustaining technical dominance inside the turn of DoD's near-peer competitors and nonstate actors, none of which must comply with the DoD acquisition system's voluminous statutes, regulations, and policies.

SECTION
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PANEL

Respectfully Submitted,



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Mr. David G. Ahern



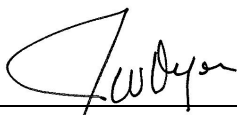
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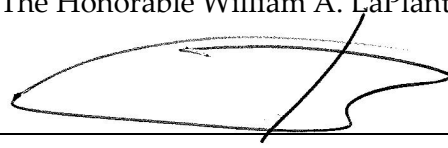
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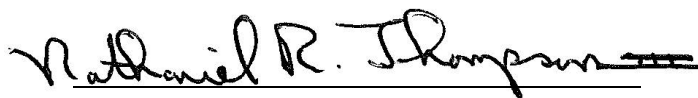
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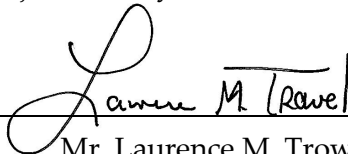
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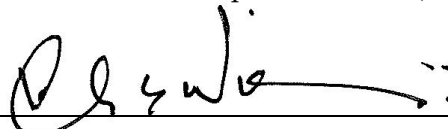
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FPDS: The Federal Procurement Data System—Next Generation is the primary source for DoD prime contract award data. FPDS is the source for much of the data cited in this report.

FPDS is a living database, updated in real time. For this reason, the same query will produce different results when run at different points in time. In accordance with FAR Subpart 4.604(c), DoD submits an annual certification within 120 days of the end of the fiscal year, which serves as an official statement of FPDS-recorded contract procurement for that year. The underlying data, however, continues to change.

Charts, tables, and calculations in this report are cited with date of data extraction. Because these data extractions occurred at various times over the course of 809 Panel research, officially certified DoD data may differ slightly from the data in this report.

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In May 2017, the Section 809 Panel submitted its *Interim Report*, which laid out the panel's rationale for streamlining DoD acquisition. The *Volume 1 Report*, published in January 2018, contained recommendations to update the process by which DoD acquires IT business systems, streamline DoD's cumbersome auditing requirements, address challenges in how the small business community and DoD interact, update commercial buying processes, clarify the definitions of personal and nonpersonal services, remove statutory requirements for acquisition-related DoD offices, and repeal acquisition-related statutory reporting requirements. Many of these recommendations have been included in the House-passed FY 2019 NDAA, H.R. 5515.

Volume 1 also included an introduction to the Dynamic Marketplace framework, a model that addresses all of the essential elements of the federally regulated acquisition environment, such as competition, business integrity, process efficiency, and transparency. This new model will include transactional processes that mirror, as appropriate, those in the commercial market, such as the prevalent use of market intelligence and efficient economic markets. The Dynamic Marketplace represents a bold shift from the current process-centric acquisition system. The panel continues to develop this concept in preparation for *Volume 3*.

This *Volume 2 Report* builds on the Section 809 Panel's previous policy recommendations by offering an introductory paper on the tenets of a viable defense acquisition system aimed at improving the existing over-managed system to more readily meet warfighter needs. This report represents an overview of the state of the system now and offers a vision for the future. It will also guide the panel's specific

recommendations for a new defense acquisition vision cemented around portfolio capabilities and tools and resources designed to empower users and product owners to manage programs more effectively, which will be published in *Volume 3*. *Volume 2* also contains recommendations related to the acquisition workforce, commercial source selection, the Cost Accounting Standards Board, and services contracting as well as further discussion of the Dynamic Marketplace concept and a section on decluttering Title 10 of the U.S Code.

In brief, *Volume 2* includes the following sections:

DEFENSE ACQUISITION FRAMEWORK

The introductory paper on the defense acquisition system identifies five key elements that drive the acquisition process and provide a framework for change:

- **Strategy:** the mission and goals of defense acquisition.
- **Structure:** how the defense acquisition enterprise is organized and the roles of stakeholders within the enterprise.
- **Processes and Procedures:** the means by which requirements, resources, procurement, and processes are used to deliver warfighting systems.
- **Resources:** the people, funding, data, and time that serve as the means for defense acquisition to execute against its mission and goals.
- **Culture:** the values and behaviors that shape the environment and practices of defense acquisition.

The Section 809 Panel's recommendations, including those contained in the *Interim Report*, the *Volume 1 Report*, this *Volume 2 Report*, and the upcoming *Volume 3 report*, address issues related to each of these five elements in an effort to create a cohesive system that optimally serves warfighters.

SECTION 1: IMPROVING DEFENSE ACQUISITION

The Defense Acquisition System requires greater speed and ability to be responsive in a dynamic environment. Changing from a program-centric management structure to a portfolio management structure would enable timely delivery of integrated capabilities. Shifting to an effective portfolio capability structure would allow for tighter alignment of acquisition, requirements, and budget processes. It would also provide flexibility and potentially increased warfighter capability. Introducing Capability Portfolio Management would enable analysis and integration of cross-cutting data and create an enterprise view that would support better-informed decision making. Realigning the acquisition system to place appropriate emphasis on sustainment would bring renewed focus on the overall state of readiness. The requirements system needs to focus on capabilities needed to achieve strategic objectives instead of predefined materiel solutions. The Section 809 Panel will provide specific recommendations related to enterprise capability portfolio management, portfolio execution, sustainment, and requirements in its January 2019 *Volume 3 Report*.

SECTION 2: ACQUISITION WORKFORCE

The acquisition workforce (AWF) faces challenges that must be overcome to ensure it is capable of implementing needed acquisition reforms. The existing framework of hiring authorities for the AWF fails to support DoD's efforts to address critical skill gaps through the hiring process. The hiring authorities must be streamlined and adapted to support the acquisition workforce. The Acquisition Workforce Personnel Demonstration Project (AcqDemo) to date has been administered under a temporary authority. The program has been successful for the DoD AWF members covered by the authority, and the program should be made permanent and applied to the entire DoD AWF. The Defense Acquisition Workforce Development Fund (DAWDF) has supported DoD's ability to recruit and retain qualified acquisition personnel, yet faces three key challenges: (a) determining the most efficient approach to operational funding, (b) determining the proper allocation method, and (c) addressing ongoing management by Human Capital Initiatives. DAWDF should be resourced and managed as a multiyear fund from expiring-year, unobligated dollars at no less than \$450 million annually.

SECTION 3: SIMPLIFIED COMMERCIAL SOURCE SELECTION

Despite numerous revisions to statutes and regulations, selecting sources for commercial products and services continues to take too long and involve unnecessarily complex procedures for buyers and sellers. Statutory changes aimed at expanding the applicability of the special streamlined acquisition procedures and updating the requirement to publish notices to reflect current technology would simplify selection of sources for commercial products and services. Improving guidance in the FAR, emphasizing the use of simplified acquisition procedures, revising the FAR to make it easier to locate procedures for using simplified acquisition procedures for commercial products and services, and defining streamlining-related terms in the FAR would also simplify commercial selection.

SECTION 4: COST ACCOUNTING STANDARDS

The Cost Accounting Standards Board (CASB) and cost accounting standards (CAS) need to be restructured to provide necessary guidance and minimize the burden for government and contractors. The CASB should be reinvigorated by extracting it from the Office of Federal Procurement Policy and making it an independent Executive branch organization. The CAS program requirements should be modified to include raising the thresholds for full CAS coverage and the disclosure statement and adding guidance for CAS applicability to hybrid contracts and indefinite delivery contract vehicles.

SECTION 5: SERVICES CONTRACTING

The regulatory and statutory distinctions between personal and nonpersonal services are outdated and inconsistent with the multisector workforce management approaches used by DoD and other federal agencies. Eliminating the statutory and regulatory distinctions between personal services contracts and nonpersonal services contracts will facilitate a multisector workforce needed to achieve and maintain national, strategic, and operational objectives and provide for managerial flexibility in determining how to fulfill service requirements.

SECTION 6: ADDITIONAL STREAMLINING RECOMMENDATIONS

The Federal Retail Excise Tax (FRET) distorts DoD vehicle-buying decisions, increases administrative costs, and conflicts with current contract-pricing policy and governmentwide regulations limiting passthrough charges. DoD should be exempt from paying FRET. FAR Part 32.805, Procedures specifies outdated procedures for the assignment of claims to contract payment that require a physical impress of the corporate seal of the assignor as well as original documentation related to corporate authority to execute assignment. The FAR should be updated to reflect the use of modern technology.

SECTION 7: TITLE 10 REORGANIZATION

In the 60 years since Title 10 was enacted, the acquisition-related part of the Code has expanded and the once organized structure now contains myriad note sections, making acquisition law challenging to navigate. Repealing certain Title 10 sections and note sections, creating a new Part V under Subtitle A of Title 10, and redesignating sections in Subtitles B-D to make room for Part V will support a more logical organization of Title 10 and facilitate greater ease of use.

SECTION 8: OPERATIONALIZING THE DYNAMIC MARKETPLACE

The Section 809 Panel has continued to examine the Dynamic Marketplace concept as an avenue for bold changes to the cost-centric and inflexible system used today that values process perfection over operational output. In working to translate this concept into transaction rules, it has become apparent that there are three operational lanes—rather than four, as described in the *Volume 1 Report*. Lane 1 pertains to readily available items that can be purchased with no customization or can be purchased with customization that is part of the normal course of business. Lane 2 pertains to items readily available to the private-sector but require customization that is consistent with existing private-sector practices to meet DoD needs. Lane 3 pertains to defense-unique items or development.



INTRODUCTION TO VOLUME 2

In the FY 2016 NDAA, Congress established the Panel on Streamlining and Codifying Acquisition (commonly known as the Section 809 Panel) to review regulations related to defense acquisition and recommend amendments and repeals that would make the system more efficient and effective.¹ Congress also tasked the Section 809 Panel with making recommendations to ensure the defense acquisition system establishes appropriate relationships between government and industry, improves function, maintains financial and ethical integrity, and protects DoD's and the taxpayers' best interests.

Volume 1 of the Section 809 Panel's *Final Report* highlighted challenges associated with the current process-based system and offered a glimpse of how an outcomes-based approach could expedite the acquisition process and better meet warfighter needs to include competition and collaboration, adaptation and responsiveness, transparency, time sensitivity, and the allowance for trade-offs. In the *Volume 2 Report*, the panel examines the defense policy foundation needed to support DoD's mission in an increasingly complex global environment marked by the rise of peer competitors, revisionist powers, and exponential technology change.

¹ Section 809 of the 2016 NDAA, Pub. L. No. 114–92, as amended by Section 863(d) of the FY 2017 NDAA, Pub. L. No. 114–328 and Sections 803(c) and 883 of the FY 2018 NDAA, Pub. L. No. 115–91.

New acquisition policies must account for the need to uphold and protect U.S. values, including accountability to and security of the American people, continued economic progress and prosperity, and promotion of the nation's interests at home and abroad.² Defense acquisition must be sufficiently responsive to global events and emerging threats. DoD once served as a major catalyst and funding source for scientific and technological innovation, driving research and development. Now, DoD must find ways to support and benefit from advances that are generally driven by the private sector, often in consumer markets.³

Defense acquisition must also operate within challenging fiscal constraints. Although DoD recently received a funding increase to restore readiness, the United States still faces trillion-dollar annual budget deficits.⁴ As Secretary of Defense James Mattis observed, "It is now contingent on us to gain full value from every taxpayer dollar spent on defense."⁵

FRAMEWORK FOR CHANGE: FIVE ELEMENTS OF DEFENSE ACQUISITION

Five key elements drive the acquisition process and provide a framework for change:

- **Strategy:** the mission and goals of defense acquisition.
- **Structure:** how the defense acquisition enterprise is organized and the roles of stakeholders within the enterprise.
- **Processes and Procedures:** the means by which requirements, resources, procurement, and processes are used to deliver warfighting systems.
- **Resources:** the people, funding, data, and time that serve as the means for defense acquisition to execute against its mission and goals.
- **Culture:** the values and behaviors that shape the environment and practices of defense acquisition.

To ensure defense acquisition optimally serves warfighters, these five elements must work in harmony, even as they are subjected to outside constraints and pressures as depicted in Figure 1 below, which is Harold Leavitt's System Model for Change Management.⁶ There are many other models that might be used to understand organizations and change, such as the McKinsey 7Ss framework or the Burke–Litwin Model of Organizational Change. For example, as depicted in the model below (see Figure 1), if moving at greater speed is a goal, then processes and procedures, organizational structures, and

² Office of the President of the United States, *National Security Strategy of the United States of America*, December 2017, accessed May 3, 2018, <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf>.

³ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Interim Report*, 4 (2017).

⁴ Bipartisan Budget Act of 2018, Pub. L. No. 115–123. Department of Defense Appropriations Act, 2018, Division C, Pub. L. No. 115–141. "Trillion-Dollar Deficits Could Return Next Year, But A Deal Could Make Them Worse," Committee for a Responsible Federal Budget, accessed on May 5, 2018, <http://www.crfb.org/blogs/trillion-dollar-deficits-could-return-next-year-deal-could-make-them-worse>.

⁵ Be Peerless Stewards of Taxpayers' Dollars, Secretary of Defense Memorandum (2018).

⁶ Mind Tools, *Leavitt's Diamond: An Integrated Approach to Change*, accessed May 24, 2018, https://edisciplinas.usp.br/pluginfile.php/1769799/mod_resource/content/3/texto%2001%20-%20Leavitts%20Diamond%20-%20An%20Integrated%20Approach%20to%20Change.pdf.

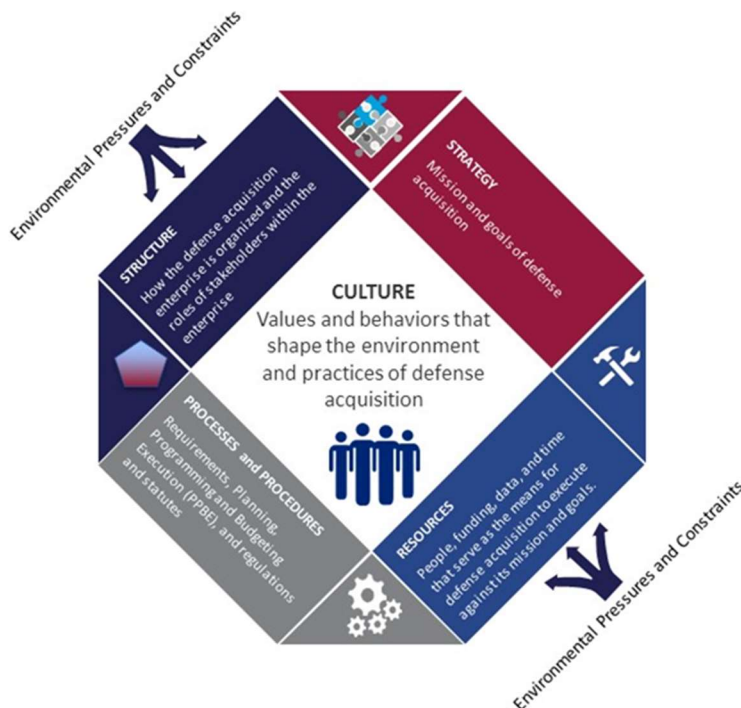
financial resources must align to support that end despite pressures such as limited funds and changing policies.

Figure 1. The Defense Acquisition Framework

Strategy

Strategy refers to the role defense acquisition plays in supporting objectives articulated in the National Security Strategy, National Defense Strategy, National Military Strategy, and other policy documents, as well as the wider context of global power politics. The strategic narrative of the wars in Iraq and Afghanistan focused on asymmetric warfare, emergent cybersecurity, and nontraditional approaches to warfare such as counterinsurgency, rather than Cold War era power politics. Regional conflicts, such as the war in Syria, have allowed great powers such as Russia an opportunity to gain strategic ground in global politics, while encouraging the re-emergence of geopolitics by its incursions into Ukraine in 2014. China's great-power ambitions include a program of territorial expansion through island-building in the South China Sea and a strategic objective to lead the world in artificial intelligence and autonomous systems by 2030.⁷ As elections in the West have demonstrated, despite continued globalization, borders and sovereignty remain ideological anchors in great-power politics.

The distinction between great-power politics and small, asymmetric and proxy wars has blurred, and the United States now must engage strategy that considers all venues of conflict: land, air, sea, cyberspace, and space. Sapolsky argued "security (is) a cyclical enterprise for America, froth with emotion and politics, which means it is impossible to make the acquisition process totally into an engineering design problem."⁸ As cyberwarfare rapidly advances (with China possibly holding the strategic advantage), and likelihood of space warfare looms, the United States must be able to exploit numerous capabilities to address diverse threats. Defense acquisition strategy must support continuous improvement of capabilities in a manner that adapts to new and changing strategic imperatives;



⁷ Chinese State Council, *A Next Generation Artificial Intelligence Development Plan*, accessed May 24, 2018, <https://www.newamerica.org/documents/1959/translation-fulltext-8.1.17.pdf>.

⁸ "Acquisition Reform; The Elusive Quest," Harvey M. Sapolsky, accessed May 23, 2018, <http://www.lexingtoninstitute.org/acquisition-reform-the-elusive-quest/>.

removes barriers; streamlines and clarifies regulations and laws; and enables government and industry to develop, field, and support 21st century capabilities.⁹

Today's Strategic Environment Demands Greater Speed and Innovation

The 2018 National Defense Strategy refocuses DoD on “long-term, strategic competition” with revanchist powers.¹⁰ Interstate competition from actors such as China and Russia is now DoD’s top priority. DoD aims to increase its competitiveness and restore dominance by building a more lethal Joint Force, rebuilding readiness, and attracting new partners through business practices that improve performance and affordability.¹¹ The defense acquisition system serves as a critical enabler, and as such must accomplish the following objectives of the National Defense Strategy:¹²

- Deliver performance at the speed of relevance.
- Organize for innovation.
- Drive budget discipline and affordability.
- Streamline rapid, iterative approaches from development to fielding.
- Harness and protect the national security innovation base.

Often, legacy programs and systems are not responsive to current defense acquisition requirements. They necessitate increased use of work-arounds, such as Other Transaction Authorities and rapid acquisition organizations, to deliver DoD’s strategic objectives in a timely manner. Speed, innovation, and iterative capability development are essential, as are funding availability and flexibility; however, these vital characteristics remain elusive in the requirements development and procurement processes. In the current system, process and cost supersede delivery of up-to-date, well-conceived, and effective capabilities to warfighters.¹³

Delivering advanced capabilities at speed and scale must be a strategic DoD priority to outpace the threat and seize technological opportunities. Speed and scale, however, rely on a robust, risk-taking culture to deliver advanced capabilities. Defense acquisition should do more to leverage prototyping, experimentation, and other developmental activities, balancing innovation and operational risk. This approach avoids encumbering the research and engineering phase with costly procurement decisions or programs with a high-cost technical risk. The market, in collaboration with innovators within DoD, has begun to produce and promote experimentation. An example of this experimentation is the United States Special Operations Command’s acquisition model comprising speed, risk tolerance, scale, inclusivity, and relationships. The acquisition culture in this model “emphasizes an aggressive, operator-focused and innovative acquisition culture with an emphasis on agility and speed of delivery

⁹ For further discussion, see Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 6 (2018).

¹⁰ DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military’s Competitive Edge*, accessed May 2, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

¹¹ Ibid.

¹² Ibid.

¹³ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 6 (2018).

to the customer.”¹⁴ This culture relies on relationships with OSD, the Military Services, Congress, industry, academia, and foreign special operations forces organizations.¹⁵ This networked culture aims to create synchronization across combat and materiel development, ensuring that warfighters and stakeholders contribute to delivery capability.¹⁶ The challenge is determining how to promote more early-development experimentation across appropriate parts of the acquisition and requirements enterprise.

Examples of Section 809 Panel’s Efforts Focusing the Defense Acquisition System on Outcomes to Fulfill Strategic Imperatives

Dynamic Market Framework: In the *Volume 1 Report*, the Section 809 Panel translates the National Defense Strategy objectives laid out above into a vision for an outcomes-based acquisition system characterized by competition and collaboration, adaptation and responsiveness, transparency, time sensitivity, and the allowance for trade-offs.¹⁷ Such an outcomes-based system would ensure the desired strategic and operational effects are delivered to warfighters where and when they are needed. The Section 809 Panel’s recommendations on how to approach the Dynamic Marketplace address the goals of the National Defense Strategy; however, to make the necessary decisions “at the speed of relevance” change must also address other characteristics of defense acquisition such as roles and responsibilities, lines of authority, and information management.¹⁸ These other characteristics are the *structure* of defense acquisition.

Structure

Structure refers to how the defense acquisition enterprise is organized, including the roles of stakeholders within the enterprise. Structure includes lines of authority; how roles and responsibilities are assigned, controlled, and coordinated; and how information flows among organizational levels.¹⁹ Improvements to the defense acquisition structure rely on challenging long-held assumptions by identifying where issues exist and recommending change supported by thorough analysis.

A Centralized Acquisition Structure Hinders Speed and Struggles to Make Space for Innovation

The structure resulting from the Goldwater–Nichols Act is known today as *jointness*. This structure strengthened the role of the Chairman of the Joint Chiefs of Staff (JCS), established the Office of the Under Secretary of Defense for Acquisition (USD(A)), and created a structure of Service Component Executives with authority over Program Executive Officers (PEOs) and Program Managers (PMs), among other positions.²⁰ Figure 2 illustrates the organizational complexity growing out of Goldwater–Nichols Act implementation. This legislation encouraged jointness among the Military Services but with the unintended consequence of delays, slow decision making, and stifled flexibility in the midst of

¹⁴ COL Joe Capobianco and COL David Phillips, U.S. Army, “Strengths and myths of what makes special operations forces acquisition special,” *AT&L Magazine*, July–September 2018, accessed May 21, 2018, https://www.army.mil/article-amp/205259/strengths_and_myths_of_what_makes_special_operations_forces_acquisition_special?_twitter_impression=true.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 7 (2018).

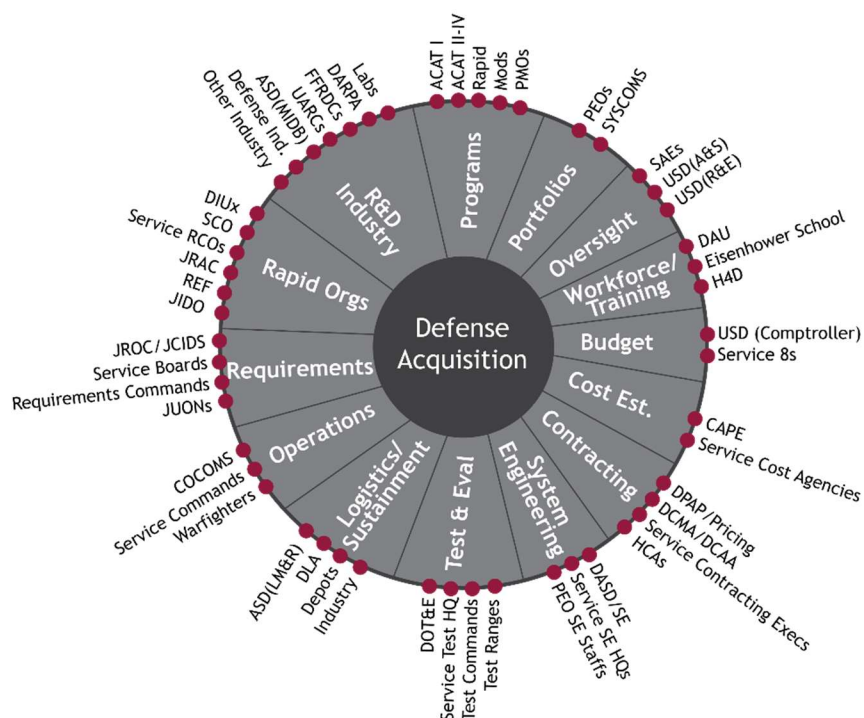
¹⁸ DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military’s Competitive Edge*, accessed May 2, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

¹⁹ “Organizational structure,” accessed May 24, 2018, <http://www.businessdictionary.com/definition/organizational-structure.html>.

²⁰ Goldwater–Nichols Department of Defense Reorganization Act of October 4, 1986, Pub. L. No. 99-433. Section 901 of the DoD Authorization Act for FY 1987, Pub. L. No. 99-661, enacted Nov. 14, 1986, restated section 133 and added specified functions for the USD(A).

evolving requirements where markets were moving forward.²¹ An example of how this focus on jointness has contributed to this type of system is the Joint Requirements Oversight Council (JROC) requirements approval process. In 2015, GAO found it took on average 24 months to complete a Capability Development Document (CDD), the longest of all the program documentation processes that GAO reviewed.²² CDD approval delays take personnel resources away from other program work and can delay the release of a Development Request for Proposal (RFP).²³

Figure 2. Decision-Making Entities in the Defense Acquisition Process



GAO noted the combination of centralization, multiple approval layers, and information requirements that are not value-added affect efficiency of major defense acquisition programs (MDAP).²⁴ GAO reported involvement of more than 56 organizations, at eight different levels, accounting for more than a year's staffing and coordination.²⁵ On average, programs took more than 2 years and more than 5,600 staff days to gain milestone documentation approval. Extensive staffing requirements and numbers of organizations involved, coupled with minimal local approval authority by the PEO and Program Management Office (PMO), added extra effort for the PMO and questionable value to overall acquisition outcomes.²⁶ This system threatens DoD's ability to sustain technological and military superiority because it is fundamentally disconnected from today's rapidly changing operating

²¹ Goldwater–Nichols Department of Defense Reorganization Act of October 4, 1986, Pub. L. No. 99-433.

²² GAO, *DOD Should Streamline Its Decision-Making Process for Weapon Systems to Reduce Inefficiencies*, GAO-15-192, accessed May 19, 2018, <http://www.gao.gov/assets/670/668629.pdf>.

²³ JCIDS Process Capability Development Document (CDD), accessed May 20, 2018, <http://acqnotes.com/acqnotes/acquisitions/capability-development-document-cdd>.

²⁴ GAO, *DOD Should Streamline Its Decision-Making Process for Weapon Systems to Reduce Inefficiencies*, GAO-15-192, accessed May 19, 2018, <http://www.gao.gov/assets/670/668629.pdf>.

²⁵ Ibid.

²⁶ Ibid.

environment and markets. Decentralization would push decision making to the most appropriate level, add speed, and lend greater flexibility to the process.

Ongoing Efforts to Decentralize Defense Acquisition are Necessary, but Present New Challenges

Recognizing the negative effects of a highly centralized system, Congress enacted legislation in the FY 2016, FY 2017, and FY 2018 NDAs to facilitate a more decentralized structure. The legislation has focused on decision making at appropriate organization levels for greater speed, innovation, and flexibility. For example, Milestone Decision Authority (MDA) was delegated to the Service Acquisition Executives of most existing MDAPs and all new MDAPs with a Milestone A starting after FY 2016. Additionally, authority for requirements has been given to the Military Service Chiefs, and Acquisition Category II programs' MDAs have been delegated to PEOs.²⁷

Decentralization allows for greater speed and decision making at lower levels; however, it can also complicate resource management, communication, and organizational strategic alignment. Without clear ownership of responsibilities and appropriate lines of authority, DoD will experience continued challenges in effectively allocating resources and fielding needed warfighter capability. To maximize the benefit of decentralization, the acquisition structure must have strong leadership, organizational strategic alignment, clear lines of authority, free-flowing communication, trust, and transparency.

A disciplined policy approach can be achieved through decentralization, but additional mechanisms, and most importantly, full support and alignment across the organization, must be in place to maximize its value.²⁸

Examples of Section 809 Panel's Efforts Recommendations That Support a More Agile Structure

Repeal Statutorily Mandated Offices: The *Volume 1 Report* put forward recommendations to repeal statutorily mandated offices to give the Secretary of Defense greater flexibility in structuring DoD to best meet current and future challenges.²⁹

Eliminate Military Service- and Departmental-Level Oversight that is Not Value-added: The *Volume 1 Report* offered recommendations to eliminate Military Service- and department-level oversight redundancies and realign milestone reviews to create more frequent decision points. Targeted areas of improvement included milestone decision, requirements, funding, and test structures. These recommendations focused on streamlining the approval chain, establishing more clear lines of authority, and accounting for the unique nature of IT acquisition.³⁰

Reorganize the Acquisition Enterprise from Program-Centric to Portfolio-Driven: In the *Volume 2 Report*, the Section 809 Panel puts forward introductory concepts to improve lifecycle management for major weapon systems. This introductory work centers on reorganizing the acquisition enterprise away from a program-centric design to portfolios within DoD and Military Service levels. Portfolio management enables decentralization by pushing authority and decision making to the lowest level practicable to allow for better management and coordination of warfighting capabilities acquired and sustained by empowered portfolio

²⁷ Aaron Mehta, "This is the Pentagon's new acquisition structure," *Defense News*, August 2, 2017, accessed May 20, 2018, <https://www.defensenews.com/breaking-news/2017/08/02/this-is-the-pentagons-new-acquisition-structure>.

²⁸ Gifford Pinchot and Elizabeth Pinchot, *Intelligent Organization*, (Oakland, CA: Berrett-Koehler Publishers, 1996) 315–319.

²⁹ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, Section 7, (2018).

³⁰ Ibid, 3.

Examples of Section 809 Panel's Efforts Recommendations That Support a More Agile Structure

managers aligned to capabilities. This approach would allow DoD to make smarter investment decisions and ensure warfighters achieve necessary outcomes.

Processes and Procedures

Defense acquisition is a system of systems that relies on collaborative, cross-functional and cross-component business processes, procedures, policy implementation, and oversight. Guidance documents that support defense acquisition include DoD 5000 Defense Acquisition System directives and instructions, addressing acquisition functions; the Federal Acquisition Regulation (FAR), addressing contracting functions; DoD 7000 Financial Management Regulation (FMR) and related documents, addressing fiscal functions; and the Defense Contract Audit Agency (DCAA), addressing DoD audit functions. DoD agencies supplement overarching DoD guidance to address component-unique mission needs and organizational structure requirements. For example, the FAR is supplemented by the Defense Federal Acquisition Regulation Supplement (DFARS) to provide DoD-unique guidance, and individual DoD agencies further supplement this guidance as needed. This core guidance framework is the basis for defense acquisition and merits preservation.

Recommendations that challenge current statutory and regulatory requirements engender lasting change. Two such examples include a recommendation to enable use of Agile methods in software development and management and a recommendation to update policies on how services are acquired to align with the composition of DoD total workforce model. Stakeholder feedback indicated that processes and procedures that were appropriate from the 1970s to the early 2000s do not operate at sufficient speed, nor do they scale well to deal with today's threats.³¹ One DoD official, whose experience spans cyber operations and acquisition, stated that requirements can change in *hours*, not *years*.³²

Requirements

The current requirements process, the Joint Capabilities Integration Development System (JCIDS), originated in the Nixon administration's efforts (then referred to as Requirements Governance System) to curb defense spending.³³ The first directive on the acquisition system, DoDD 5000.01, now titled The Defense Acquisition System, was issued in 1971 to provide guidance for improving how the defense acquisition system functioned, including the requirements process.³⁴ In response to an encumbered process, JCIDS was created in 2003 to support the Chairman JCS and the Military Services in determining and prioritizing capability gaps and needs. Much of the requirements process today in

³¹ Senior DoD official, meeting with Section 809 Panel, October 2017.

³² Ibid.

³³ Jarrett Lane and Michelle Johnson, "Failures of Imaginations: The Military's Biggest Acquisition Challenge," *War on the Rocks*, April 3, 2018, accessed May 25, 2018, <https://warontherocks.com/2018/04/failures-of-imagination-the-militarys-biggest-acquisition-challenge/>.

³⁴ Joe Ferrara, Defense Technical Information Center, *DOD's 5000 Documents: Evolution and Change in Defense Acquisition Policy*, accessed May 24, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a487769.pdf>.

JCIDS exists due to both historical precedent and the need to ensure joint capabilities among the Military Services.³⁵

More generally the JCIDS process does the following:

- Supports the acquisition process by identifying and assessing capability needs and associated performance criteria to be used as a basis for acquiring the right capabilities, including the right systems.
- Uses capability needs as the basis for the development and production of systems to fill those needs.
- Provides the PPBE process with affordability advice by assessing development and production lifecycle cost.³⁶

The Joint Staff Deputy Director for Requirements (the *J-8*) serves as the Joint Staff *gatekeeper* under the JCIDS process. The gatekeeper acts as the sole point of entry for anyone seeking JROC approval of a capability requirement document. The gatekeeper also maintains archived requirements documentation and coordinates between JROC and the intelligence community. Key products JCIDS produces to support the defense acquisition system include the Initial Capabilities Document (ICD), the Capability Development Document (CDD), and the Capability Production Document (CPD). The purpose of each document is as follows:³⁷

- **ICD:** serves as the basis for a subsequent Analysis of Alternatives (AoA) conducted in the Materiel Solution Analysis Phase (Milestone A) for ACAT I programs.
- **CDD:** focuses on the specific capability being developed to close the gap and is the preferred alternative chosen from the AoA; entry criteria for Engineering and Manufacturing Development (EMD), Milestone B, program initiation.
- **CPD:** serves as the final updated capability document prior to full-rate production, Milestone C; adjustments made by acquisition, resource, and requirement communities.

JCIDS documentation delivery is directly related to program acquisition milestones. Figure 3 shows the relationship of the JCIDS documentation to milestone approval. Any disturbances in the documentation approval will directly affect the program's schedule.³⁸

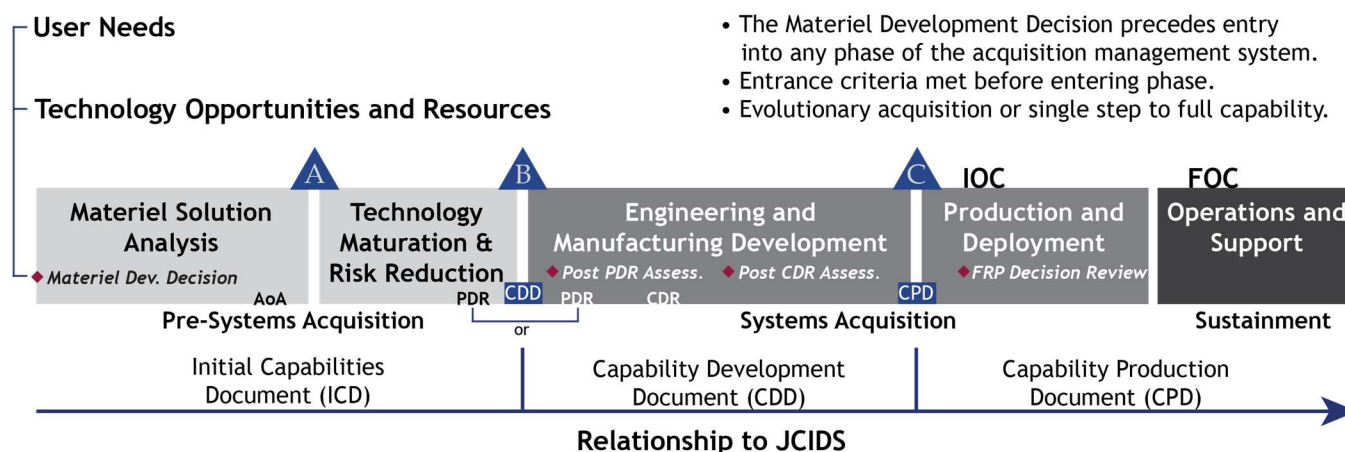
³⁵ LTC Douglas Cherry, *Making JCIDS Work for the Warfighter*, accessed May 24, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a517906.pdf>.

³⁶ Stephen Howard Chadwick, *Defense Acquisition: Overview, Issues, and Options for Congress*, (Washington, DC: Congressional Research Service, 2007).

³⁷ *Ibid.*

³⁸ Joint Capabilities Integration and Development System, CJCSI 3170.01 (2009).

Figure 3. Acquisition Lifecycle Relationship to JCIDS³⁹



Note. PDR=Preliminary Design Review; CDR=Critical Design Review; FRP=Full Rate Production; IOC=Initial Operating Capacity; FOC=Full Operational Capacity

JCIDS's requirements constrain DoD's ability to deliver capabilities with greater speed, agility, and innovation. Lengthy analyses and reviews required by bureaucracy layers encumber the current system and result in excessive hiring timelines and limited solutions. As such, the requirements process reflects an outdated approach to informing DoD's investment decisions, particularly for high-dollar acquisitions, and it is not conducive to the complex and fast-paced threat environment facing the United States. The Section 809 Panel found in its earlier research, "DoD's preference for narrowly defined requirements and unique products creates a barrier for industry to provide innovative technology and results in DoD struggling to achieve optimal outcomes."⁴⁰

The system is too inward-looking and lacks the speed, agility, and innovation the current environment requires.⁴¹ The system functions on a *requirements pull* instead of a *requirements push* methodology. The requirements pull is driven by a particular threat or predefined solution that limits innovative alternatives and leading-edge technologies. The requirements push methodology allows for innovative solutions that anticipate new warfighting approaches and threats. Hypersonic technology serves to illustrate this point. In the past, the United States had a commanding advantage in hypersonic research and technology, but it is now in jeopardy of falling behind China and Russia in hypersonic weapon development. JCIDS contributes to this lag. The United States is constrained by a requirements process that reacts to needs rather than anticipates them. Meanwhile, China and Russia have invested heavily in hypersonic research technologies.⁴²

Congress and DoD have acknowledged system inefficiencies and implemented changes to make the system more responsive. The FY 2016, FY 2017, and FY 2018 NDAs each contain legislation that targets acquisition requirements improvements. Congress directed the Secretary of Defense and the

³⁹ William Fast, *Improving Defense Acquisition Decision Making*, accessed May 24, 2018, <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA518523>.

⁴⁰ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 6 (2018).

⁴¹ Jarrett Lane and Michelle Johnson, "Failures of Imaginations: The Military's Biggest Acquisition Challenge," *War on the Rocks*, April 3, 2018, accessed May 25, 2018, <https://warontherocks.com/2018/04/failures-of-imagination-the-militarys-biggest-acquisition-challenge/>.

⁴² Sydney J. Freedberg Jr., "DoD Boosts Hypersonics 136% In 2019: DARPA," *Breaking Defense*, accessed May 20, 2018, <https://breakingdefense.com/2018/03/dod-boosts-hypersonics-136-in-2019-darpa/>.

Chairman JCS in Section 810 of the FY 2016 NDAA to review the requirements processes to establish an agile and streamlined system. Congress also directed DoD to develop time-based requirements processes based on capabilities to be deployed urgently, within 2 years, within 5 years, and longer than 5 years.⁴³

Responding to congressional direction, DoD is working to improve the acquisition and requirements process. The Navy enhanced its *six-gate* review process with early and continuous involvement of the Chief of Naval Operations and Assistant Secretary of the Navy for Research, Development and Acquisition (ASN(RDA)) throughout the acquisition lifecycle. The Army Requirements Oversight Council (AROC) has been reinvigorated as a command-centric versus staff-centric forum. For example, AROC provides executive-level approval of capabilities documents. Additionally, the Army Rapid Capabilities Office was established to address emerging threats with accelerated outcomes through early development. The Air Force established the Air Force Rapid Capabilities Office (AFRCO), which undertakes expedited and operationally focused concept-through-fielding activities to support immediate and near-term needs.⁴⁴ AFRCO's key operating principles include a short and narrow chain of command; overarching programmatic insight; early and prominent warfighter involvement with small, integrated operating teams within a single office; high DoD, Air Force, or industrial precedence rating; and funding stability. In addition, waivers to, and deviations from, any encumbering practices, procedures, policies, directives or regulations may be granted to ensure the timely accomplishment of the mission within applicable statutory guidance.⁴⁵

Examples of Section 809 Panel's Efforts Recommendations to Help Rebalance DoD's Acquisition System to Prioritize Outcomes

Requirements System: The Section 809 Panel seeks to build on what Congress and DoD have begun by providing recommendations to make the requirements system more responsive and agile. The *Volume 2 Report* introduces several foundational structures that will be elucidated in the *Volume 3 Report* recommendations.

Capability Portfolio Management: This approach offers potential for great returns. A broader portfolio of capability needs would enable greater system interoperability than the large, fixed-requirements documents used for major weapon systems. DoD needs to transition from stovepiped, program-centric requirements documents with system performance thresholds to integrated requirements for portfolios of capabilities. This portfolio approach to requirements, aligned with a more dynamic portfolio resource allocation model, provides the flexibility to iteratively fund and execute priority capabilities. For the system to be fueled by innovation, DoD must promote active collaboration among the government research community, federally funded research and development centers, universities, and industry. This collaboration will be critical for healthy competition of ideas and true innovation in early program development.⁴⁶ An approach allowing for a range of ways to establish needs would reset the entrenched culture and processes currently limiting the system. Teaching the operational and acquisition communities to identify and clearly articulate problems will

⁴³ Section 810 of the FY 2016 NDAA, Pub. L. No. 114-92.

⁴⁴ U.S. Air Force, "Rapid Capabilities Office," accessed May 20, 2018, <http://www.af.mil/About-Us/Fact-Sheets/Display/Article/104513/rapid-capabilities-office/>.

⁴⁵ Department of Defense Report to Congress on Linking and Streamlining Army Requirements, Acquisition, and Budget Processes, May 2016.

⁴⁶ Michele Flournoy, Center for a New American Security, *Testimony before the Senate Armed Services Committee*, December 8, 2015, accessed May 20, 2018, https://www.armed-services.senate.gov/imo/media/doc/Flournoy_12-08-15.pdf.

Examples of Section 809 Panel's Efforts
Recommendations to Help Rebalance DoD's Acquisition System to Prioritize Outcomes

invite innovation and new ways of getting the mission done.⁴⁷ The Hacking for Defense (H4D) program is an example of problem-solving methodology with potential to infuse speed, agility, and innovation into the requirements system.

Planning, Programming, Budgeting, and Execution (PPBE)

DoD uses PPBE as its primary resource management system. PPBE is rooted in the legacy of Secretary of Defense Robert McNamara, who “set out to optimize the nation’s arsenal, to provide the best military capability in the most efficient manner, subordinating the parochial interests of the individual services.”⁴⁸ McNamara believed PPBE, created in the early 1960s, was a key policy lever that used funding to influence behavior across the enterprise.

Through PPBE, DoD allocates resources by considering capability needs, risk, and affordability. PPBE is intended to achieve the best mix of resources (forces, manpower, material, equipment, and support) to effectively implement military strategy. DoD uses PPBE for strategic planning, program development, resource determination, and budget justification and execution.⁴⁹

Administrations have emphasized PPBE enhancements to enable long-range planning, a greater decentralization of authority to the Military Services, closer attention to cost savings and efficiencies, a refocus of leadership involvement, and a general streamlining of the entire PPBE process. For example, in 2010, former Deputy Secretary of Defense William Lynn eliminated the 2-year budgeting process and returned to a single-year budget and annual Program Objective Memorandum (POM) process.⁵⁰ Former Secretary of Defense Robert Gates created the Defense Planning and Programming Guidance (DPPG) to support POM development and the Front End Analysis process to facilitate up-front decision making in the programming phase.⁵¹ DPPG implementation resulted in leadership involvement earlier in the acquisition lifecycle.

Despite PPBE being one of the federal government’s most robust resource allocation systems, challenges that adversely affect outcomes persist.⁵² Vague lines of authority and accountability result in a lack of transparency and access to accurate data. Stovepiped objectives fragment the system. Strategic objectives and investment decisions are misaligned, with execution driven by impractical timelines, strained personnel resources, and inadequate time for planning and debate. The rigid system fails to

⁴⁷ Ibid.

⁴⁸ Phil Rosenzweig, “Robert S. McNamara and the Evolution of Modern Management,” *Harvard Business Review*, December 2010, accessed May 24, 2018, <https://hbr.org/2010/12/robert-s-mcnamara-and-the-evolution-of-modern-management>.

⁴⁹ The Planning, Programming, Budgeting, and Execution (PPBE) Process, DoDD 7045.14, 2017.

⁵⁰ William Lynn, “Procedures and Schedule for Fiscal Year 2012-2016 Integrated Program/Budget Review,” April 9, 2010, accessed May 24, 2018, <http://www.acqnotes.com/Attachments/Memorandum%20from%20the%20Deputy%20Secretary%20of%20Defense%20dated%209%20April%202010.pdf>.

⁵¹ U.S. Army War College, *How the Army Runs: A Senior Leader Reference Handbook, 2011-2012*, accessed May 24, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a551164.pdf>.

⁵² GAO, *Opportunities Exist to Improve the Department of Defense's Portfolio Management*, GAO-15-466, accessed June 23, 2018, <https://www.gao.gov/products/GAO-15-466>.

accommodate real-time, emerging, warfighter needs. Its program-centric focus limits flexibility and inhibits strategic focus.

To achieve its tactical and strategic goals, DoD needs to get the PPBE system *right*. To do so, DoD must make the right investment decisions and have the resources to execute those decisions. DoD must address shortfalls to optimizing its resources, which GAO indicated is challenging. “DoD lacks the governance structure, sustained leadership, and policy to do so...this fragmentation does not allow for an integrated portfolio management (resource allocation) approach to making investment decisions across the department.”⁵³ GAO also reported that OSD officials felt limited in their ability to meaningfully influence or change Military Services’ investment priorities because of the Title 10 responsibility to buy weapons.⁵⁴ Although DoD relies on being able to execute its acquisition plans to maintain military advantage, the Congressional Budget Office (CBO) has projected a more than a 21 percent increase in weapon systems acquisition costs through the early 2020s, bringing into question the overall affordability of DoD’s current programs.⁵⁵

The 2006 Defense Acquisition Performance Assessment described the investment process as,

*a highly complex mechanism that is fragmented in its operation...[has] driven the requirements, acquisition, and budget processes further apart, and [has] inserted significant instability into the acquisition system. In practice, however, these processes and practitioners often operate independent of one another. Uncoordinated changes in each of the processes often cause unintended negative consequences that magnify the effects of disruptions in any one area.*⁵⁶

OSD and the Military Services created Rapid Capability Offices to address emergent issues outside the system for both requirements and PPBE because the current processes lack needed flexibility to rapidly plan, program, and fund emergent needs.

Examples of Section 809 Panel’s Efforts Recommendations to Increase Flexibility

Portfolio Management: In the *Volume 2 Report*, the Section 809 Panel introduces the concepts of enterprise and execution portfolio management, which feature decentralized processes and appropriate-level authority to enable budget and financial execution flexibility.

Continuing Resolutions: In January 2019 the *Volume 3 Report*, the Section 809 Panel will put forward recommendations to mitigate effects of the continuing resolutions and allow for continued, efficient financial execution.

Funding Flexibility: The *Volume 3 Report* will also include recommendations for ways to infuse programming and funding flexibility through adjustments to the reprogramming rules and obligation authority enhancements.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ William Fast, *Improving Defense Acquisition Decision Making*, accessed May 24, 2018, <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA518523>.

Procurement

Procurement processes and procedures are depicted in Figure 4. DoDI 5000.02 delineates policies and principles that govern the defense acquisition system and form the management foundation for all DoD programs. It also identifies the specific statutory and regulatory reports and other information requirements for each milestone review and decision point.

Unlike the calendar-driven PPBE process or the needs-driven JCIDS, the acquisition management system is event-driven. In event-based processes, programs go through a series of processes, milestones, and reviews from beginning to end. Each milestone culminates a phase at which the Milestone Decision Authority (MDA) must determine whether a program proceeds into the next phase. The MDA's primary responsibility is making *go/no-go* decisions, as well as ensuring programs demonstrate or complete the program-specific exit criteria for the given phase and the statutory and regulatory entrance criteria for the next phase of the system's lifecycle.⁵⁷ Figure 5 illustrates the acquisition lifecycle.

Figure 4. DoD Procurement Processes and Procedures

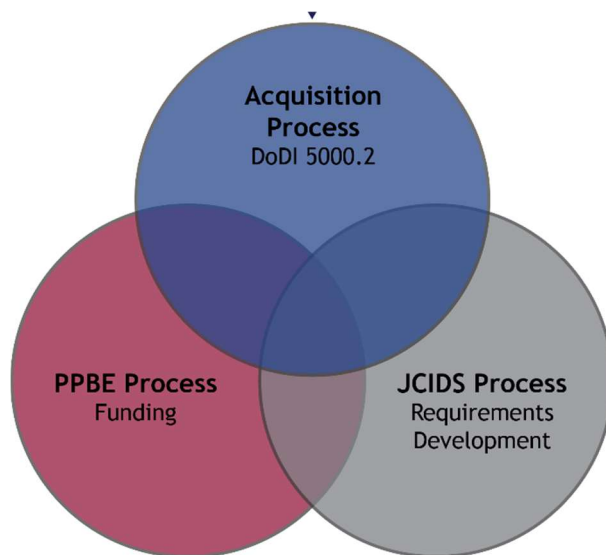
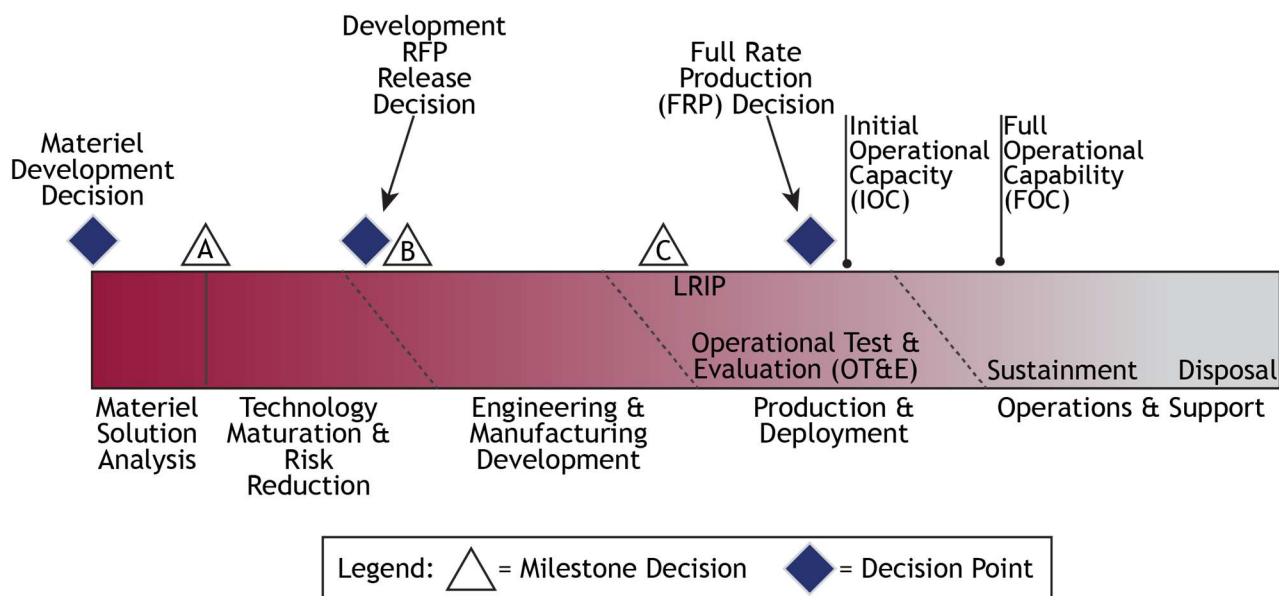


Figure 5. Acquisition Program Lifecycle⁵⁸



The procurement process is subjected to many of the same challenges as the funding and requirements processes. Centralized, multilevel decision making has impeded effectiveness and efficiency throughout the system. PMs have reported it takes more than 2 years to prepare and staff program

⁵⁷ Operation of the Defense Acquisition University, DoDI 5000.0 (2017).

⁵⁸ Ibid.

milestone decision documentation, with up to eight levels of approval required (a primary reason for excessive length).⁵⁹ The Air Force's acquisition strategy, for example, takes approximately 12 months during which procurements go through 56 offices.⁶⁰ Despite the time and effort invested to develop and staff system documentation, the usefulness and value to PMs is questionable. GAO reported that PMs only considered 10 percent of the reviews valuable.⁶¹ Reviews by staff functional experts are narrowly focused to individual expertise and often fail to consider the system as a whole or cost, schedule, and performance effects.⁶²

Military readiness, which is priority one for Secretary of Defense James Mattis, is paramount to the Military Service's future success.⁶³ Required operational availability is not driving sustainment requirements and readiness statistics are at the lowest levels since the post-Vietnam era.⁶⁴ This well-documented situation results from lack of focus on logistics and sustainment management, limited budget applied to those areas, decades spent in armed conflict, weapon systems that have outlived their intended operational lives, insufficient training, and a lack of a single individual responsible for weapon systems readiness.

Adopting a Sustainment Program Baseline (SPB) to foster active management of programs, operational readiness, and sustainment costs would underperformance in the sustainment system. The proposed SPB would bridge the gap between the acquisition and sustainment phases of the lifecycle and establish accountability among the stakeholders by actively managing requirements, cost, and funding and creating a contract among weapon system stakeholders to improve readiness.

The Section 809 Panel advocates improved data analytics with emphasis on lifecycle cost modeling and a defense materiel enterprise aligned to the National Defense Strategy to address the need for more flexible funding and contracting structures, elevate leadership visibility into logistics and sustainment aspects of a program, and elevate their importance to a level on par with development and production.

The current system focuses on process, not product. Former ASN(RDA) Sean Stackley said this focus takes PMs' attention away from the fundamentals of cost, schedule, and performance, and is one of the major contributors to negative acquisition outcomes.⁶⁵ This perspective is shared by many stakeholders with whom the Section 809 Panel met and was aptly described by one stakeholder as "mission becoming secondary to perfection of the contract."⁶⁶

The acquisition system is characterized as an inflexible, one-size-fits-all approach for which dissimilar products or services are acquired using the same processes. For example, the many regulatory and

⁵⁹ GAO, *DOD Should Streamline Its Decision-Making Process for Weapon Systems to Reduce Inefficiencies*, GAO-15-192, accessed May 19, 2018, 12, <http://www.gao.gov/assets/670/668629.pdf>.

⁶⁰ Ibid, 13.

⁶¹ Ibid, 13.

⁶² Ibid, 13.

⁶³ Guidance from Secretary Jim Mattis, memorandum for all Department of Defense Personnel, (2017).

⁶⁴ GAO, *DOD's Readiness Rebuilding Efforts May Be at Risk without a Comprehensive Plan*, GAO 16-841, accessed April 4, 2018, <https://www.gao.gov/products/GAO-16-841>.

⁶⁵ Kenneth A. Stewart, Acquisition Leaders Converge on NPS, *Naval Postgraduate School Update*, June 2016, accessed May 23, 2018, <https://my.nps.edu/documents/10180/108368743/Update+NPS+June+2016.pdf/f8d20a5f-8898-487b-8329-f82ffce0be0>

⁶⁶ Senior DoD official, meeting with Section 809 Panel, November 2017.

oversight requirements, appropriate for MDAPs, are not necessarily appropriate for the acquisition of basic commodities. These requirements produce process delays that detract from meeting warfighters' needs. Although acquisition regulations permitting risk-taking exist, the acquisition workforce is neither incentivized nor empowered to actually take risks.⁶⁷

Even with these challenges, DoD has shown some tangible improvements. The procurement system is typically measured in terms of cost, schedule, and performance. GAO noted that DoD has made improvements to the process, which has flattened cost growth across the MDAP portfolio from 2010 to 2015. GAO also reported cost decreases in 2015 and 2016 for programs that started development after DoD's Better Buying Power initiative began.⁶⁸

In 2014 DoD began using an electronic tool to help put time limits on documentation reviews. DoD is also assessing the relevance and importance of program information to tailor documentation requirements.⁶⁹ Congress, noting the need to increase efficiency in the procurement system, included provisions in the FY 2016, FY 2017, and FY 2018 NDAs to decentralize acquisition by allowing more authority and decision making at the appropriate level in the Military Services. The decentralization includes MDA and requirement approval authority.⁷⁰

Examples of Section 809 Panel's Efforts Recommendations to Increase Flexibility

Operational Flexibility: *Volume 1* of the *Final Report* recommended decentralizing management of the defense business systems by reducing the number of approval layers and giving approval authority to experienced portfolio leaders at the appropriate level. To gain additional efficiency and speed when implementing information technologies, the Section 809 Panel recommended eliminating the requirement to use Earned Value Management (EVM) when using Agile software development. In the *Volume 2 Report*, the panel introduced enterprise and execution capability management principles for weapon systems. The *Volume 3 Report* will follow with specific details.

Eliminate Reporting Requirements: In the *Volume 1 Report*, the Section 809 Panel recommended ways to right-size imposition of statutory business processes and procedures by eliminating some reporting requirements. These recommendations give the Secretary of Defense greater ability to align systems with strategic priorities.

Dynamic Marketplace: *The Volume 1 Report* introduced the Dynamic Marketplace—an outcomes-based acquisition process for providing DoD simplified access to the global marketplace and allowing DoD to leverage ideas, solutions, products, and services in closer to real-time than the current process allows.

Eliminate Obsolete Law: *The Volume 1 Report* included recommendations to repeal many obsolete provisions of law that either unnecessarily constrain the Secretary of Defense's authority or are no longer operative, giving DoD greater flexibility.

⁶⁷ See Statement of Guiding Principles for the Federal Acquisition System, FAR 1.102.

⁶⁸ GAO, *Assessments of Selected Weapon Programs*, GAO-17-333SP, accessed June 23, 2018, <https://www.gao.gov/products/GAO-17-333SP>.

⁶⁹ GAO, *DOD Should Streamline Its Decision-Making Process for Weapon Systems to Reduce Inefficiencies*, GAO-15-192, accessed May 19, 2018, 13, <http://www.gao.gov/assets/670/668629.pdf>.

⁷⁰ Aaron Mehta, "This is the Pentagon's new acquisition structure," *Defense News*, August 2, 2017, accessed May 20, 2018, <https://www.defensenews.com/breaking-news/2017/08/02/this-is-the-pentagons-new-acquisition-structure>.

Federal Acquisition Regulation

FAR system, codified at Title 48 Code of Federal Regulations, is the primary regulatory framework governing policies and procedures by which the federal government contracts for supplies and services and implements statutes, executive orders, policies and guidance. DoD supplements the FAR as needed to accommodate DoD-specific statutes, executive orders, and policies in the DFARS. The FAR system is complex because it implements the legislation, policies, guidance, and requirements of a diverse set of government entities and mission—legislative, executive, judicial, bureaucratic, and operational. This complexity has led to criticism that the FAR is difficult to navigate, which may result in acquisition professionals not fully using the flexibilities, simplified methods, and authorities available to them in the FAR System. The process by which the FAR System is updated and new regulations are promulgated also takes substantial time to accomplish. The Section 809 Panel is cognizant of these challenges and fully supports the need to address them. The panel is working on recommendations to address complexities and also speed up the timeframes within which statutes, executive orders, and policies are codified as part of the overall set of Section 809 Panel recommendations to simplify, streamline, and improve the efficiency and effectiveness of the defense acquisition process.

Examples of Section 809 Panel's Efforts Recommendations to Streamline and Declutter Regulations

FAR Genealogy: In the *Volume 2* and *Volume 3* reports, the Section 809 Panel is pursuing solutions to mitigate complicating and burdensome effects of the FAR and DFARS. One such solution suggests providing a research tool to query the base document that will identify the source, such as legislation or executive order, of the content of the FAR and DFARS. This tool will support identification of outdated, complicating, and burdensome language and guidance for other government entities and private-sector organizations.

Services Contracting: In the *Volume 1* and *Volume 2* reports, the Section 809 Panel has developed recommended changes to statutes, regulations, and other policies, including the FAR and DFARS, affecting acquisition of knowledge-based service. Changes to FAR Part 37 and DFARS Part 237 would eliminate the distinction between personal and nonpersonal services contracts, simplifying acquisition of support services.

Commercial Buying: In the *Volume 1* and *Volume 2* reports, the Section 809 Panel presented a number of recommendations to statutes and implementing regulations intended to improve DoD's access to the commercial marketplace. These recommendations include simplified definitions, elimination of burdensome government-unique terms and conditions, and a more simplified approach to selecting sources for commercial products and services.

Audit: In the *Volume 1 Report*, the Section 809 Panel recommendations would enable the contract compliance and audit system to achieve four key purposes: focus on the mission, value time, simplify, and operate with a cooperative spirit. It does this by recommending DoD internal controls be leveraged to provide timely, useful advice to contracting officers, allowing them to do their job with greater effectiveness. These controls offer a means for providing advice to contracting officers regarding cost/price negotiations, and allowing insight into contractors' current operations.

Resources

Time

Time is a fundamental resource that is used differently across the defense acquisition enterprise. For defense acquisition to provide “a rapid, iterative approach to capability development” speed has to be

managed with stewardship equal to any other valuable resource.⁷¹ Adopting such an approach will require all stakeholders in the system to be aligned on how they measure and value time. The Section 809 Panel has explored this issue in the *Volume 2 Report* and will make related recommendations in *Volume 3* of the *Final Report*.

Funding

Although PPBE funding is discussed above, its role as a resource must also be recognized. Following every major conflict since 1942, DoD funding reductions of between 30 and 40 percent occur.⁷² DoD is currently experiencing a rapid increase in budget to \$700 billion, but it depends on systems and structures that are slow to respond and leave it vulnerable to inefficiencies. Deputy Secretary of Defense Patrick Shanahan noted that with the sheer volume of military contracts execution, mistakes will inevitably occur.⁷³

Policy changes, such as the Budget Control Act, contribute to reduced readiness, degraded facilities, and lagging innovation as investment has shifted from research and development, procurement, and sustainment to preserving readiness. Assistant Secretary of Defense (Energy, Installations, and Environment) recently testified to the Senate Committee on Appropriations Subcommittee on Military Construction, Veterans Affairs, and Related Agencies Fiscal Year 2019, stating “These activities have endured funding constraints under the Budget Control Act, forcing Defense Components to accept significant risk in facilities sustainment and recapitalization.”⁷⁴ He states the reprioritization of funds has created “an unfunded backlog of deferred maintenance and repair (M&R) work exceeding \$116 billion, and many of our facilities will require significant investment in the future.”⁷⁵

Operations and Maintenance (O&M) funding has increased to 42 percent from a Cold War average of 28 percent, yet “procurement funding has fallen from an average of 28 percent of the budget during the Cold War to roughly 20 percent in recent years (both with and without OCO funding).”⁷⁶ This growth in O&M, according to CBO, can largely be accounted for through growth in the medical care for Military Service members, military retirees, and their families; civilian compensation; and fuel.⁷⁷ DoD

⁷¹ DoD, Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military’s Competitive Edge, accessed May 2, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

⁷² Clark A. Murdock, Ryan Crotty, and Angela Weaver, *Building the 2021 Affordable Military*, accessed June 23, 2018, <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/Building2021Military.pdf>.

⁷³ “Pentagon’s No. 2 Watches the Money—and the future,” Tom Bowman, NPR, accessed June 23, 2018, <https://www.npr.org/sections/parallels/2018/05/02/607525467/pentagons-no-2-watches-the-money-and-the-future>.

⁷⁴ Statement of Honorable Lucian Niemeyer Assistant Secretary Of Defense (Energy, Installations and Environment), Before the Senate Committee on Appropriations Subcommittee on Military Construction, Veterans Affairs, and Related Agencies Fiscal Year 2019 Department of Defense Budget Request for Energy, Installations and Environment, April 26, 2018, accessed May 21, 2018, <https://www.appropriations.senate.gov/imo/media/doc/042618%20-%20Niemeyer%20Testimony.pdf>.

⁷⁵ Statement of Honorable Lucian Niemeyer Assistant Secretary Of Defense (Energy, Installations and Environment), Before the Senate Committee on Appropriations Subcommittee on Military Construction, Veterans Affairs, and Related Agencies Fiscal Year 2019 Department of Defense Budget Request for Energy, Installations and Environment, April 26, 2018, accessed May 21, 2018, <https://www.appropriations.senate.gov/imo/media/doc/042618%20-%20Niemeyer%20Testimony.pdf>.

⁷⁶ Todd Harrison, CSIS, *Analysis of the FY 2018 Defense Budget*, accessed May 19, 2018, https://csis-prod.s3.amazonaws.com/s3fs-public/publication/171208_Defense_Budget_Analysis.pdf?_bMzg.Rwos033iujMRE7YyyabElygTDY.

⁷⁷ CBO, *Trends in Spending by the Department of Defense for Operation and Maintenance, January 2017*, accessed May 21, 2018, <https://www.cbo.gov/sites/default/files/115th-congress-2017-2018/reports/52156-omchartbook.pdf>.

spends more on maintenance than investing in the future, and this funding imbalance hinders DoD's ability to achieve strategic priorities as set out in the National Defense Strategy.

Example of Section 809 Panel's Efforts Recommendations to Stabilize the Budget

Future Work on Budget Challenges: The Section 809 Panel is continuing its research related to lowering funding instability risk by looking at reserve funding and other options. For the *Volume 3 Report*, the panel is exploring other ways to assist DoD in reducing financial uncertainty.

People

The defense acquisition workforce (AWF) represents a key resource in defense acquisition. The AWF has experienced changes in the past 3 decades, contracting and expanding in size. Lows of approximately 126,000 employees in the early 2000s, at the same time the United States engaged in two wars, alarmed former Secretary of Defense Robert Gates who urged DoD to expand the AWF and to provide professional development for its members.⁷⁸ These efforts have increased the AWF to approximately 165,000 personnel, more than half of whom hold bachelors or advanced degrees, as well as career function certifications.⁷⁹ Even with these improvements, the workforce is beleaguered by lengthy processes and procedures that prolong the hiring process and increase the time it takes to develop and deploy new curriculum and courses. To address these issues, Defense Acquisition University (DAU) is engaging with different approaches to learning that leverage emerging technologies and seek to make the AWF more flexible and responsive, with on-the-job training and access to flexible and interactive online courses. Another effort is the flipped classroom methodology—an approach for which instruction takes place outside the classroom and activities (often traditionally seen as homework) take place in the classroom—which is used in several DAU pilot programs and has demonstrated that alternative approaches to learning and problem solving may allow for fast-paced, iterative problem solving.⁸⁰

Examples of Section 809 Panel's Efforts Recommendations to Empower the Workforce

Hiring Authorities: In the *Volume 2 Report*, the Section 809 Panel recommends streamlining hiring authorities to increase the speed of recruitment and allow DoD to compete for talent.

Acquisition Demonstration Project (AcqDemo): In the *Volume 2 Report*, the Section 809 Panel recommends mandating AcqDemo for most of the defense AWF. AcqDemo empowers the workforce with a performance-based incentive structure.

Defense Acquisition Workforce Development Fund (DAWDF): In the *Volume 2 Report*, the Section 809 Panel recommends increasing oversight and structure robustness to ensure DAWDF is executed to its original purpose.

⁷⁸ Defense Acquisition Workforce Improvement Act P.L. 101-510, April 2009.

⁷⁹ Ibid.

⁸⁰ "An Innovation Insurgency," David Gallop, accessed May 20, 2018, <https://www.dau.mil/library/defense-atl/blog/An-Innovation-Insurgency>.

Partners: Public/Private and Allies

DoD no longer holds a technological edge over its competitors. For the past 100 years, the U.S. industrial base provided diverse and innovative solutions in a timely manner. Although the industrial base has evolved its technologies and its business practices, DoD acquisition has not. DoD has inconsistently partnered with the industrial base in how it communicates requirements, how it contracts for supplies and services, and how it attracts nontraditional suppliers. Without effective industry partnerships, DoD often procures materiel that is late and obsolete upon delivery. DoD needs to leverage innovation and technology in partnership with industry, academia, laboratories, and allies, to include considering international collaboration, interoperability, and the exportability of platforms.

Examples of Section 809 Panel's Efforts Recommendations to Improve Transparency Among Stakeholders

Communicate More Effectively with Industry: The *Volume 3 Report* will explore several recommendations to facilitate earlier and more collaborative communications between DoD and its suppliers by increasing use of Statement of Objectives (SOO) and allowing for more technological tradeoffs through the management of requirements at the portfolio level. The panel will also address the protest element of contract awards.

Align Relationships with Types of Transaction: The *Volume 3 Report* will also explore how DoD can adopt more commercial-like transactions when procuring supplies or services that are readily available.

Data

Data allow evidence-based decision making in defense acquisition that can enable strategic advantage. To optimize this advantage, defense acquisition communities must have reliable data and systems to support detailed analysis, yet current data systems used in planning and resource allocation are not interconnected or integrated. Both the Office of the Undersecretary for Acquisition, Technology, and Logistics (Now the Office of the Undersecretary for Acquisition Sustainment and the Office of the Undersecretary for Research and Engineering) and Joint Staff have expressed that barriers to accessing data constrain their analysis and oversight responsibilities. According to GAO, analysts at the OSD level, both acquisition and Joint Staff, stated they lacked systems and access to data, which impairs their ability to provide analysis that supports resource allocation decisions.⁸¹

When data are needed, DoD often depends on inefficient, time-consuming, and resource-intensive data calls to organizations that net poor-quality data that may not comport with the requirement.⁸² Often analysts at the local organization level lack the skills or systems to capture needed data. An example was a data call for all artificial intelligence (AI) efforts ongoing within DoD. The initial data call yielded 37 programs, while specialized analysis tools available on the market uncovered 593 number.⁸³

⁸¹ GAO, *Opportunities Exist to Improve the Department of Defense's Portfolio Management*, GAO-15-466, accessed June 23, 2018, <https://www.gao.gov/products/GAO-15-466>.

⁸² Ibid.

⁸³ Chris Taylor, Govini, briefing to Section 809 Panel, May 8, 2018.

**Example of Section 809 Panel's Efforts
Recommendations to Improve Data Management and Associated Tools**

Workforce Analytics: In the *Volume 2 Report*, the Section 809 Panel noted lack of standardization across the enterprise inhibits collection of crucial data with which to link strategic priorities to outcomes. The panel recommended adopting internal federal control standards.

CULTURE

Culture overarches strategy, structure, and systems, representing defense acquisition workforce, leaders, and partners as a whole. One definition of culture that aligns to the Section 809 Panel's approach is, "the self-sustaining pattern of behavior that determines how things are done."⁸⁴ The sort of changes the Section 809 Panel is recommending cannot create systemic change without a shift in culture. Culture cannot be legislated or regulated; it results from incremental system changes that empower the workforce while aligning strategic priorities to efficient business practices and procedures. Without a culture shift, changes to the system will not be fully realized as alluded to by one Air Force official who said, "For a number of years, the system was like a chained elephant, walking in a circle. Then, the chain got cut, but the elephant still walks in the same circle, not realizing it is free."⁸⁵

Cultural Change Requires Long-Term Commitment and Leadership

Cultural shifts depend on networks of leaders who are committed to a strategic vision. These networks must be resilient and adapt to changing political cycles and the needs of government employees who are currently in career pathways and functions for which cultural change is difficult. When government employees do not benefit from job rotations that foster new skills and knowledge, cultural change may stagnate. DoD industry exchange programs help counter this problem by providing government workers industry experience that will make them better negotiators, but such programs are not standardized across the enterprise.

Some parts of the current defense acquisition culture exhibit positive changes in behavior needed to keep DoD competitive. The Section 809 Panel's portfolio management recommendation aims to empower the workforce to make decisions at lower levels. The panel has recommended reduced transaction rules to increase transparency and partnership with industry.

**Examples of Section 809 Panel's Efforts
Recommendations to Improve Workforce Culture**

Exchange with Industry: One example of current research is systemwide implementation of *exchange-with-industry* programs. These programs build robust networks that provide access for the defense acquisition workforce to a greater body of knowledge and industry practices. These networks and relationships allow for immediate exchanges of knowledge and experience that support efficient and well-informed decision making.

⁸⁴ Jon Katzenbach, Carolin Oelschlegel, and James Thomas, "10 Principles of Organizational Culture," *Strategy+Business*, Spring 2016, Issue 82, <https://www.strategy-business.com/article/10-Principles-of-Organizational-Culture?gko=71d2f>.

⁸⁵ Stakeholder, comment to Section 809 Panel, May 2018.

Examples of Section 809 Panel's Efforts Recommendations to Improve Workforce Culture

Emerging Technologies/Artificial Intelligence (AI): The Section 809 Panel is currently researching the relationships between emerging technologies and AI to understand how they can be leveraged to put the defense AWF at strategic advantage. This research ranges from types of teaching/training methodologies that harness this technology to the effect of automation on efficiency and risk within the defense AWF.

Defense Acquisition University (DAU)/DAWIA: The Section 809 Panel is currently researching how Defense Acquisition University delivers training to empower decision making across the enterprise as the workforce continues its qualification and certification standards.

CONCLUSION

This introduction has provides a framework that shapes how the Section 809 Panel continues to address change to defense acquisition as a whole. U.S. defense acquisition is unparalleled but faces serious and substantial challenges and risks in an increasingly uncertain world. By discussing the core elements and attributes of defense acquisition, the Section 809 Panel indicates where it has made recommendations to affect real change, and identifies what further areas it seeks to address in the *Volume 3 Report*. It also identifies issues that will continue to require dedicated attention beyond the life of the panel, and provides an initial foundation for further inquiry and change.



Moving from program-centric to portfolio-driven management acquisition will facilitate meeting warfighter needs in a rapidly changing threat environment.

INTRODUCTION

The existing defense acquisition system does not allow for flexible and responsive program execution required by today's program managers and warfighting community. The current organization and management of Major Defense Acquisition Programs (MDAPs) center on individual programs defined by—and in some cases, confined by—Acquisition Program Baselines (APBs). Program-centric management at the Defense Acquisition Executive (DAE) and Service Acquisition Executive (SAE) levels inhibits programs from responding to the dynamic threat environment and potential technology solutions to it.

A structural change from program-centric management at the SAE level to more robust portfolio management at the Program Executive Officer (PEO) level would reduce the time and information challenges of the current centralized organization and allow for devolved decision making and flexibility in requirements, budgets, testing, and schedule. Four elements of this proposed shift to a portfolio management framework are outlined in this section. The first subsection explores the prospect of replacing the traditional PEO role with that of Portfolio Acquisition Executive (PAE) and describes responsibilities of this new position. The second subsection introduces the concept of enterprise-level

portfolio management and builds on existing directives to establish governance, categorization procedures, and other processes. The third subsection focuses on logistics and sustainment management, an area often overlooked in favor of new technology acquisition priorities. The Sustainment Program Baseline (SPB) is introduced as a tool to improve sustainment planning at the portfolio level. The final subsection examines the idea of replacing the current requirements process governed by Joint Capabilities Integration and Development System (JCIDS) with a management structure that allows for tradeoffs within the portfolio.

Portfolio Execution

The portfolio execution component of the framework is intended to elevate the role of PEO to PAE to remove the barriers and delays of the current program-centric, hierarchical management structure. Under this structure, PAEs would be responsible and accountable for development, procurement, and lifecycle management across the portfolio for operational capability to the Portfolio Acquisition and Sustainment Baseline (PASB). PAEs would have below threshold/above threshold authority to make tradeoffs inside the portfolio, and they would manage risk and opportunities across the portfolios for greater cost and schedule effectiveness. PAEs would be responsible for maintaining a capability roadmap that addresses emerging threats and opportunities for technology insertion.

Enterprise Capability Portfolio Management

Under the proposed framework, DoD would implement an Enterprise-level Capability Portfolio Management (ECPM) framework that provides an enterprise view of existing and planned capability across DoD to ensure delivery of integrated and innovative solutions. The ECPM framework employs current knowledge of portfolio management and recommends further action to codify processes and procedures. The ECPM framework is intended to consolidate the Program Element (PE) budgeting system into one capability portfolio budget.

Sustainment

Logistics and sustainment management efforts have long played a secondary role to development and procurement within the defense acquisition system. The lack of attention to logistics and sustainment management has led to readiness issues, rising costs, and other concerns. By placing sustainment responsibilities within the portfolio management framework, two important objectives are advanced: elevation of sustainment as equally important within lifecycle management and establishment of a SPB, similar to the APB currently governing MDAP acquisition. These proposed actions would serve to preserve the budgetary and support elements often sacrificed under the current program-centric management. The new framework would also allow the sustainment community to capture potential economies of scale across platforms within the portfolio.

Requirements

To effectively implement a portfolio acquisition approach, the requirements process must be tailored to enable greater speed and agility. Managing requirements through a broader set of portfolio requirements would enable technological trade-offs and greater system interoperability than is currently allowed under the JCIDS paradigm of large, fixed-requirements documents for MDAPs. This portfolio approach to requirements, aligned with a more dynamic portfolio resource allocation model, provides the flexibility to iteratively fund and execute priority capabilities. The PAE would regularly collaborate with operational and requirements commands on concept of operations (CONOPS),

requirements, threats, and potential solutions and opportunities. Further, portfolios could manage unmet requirements via a portfolio backlog.

EXECUTION PORTFOLIO MANAGEMENT

Problem

The U.S. threat environment—in the wake of adversaries modernizing their militaries—has become increasingly dynamic and complex, making it challenging for the United States to maintain technological, military, and economic superiority.¹ DoD must identify gaps quickly and respond agilely to this asymmetric threat environment; however, the existing acquisition system does not allow for flexible, agile, and responsive program execution to meet real-time threats. Consequently, DoD is not keeping pace with the rapidly evolving environment.² Current defense acquisition can be characterized by the following:

- Centralized and serial organizational structure under which sequentially made decisions cause bottlenecks and delays.
- Risk-aversion motivated by avoiding an APB breach.
- Lack of PEO and Program Manager (PM) authority commensurate with responsibilities.
- Decision making that is program-centric, instead of broad-capability-driven.
- Decision stovepipes burdened with documents and multiple review layers, adding little value but substantial time to the schedule.

These characteristics forge systems that preclude timely responses to technologies, priorities, or dynamic threats.³ The current acquisition system is more responsive to protecting against a Nunn–McCurdy breach than a real enemy.⁴ That system must pivot to an outward focus to respond to real-time threats from adversaries.

Background

In 1986, the Packard Commission recommended organizational changes to address chronic instabilities in major weapon systems procurement, budgeting, oversight, and organizational structure.⁵ The commission identified two key problems: fragmented responsibility for acquisition policy and absence of a senior official at the Office of the Secretary of Defense (OSD) level to provide acquisition system supervision.⁶ The commission recommended establishing an Under Secretary of Defense (Acquisition), a comparable senior position for the Military Services, and PEOs to resolve instabilities in major

¹ Charles R. Mahon and John D. Driessnack, *Winning in the 21st Century: An Acquisition Point Paper to the Section 809 Panel*, September 2017, accessed June 7, 2018, <https://www.pmi.org/-/media/pmi/documents/public/pdf/white-papers/command-negation.pdf>.

² Ibid.

³ Ibid.

⁴ Moshe Schwartz and Charles V. O'Connor, *The Nunn-McCurdy Act: Background, Analysis, and Issues for Congress*, Congressional Research Service, May 12, 2016, accessed June 7, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/1013630.pdf>.

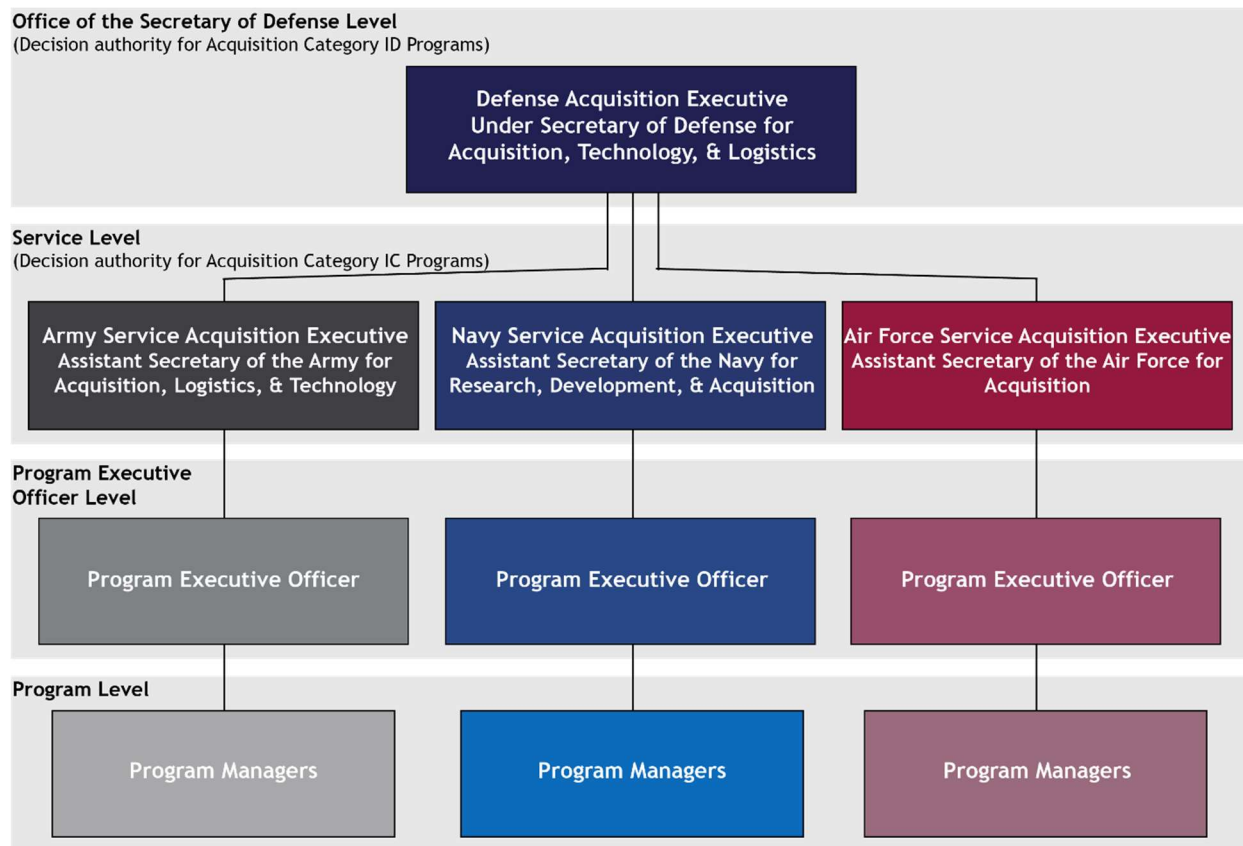
⁵ President's Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report to the President*, June 1986, xxii, accessed June 7, 2018, <https://www.documentcloud.org/documents/2695411-Packard-Commission.html>.

⁶ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433 (1986).

weapon systems acquisition.⁷ This recommended acquisition organization was enacted by the Goldwater–Nichols Department of Defense Reorganization Act (Goldwater–Nichols) and is illustrated in Figure 1-1.⁸

Although this centralized organizational structure allowed for flexibility for the Military Services and shortened approval chains, acquisition stovepipes developed because requirements and acquisition processes focused on individual programs rather than collective investments.⁹ Each program or product had its own review and approval process, driving inefficiency and resulting in program-centric execution. Such a focus is contrary to developing an integrated view of warfighting capability.

Figure 1-1. Acquisition Decision-Making Structure



Note: Above figure represents the organization put in place for acquisition matters; SAE does not report to DAE. Figure represents DAE as Defense Executive and SAE as Service Executive.

Discussion

The Government Accountability Office (GAO) reported in 2007 that DoD had difficulty managing weapon systems and suffered from fragmented governance, lack of sustained leadership and policy, and a perceived lack of decision-making authority.¹⁰ The current weapon systems organization and

⁷ Ibid.

⁸ Ibid.

⁹ GAO, *Best Practices: An Integrated Portfolio Management Approach to Weapon System Investments Could Improve DOD's Acquisition Outcomes*, GAO-07-388, March 2007, accessed June 7, 2018, <https://www.gao.gov/assets/260/258331.pdf>.

¹⁰ Ibid.

management framework remains program-centric. PMs report through PEOs to SAEs. PMs are responsible for weapon systems development, production, and sustainment through cost, schedule, and performance objectives and thresholds. PEOs, as executive managers of assigned programs, oversee one or more PMs but have no other command responsibilities.¹¹ PEOs have varying authority levels within the Military Services but no formal Title 10 authority for program execution. The DAE and SAE are the executive leaders with statutory authority to make the critical decisions on key milestones, contracts, and program documentation as established in Goldwater–Nichols.

Cost, schedule, and technical performance, as outlined in the approved APB, are the current measures of program and PM success. These measures are analyzed, reviewed, and approved through prolonged coordination at the Joint Requirements Oversight Council (JROC)/SAE/DAE level. Budgets organized around those key performance metrics are then submitted by the comptrollers, and Congress appropriates funding with statutory and regulatory constraints. The PM and the PEO must manage, execute, and oversee requirements and budgets established by factors outside their control and allocated with very little managerial flexibility. This system reinforces stovepiped, program-centric acquisition and inhibits the flexibility and integration required for asymmetric threats.

To put the Military Services back in charge of major programs, Section 825 of the FY 2016 NDAA required that MDAPs be managed at the SAE level unless otherwise directed by the Secretary of Defense.¹² The expected benefits of the SAE as the Milestone Decision Authority (MDA) are faster critical decision making by those closer to program execution and timely delivery of weapon systems. The NDAA also required that for programs at the Acquisition Category (ACAT) II level and below, PEOs would serve as the MDA. These steps help reduce authority layers that act as barriers to efficient management; however, there has been no evidence that these changes will increase weapon systems execution agility and efficiency.

Vision for the Future

A fundamental change from program-focused decisions at the SAE level to more robust portfolio management at the PEO level would help break down silos, streamline processes, decrease decision timelines, and provide viable solutions to combat real-time threats.

For more than a decade, GAO has documented affordability and under-delivery problems within DoD's weapon systems acquisition, and in 2015, GAO recommended a portfolio management approach.¹³ GAO noted that DoD's stovepiped acquisition structure is an impediment to using an integrated portfolio management approach to optimize weapon systems investments.¹⁴ Because the current processes are geared toward making decisions on individual programs rather than assessing investments at a portfolio level, DoD may miss opportunities to better leverage resources and identify investment priorities for DoD-wide capability needs.

¹¹ Operation of the Defense Acquisition System, DoDI 5000.02 (2017).

¹² FY 2016 NDAA, Pub. L. No. 114-92 (2015).

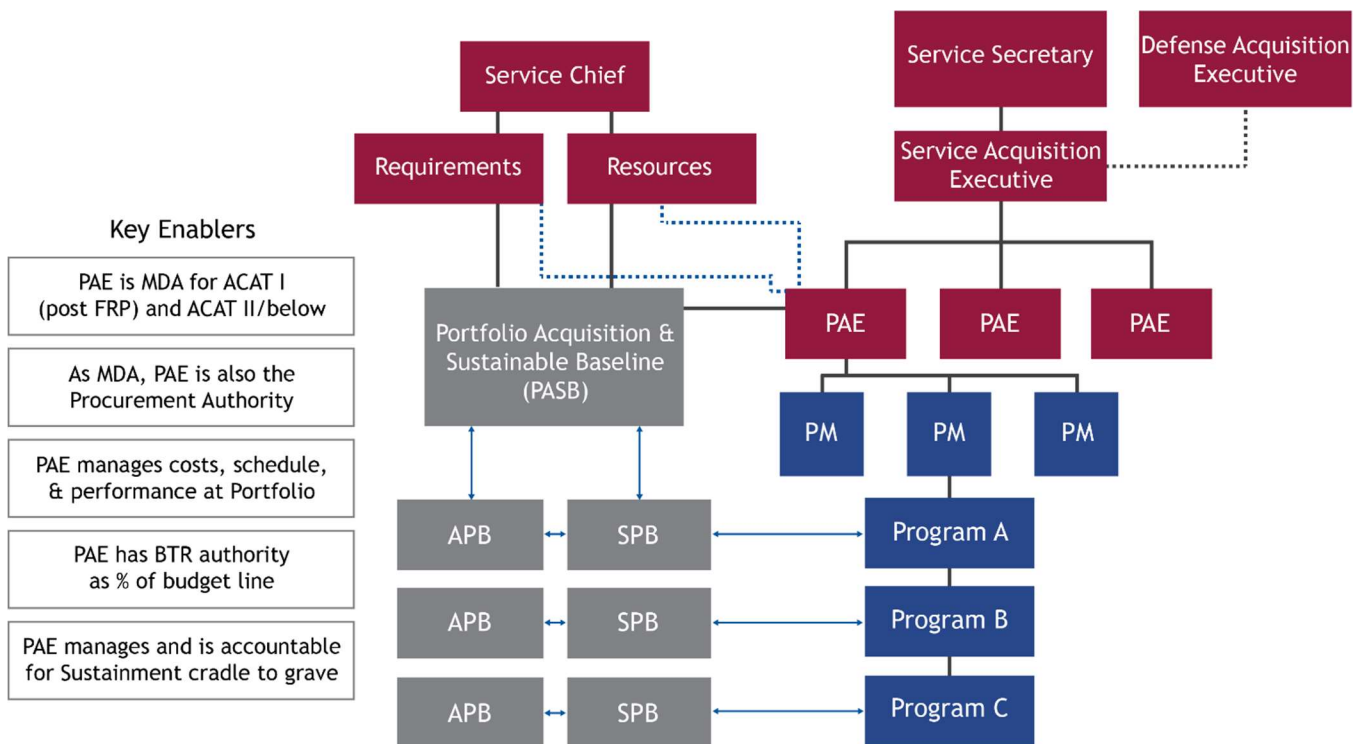
¹³ GAO, *Weapon Systems Acquisition: Opportunities Exist to Improve the Department of Defense's Portfolio Management*, GAO-15-466, August 2015, accessed June 7, 2018, <https://www.gao.gov/assets/680/672205.pdf>.

¹⁴ Ibid, 10.

Shifting to an effective portfolio capability structure (see Figure 1-2) would necessitate shifting the current PEO role to a PAE role. Under this structure, the PAE would do the following:

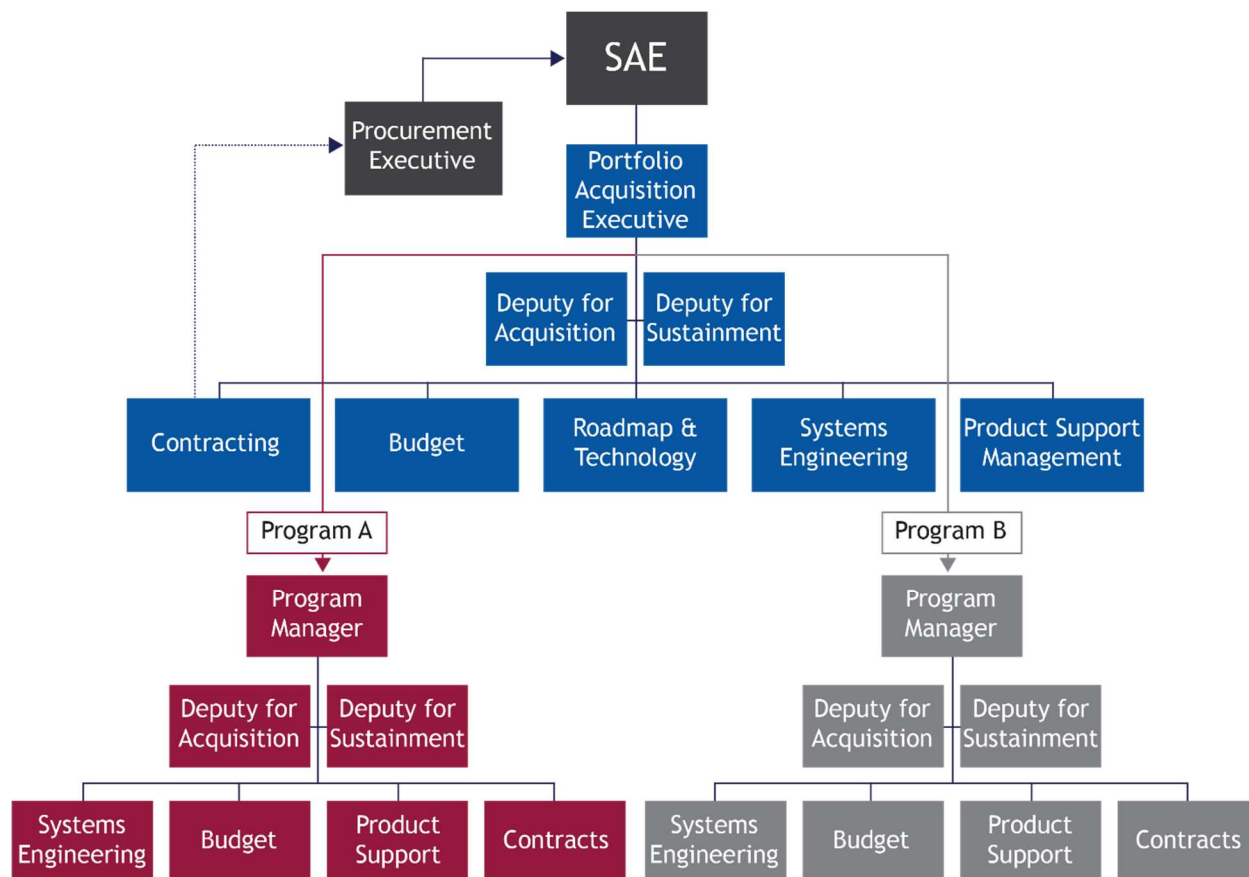
- Own responsibility and accountability for development, procurement, and lifecycle management across the portfolio for operational capability to the PASB.
- Have authority to make tradeoffs inside the portfolio.
- Hold responsibility for maintaining a capability roadmap that addresses emerging threats and opportunities for technology insertion.
- Manage risk and opportunities across the portfolios for greater cost and schedule effectiveness.

Figure 1-2. Portfolio Management Construct (Notional)



Program planning, decision documentation requirements, and risk management would be assessed individually and collectively for programs inside the portfolio. Changes to the current PEO authority level and organizational structure would be required to achieve the constructive outcomes for portfolio management governance reflected in Figure 1-3. For implementation clarity, it is crucial that the definitions of PAE, PM, contracting officer, acquisition strategy, APB, and SPB are consistent in the FAR, Title 10, and DoDIs 5000.01 and 5000.02.

Figure 1-3. Portfolio Acquisition Executive Organization (Notional)



Conclusions

DoD has not universally adopted portfolio management of weapon systems acquisition, which is a best practice in industry.¹⁵ Integration, execution, and management of programs within a portfolio will provide flexibility and potentially increased warfighter capability. Portfolio management will address risks and opportunities across the portfolio while optimizing cost and schedule effectiveness.

A portfolio model allows for tighter alignment of acquisition, requirements, and budget processes to shifting priorities and threats, and it supports achieving more effective mission outcomes. Large programs can be better managed as an integrated capabilities suite, leveraging common platforms, subsystems, interfaces, and architectures.

The Section 809 Panel's specific recommendations for a portfolio model implementation will be addressed in the *Volume 3 Report* in January 2019.

¹⁵ GAO, *Weapon Systems Acquisition: Opportunities Exist to Improve the Department of Defense's Portfolio Management*, GAO-15-466, August 2015, accessed June 7, 2018, <https://www.gao.gov/assets/680/672205.pdf>.

ENTERPRISE PORTFOLIO CAPABILITY MANAGEMENT

Problem

DoD's separate decision-making processes do not enable an enterprisewide view of existing and planned capabilities across Military Services and Defense Agencies to support timely and informed resource-allocation decisions. In today's environment of rapid technologic innovation, failing to implement an enterprisewide view of capabilities jeopardizes DoD's ability to meet National Defense Strategy objectives through timely delivery of integrated solutions.

The Defense Acquisition Decision Support System (DSS) is the forum in which defense acquisition decisions are made. The disjointed, three-system DSS structure comprises defense requirements, acquisition, and budget systems and is informally referred to as *Big-A acquisition*. Each of these systems has extensive, complex, and centralized decision-making processes driven by different timelines and system owners. This situation impedes rapid response to priority needs and timely delivery of material solutions. DoD's military and technological superiority is at risk as adversaries exploit commercial technologies for military purposes and develop and iterate solutions at a much faster pace than the current three-system structure allows.

There have been several recent changes to this system, including the return of requirements authority to Service Chiefs and delegation of program MDA from the Under Secretary of Defense for Acquisition and Sustainment (USD[A&S]) to the Military Services. Military Services have delegated MDA for ACAT II Programs from SAEs to PEOs. These initiatives potentially introduce greater flexibility and responsiveness into the acquisition system, yet there remains a vital and continued need to foster innovation to ensure all the DoD enterprise capabilities can adapt to the evolving international security environment.

This report previously introduced the concept of transitioning to a series of execution capability portfolios (led by PAEs) at the Military Service level. That approach would help enable DoD to deliver capability with greater speed and agility. An enterprise view of existing and planned capability across DoD would further enhance the system outcomes by continuous analysis of enterprise capabilities toward identification of gaps, overlaps, and resource allocation issues.

Background

DSS produced the most potent and technologically advanced military in history. DSS was designed and optimized for use in an industrial-age environment in which clear and predictable adversaries, future outcomes, and threats were well defined and the technology innovation cycle was much slower. It is not an ideal system for addressing the fast-paced, ever-evolving dynamic threat posed by the current security environment.

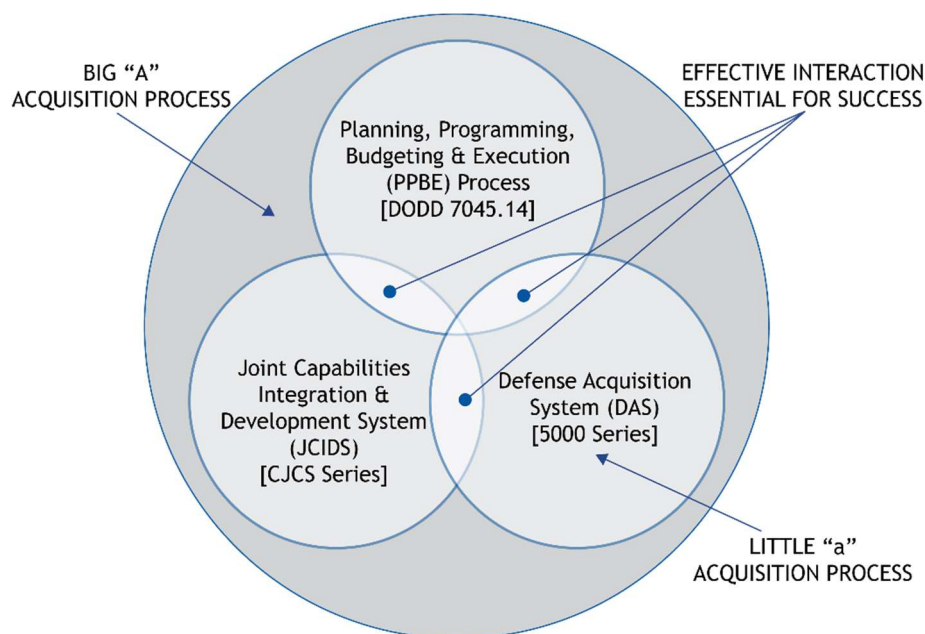
The highly centralized management framework of each support system fosters inconsistent accountability and responsibility. Decision-making processes that focus on individual programs

instead of enterprise capabilities as a whole cultivate a system bereft of flexibility, speed, and innovation.¹⁶

DoD Acquisition System—Decision Support System

DSS is intended to deliver warfighting capabilities. The three interrelated systems include the JCIDS; Planning, Programming, Budgeting, and Execution (PPBE); and the defense acquisition system. JCIDS, a requirements/capabilities generation system, determines what capability is needed and why. PPBE resourcing determines the funding available to develop and deliver capabilities. The defense acquisition system is responsible for buying, developing, and delivering capabilities. The defense acquisition system is also referred to as *Little-a acquisition*. Each system has a different organizational owner with different motivations. For example, the Joint Staff, which owns the JCIDS, is primarily motivated to identify warfighter capability needs. The Deputy Secretary of Defense, which owns PPBE, is administered by OSD(C) and Cost Assessment and Program Evaluation (CAPE). OSD(C) is concerned with alignment of resources to support defense policy, and CAPE is driven by cost and affordability. For the overall system to be effective, the individual system owners must coordinate and synchronize the activities to deliver warfighter capabilities. Figure 1-4 depicts DSS and defense acquisition system.

Figure 1-4. Defense Acquisition Decision Support System (DSS – Big-A Acquisition)



JCIDS

CJCSI 3170.01 defines JCIDS's role as assessing, validating, and prioritizing warfighter needs. JCIDS is commonly referred to as the joint requirements system, as it replaced the Requirements Generation

¹⁶ GAO, *Best Practices: An Integrated Portfolio Management Approach to Weapon System Investments Could Improve DOD's Acquisition Outcomes*, GAO-07-388, March 2007, accessed June 7, 2018, <https://www.gao.gov/assets/260/258331.pdf>.

System (RGS) in 2003.¹⁷ RGS was a threat-based requirement process, and JCIDS is a capabilities-based process. JCIDS was created to identify the capabilities in the operational performance criteria required by joint warfighters and was intended to ensure a collaborative capability development process. DoDD 7045.20, Capability Portfolio Management, directs use of a portfolio management approach for capability identification and requirement development. DoDD 7045.20 directs DoD to use capability portfolio management to advise the Deputy Secretary of Defense and Defense Agency heads how to optimize investments across DoD and minimize risk in meeting capability needs.¹⁸ More generally the JCIDS process does the following:

- Supports the acquisition process by identifying and assessing capability needs and associated performance criteria to be used as a basis for acquiring the *right capabilities*, including the *right systems*.
- Uses these capability needs as the basis for the development and production of systems to fill those needs.
- Provides the PPBE process with affordability advice by assessing the development and product lifecycle cost.¹⁹

CJCSI 3170.01, Joint Capabilities Integration and Development System (JSIDS), describes the interface relationship and responsibility to the acquisition system in PPBE. Some of the key products that JCIDS produces to support DSS are the Initial Capabilities Document (ICD), Capability Development Document (CDD), and Capability Production Document (CPD). The purpose of each document is as follows:²⁰

- ICD serves as the basis for a subsequent Analysis of Alternatives (AoA) conducted in the Materiel Solution Analysis Phase (Milestone A) for ACAT I programs.
- CDD focuses on the specific capability being developed to close the gap and is the preferred alternative chosen from the AoA; it includes entry criteria for Engineering and Manufacturing Development (EMD), Milestone B, and program initiation.
- CPD is the final, updated capability document prior to full-rate production, Milestone C; it includes adjustments made by acquisition, resource, and requirement communities.

Figure 1-5 depicts key JCIDS documents that support the acquisition lifecycle.

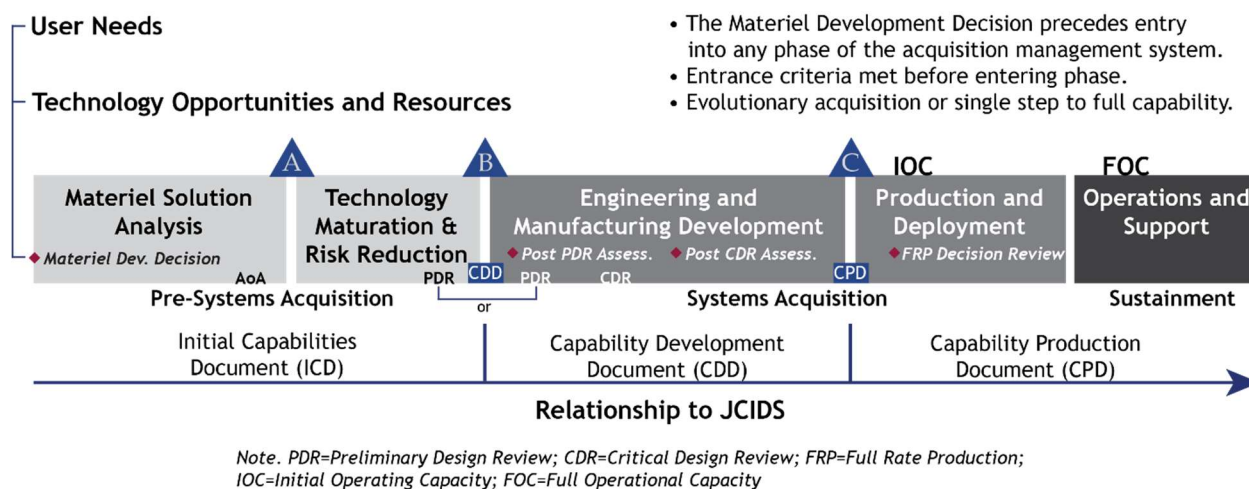
¹⁷ Stephen H. Chadwick, Defense Acquisition: Overview, Issues, and Options for Congress, Congressional Research Service, June 20, 2007, accessed June 7, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a470252.pdf>. Joint Capabilities Integration and Development System (JCIDS), CJCSI 3170.1 (2015).

¹⁸ GAO, *Weapon Systems Acquisition: Opportunities Exist to Improve the Department of Defense's Portfolio Management*, GAO-15-466, August 2015, accessed June 7, 2018, <https://www.gao.gov/assets/680/672205.pdf>.

¹⁹ Stephen H. Chadwick, Defense Acquisition: Overview, Issues, and Options for Congress, Congressional Research Service, June 20, 2007, accessed June 7, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a470252.pdf>.

²⁰ Ibid.

Figure 1-5. Acquisition Lifecycle & JCIDS Dependencies



PPBE Description

DoDD 7045.14, The Planning, Programming, Budgeting, and Execution (PPBE) Process, states PPBE is the primary resource management system for DoD. PPBE is rooted in the legacy of Secretary of Defense Robert McNamara and his efforts to develop a system to “establish better control of the DoD budget and gain department effectiveness and efficiency.” Secretary McNamara believed the budget was one of the key levers in developing and implementing policy.

One of the fundamental purposes of creating the Planning, Programming, and Budgeting System (PPBS) in the early 1960s was to integrate the Military Services’ annual budgets and ensure linkage of resources to strategic goals. To make a 5-year force structure and financial plan, the system also aligned defense planning outputs to the available appropriated funds mapped to a set of the program elements. As originally envisioned, “planning within the PPBS was to be a comparative analysis of the projected costs and effectiveness of feasible alternatives. The primary purpose of the PPBE process articulates the defense strategy; identifies size, structure, and equipment for military forces; sets programming priorities; allocates resources; and evaluates actual output against planned performance.”²¹

Through the PPBE process, DoD allocates resources by considering capability needs, risk, and affordability. The objective outcome of the PPBE process is to achieve the best mix of resources (forces, manpower, material, equipment, and support) to support military strategy. The PPBE process is the mechanism DoD uses for strategic planning, program development, resource determination, and budget justification and execution.²²

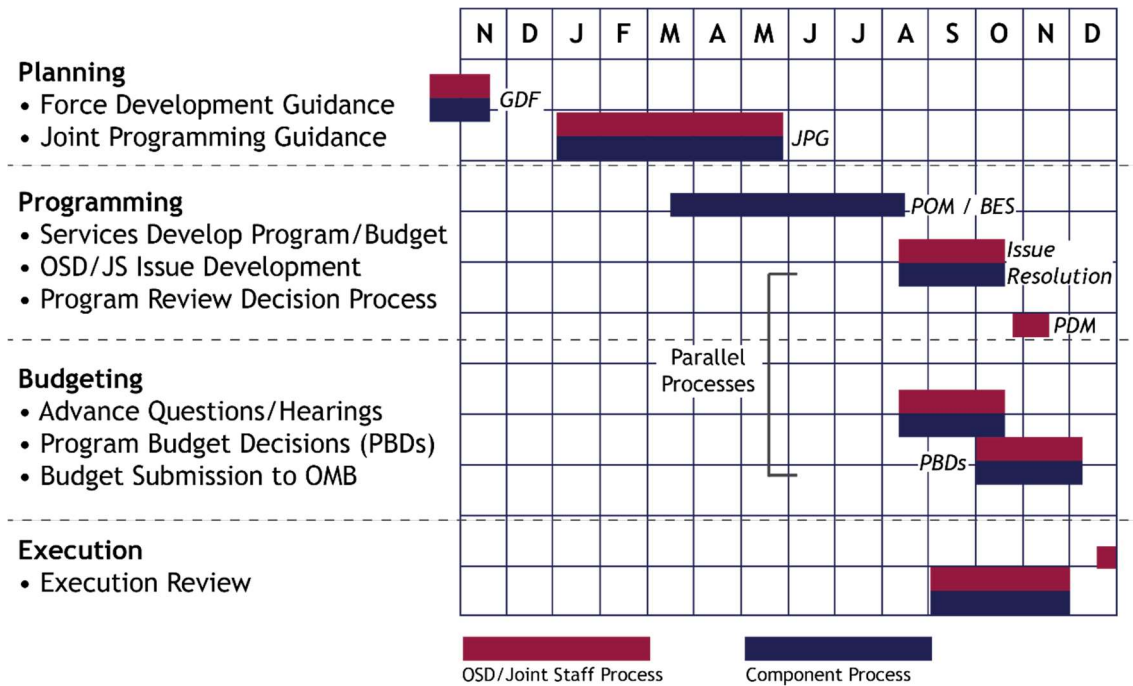
²¹ Stuart E. Johnson, *A New PPBS Process to Advance Transformation*, Defense Horizons, A Publication of the Center for Technology and National Security Policy, National Defense University, September 2003, accessed June 7, 2018, <https://www.files.ethz.ch/isn/135167/DH32.pdf>.

²² Deacon Hoen, *The DoD Planning, Programming, Budgeting, and Execution (PPBE) Process*, DAU Lunch and Learn presentation, March 23, 2016.

PPBE is a date-based process driven by specific financial deliverables in each of its four phases. Figure 1-6 provides an example of the timing of the four different phases. A description of each phase follows:

- *Planning* takes the strategic guidance from national and departmental defense levels and produces Defense Planning Guidance (DPG). The DPG drives the programming phase in which resourcing decisions are made.
- *Programming* allocates resources according to DPG guidance. The product from this phase is the Program Objective Memorandum (POM). POM is a 5-year plan that allocates the resources required to train, organize, and equip the Military Services.
- *Budgeting* provides the upcoming fiscal year budget numbers for congressional enactment in the appropriations language. This process takes the form of the Budget Estimate Submission (BES) for the OSD's consideration, and the BES becomes the basis for the following fiscal year's presidential budget.
- *Execution* involves continuous monitoring of program performance by assessing fiscal health through a series of metrics; from the assessments come recommended budget changes.²³

Figure 1-6. PPBE Cycle²⁴



²³ The Planning, Programming, Budgeting, and Execution (PPBE) Process, DoDD 7045.14 (2017).

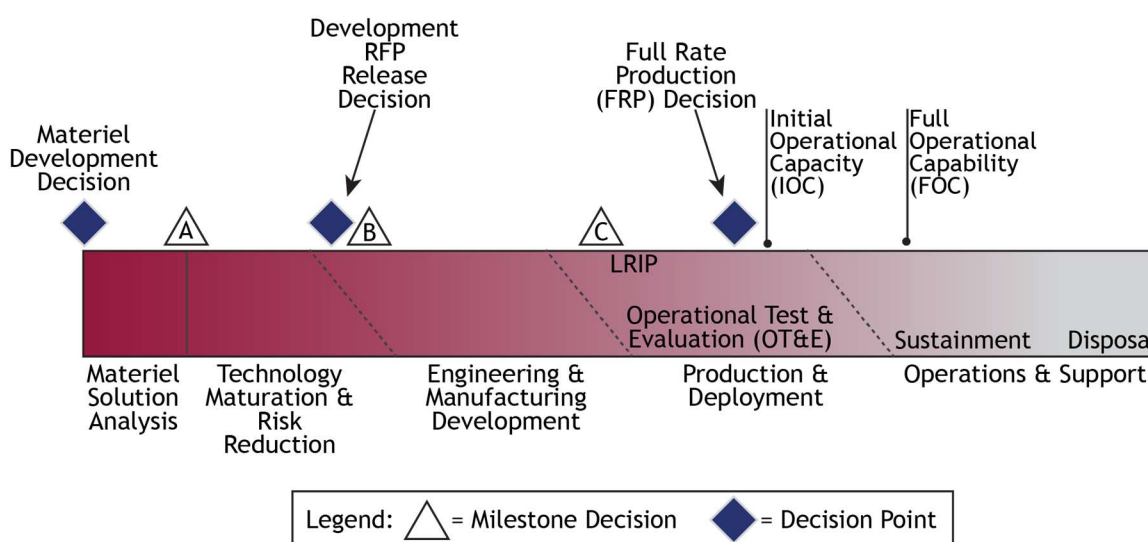
²⁴ Deacon Hoen, *The DoD Planning, Programming, Budgeting, and Execution (PPBE) Process*, DAU Lunch and Learn presentation, March 23, 2016.

Defense Acquisition System

DoDI 5000.02, Operation of the Defense Acquisition System, provides the policies and principles governing the defense acquisition system and forms the management foundation for all DoD programs. It also identifies the specific statutory and regulatory reports and other information requirements for each milestone review and decision point.²⁵

Unlike the calendar-driven PPBE process or the needs-driven JCIDS, the acquisition management system is event-driven. The defense acquisition system takes a program through a series of processes, milestones, and reviews throughout the program's lifecycle. Each milestone is a decision point at which a program is assessed to determine if it will proceed into the next phase.²⁶ The individual responsible for the decision is the MDA. The MDA's primary responsibility is making *go/no-go* decisions by determining if a program demonstrated or completed the program-specific exit criteria for the current phase. The MDA must also determine if a program has met the statutory and regulatory entrance criteria for the next phase of the system's lifecycle. Figure 1-7 provides a graphic of the acquisition process and the relationship with the requirements process documentation.²⁷

Figure 1-7. The Acquisition Process



Challenges with Current System

DSS processes lack the speed, flexibility, and innovation required. The complex, centralized, fragmented, and multilayered DSS framework contains unclear and under-defined roles, responsibilities, and authorities. These characteristics create system inefficiency that inhibit timely, well-informed resourcing decisions, as evidenced by late capability deliveries, cost overruns, and deteriorating technical dominance.

²⁵ Operation of the Defense Acquisition System, DoDI 5000.02 (2017).

²⁶ Ibid.

²⁷ COL William R. Fast, USA (Ret.), "Improving Defense Acquisition Decision Making," *Defense Acquisition Research Journal*, Vol. 17, No. 2, Issue 54 (2010): 220-241.

The Project Management Institute and GAO, in recent reports, highlighted indicators of poor decision systems. Typically, organizations with challenges in resource allocation display the following symptoms:²⁸

- Resources unaligned with objectives and strategies.
- Lack of transparency or access to good and accurate data.
- Resources depleted because of time wasted on too many low value projects.
- Difficulty in assessing the effect of reallocating resources across components or business units.
- Difficulty in adjusting portfolios quickly in response to changes.
- Duplicative, overlapping, and redundant programs.

The DoD resource allocation system exhibits all the above characteristics.

DSS is Centralized, Complex, Fragmented, and Misaligned, Not an Integrated Whole

DSS is complex due to the number of stakeholder communities and the multitude of underlying processes used to generate the decision-making inputs and products. For the system to function properly, all the processes and equities must be accounted for and defined through an integrated governance structure. As noted above, the current governance structure is dictated by the three subsystems in DSS. Each subsystem has its own set of processes governing decisions within its individual community. This structure has produced an overall decision support system that is fractured, disjointed, unsynchronized, and stovepiped, with objectives based on individual stakeholder communities' equities.

GAO concluded that achieving an optimized set of resources would continue to be a challenge: "DoD lacks the governance structure, sustained leadership, and policy to do so...this fragmentation does not allow for an integrated portfolio management (resource allocation) approach to making investment decisions across the department."²⁹ Scholarly research has produced similar findings:

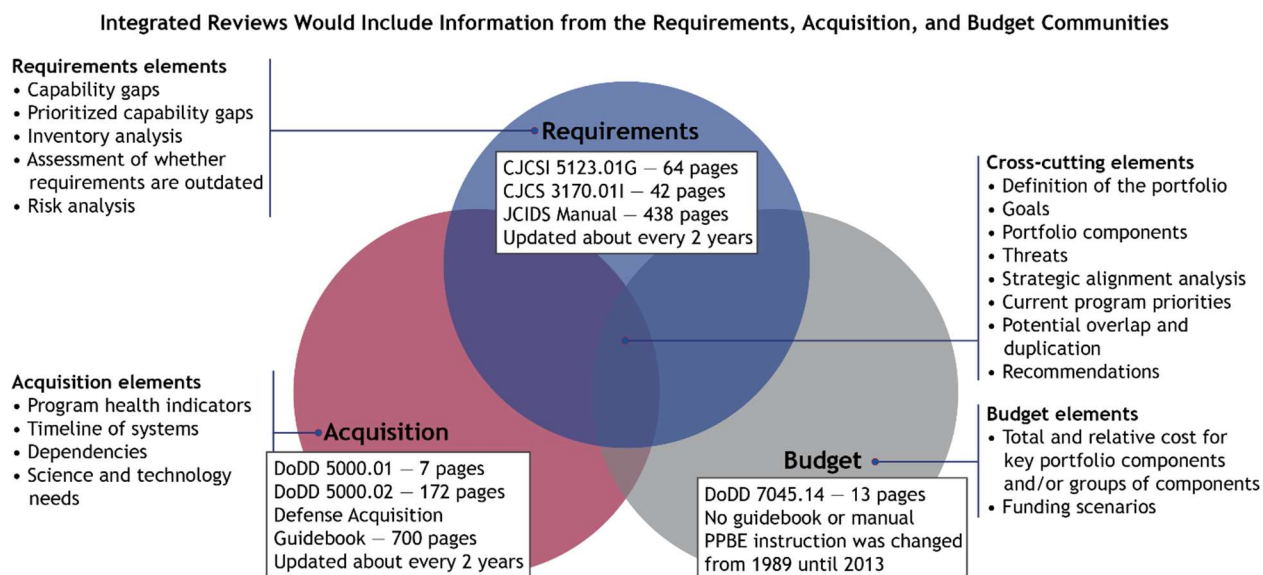
Linkages between the defense acquisition management system, the requirements process, and the budgeting system are not sufficiently defined to enable the success of acquisition programs and contribute to weapons systems cost overruns, schedule delays, and performance problems.... [C]ost overruns, schedule delays, and operational test failures testify to numerous severed connections among the acquisition management, requirements, and budgeting systems.³⁰

²⁸ Charles R. Mahon and John D. Driessnack, *Winning in the 21st Century: An Acquisition Point Paper to the Section 809 Panel*, September 2017, accessed June 7, 2018, <https://www.pmi.org/-/media/pmi/documents/public/pdf/white-papers/command-negation.pdf>.

²⁹ GAO, *Weapon Systems Acquisition: Opportunities Exist to Improve the Department of Defense's Portfolio Management*, GAO-15-466, August 2015, accessed June 7, 2018, <https://www.gao.gov/assets/680/672205.pdf>.

³⁰ COL William R. Fast, USA (Ret.), "Improving Defense Acquisition Decision Making," *Defense Acquisition Research Journal*, Vol. 17, No. 2, Issue 54 (2010): 220-241.

Figure 1-8. Description & Guidance for the DSS



Linkages between the DSS sub-systems are not sufficiently defined to enable the success of acquisition programs

The 2006 Defense Acquisition Performance Assessment described the three decision support systems as:

*a highly complex mechanism that is fragmented in its operation.... In theory, new weapons systems are delivered as the result of the integrated actions of the three interdependent processes whose operations are held together by the significant efforts of the organizations, workforce, and the industrial partnerships that manage them. In practice, however, these processes and practitioners often operate independent of one another. Uncoordinated changes in each of the processes often cause unintended negative consequences that magnify the effects of disruptions in any one area.*³¹

Fragmentation contributes to the perception there is no accountability and authority for resource allocation decisions. GAO reported that OSD officials felt limited in their ability to meaningfully influence or change the Military Services' investment priorities due to the Military Services' Title 10 responsibilities to buy weapons. The report noted similarities in program capabilities between the Air Force's Three-Dimensional Expeditionary Long-Range Radar and the Marine Corps's Ground/Air Task Oriented Radar. OSD questioned the need for two separate programs. The resolution path was complicated by a perceived lack of authority and accountability within the governance framework. Examples like this one illustrate the potential for communication chain disconnects that have led to capability duplication, conflicting guidance, and decisions unaligned with the overall strategy. GAO reported, "These diffuse decision-making responsibilities make it difficult to determine who is

³¹ Defense Acquisition Performance Assessment Report, January 2006, accessed June 25, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a459941.pdf>.

empowered to make enterprise-level weapon system investment decisions.”³² Without clear lines of responsibility and authority, DoD will continue to struggle with effectively allocating resources.

Each subsystem within DSS uses a different resource categorization framework. The requirements community and JCIDS use Joint Capability Areas (JCs), PPBE uses Major Force Programs (MFPs), and the acquisition community uses Affordability Portfolios (see Table 1-1). As GAO noted, “using different resource allocation constructs is a barrier to taking an integrated approach.”³³

Table 1-1. Portfolio Categorizations within DSS³⁴

Portfolio Constructs	
Requirements Community: Joint Capability Areas	
<ul style="list-style-type: none"> Force Support Battlespace Awareness Force Application Logistics Command and Control 	<ul style="list-style-type: none"> Net-Centric Force Protection Building Partnerships Corporate Management and Support
Acquisition Community: Affordability Portfolios	
Air Force	
<ul style="list-style-type: none"> Space Superiority Rapid Global Mobility Personnel Recovery Nuclear Deterrence Operations Global Precision Attack Global Integrated Intelligence Surveillance and Reconnaissance 	<ul style="list-style-type: none"> Cyberspace Superiority Command and Control Air Superiority Agile Combat Support Building Partnerships Special Operations Classified Programs
Army	
<ul style="list-style-type: none"> Aviation Mission Command (Network) Maneuver Combat Vehicles Air and Missile Defense Transportation 	<ul style="list-style-type: none"> Chemical Demilitarization Soldier Fires Science and Technology Other
Navy	
<ul style="list-style-type: none"> Expeditionary (Land) Ships 	<ul style="list-style-type: none"> Missiles Naval Air

³² GAO, *Best Practices: An Integrated Portfolio Management Approach to Weapon System Investments Could Improve DOD’s Acquisition Outcomes*, GAO-07-388, March 2007, accessed June 7, 2018, <https://www.gao.gov/assets/260/258331.pdf>.

³³ GAO, *Weapon Systems Acquisition: Opportunities Exist to Improve the Department of Defense’s Portfolio Management*, GAO-15-466, August 2015, accessed June 7, 2018, <https://www.gao.gov/assets/680/672205.pdf>.

³⁴ Ibid.

Portfolio Constructs

Budget Community: Major Force Programs

- Strategic Forces
- General Purpose Funds
- Command, Control, Communications, Intelligence, and Space
- Mobility Forces
- Guard and Reserve Forces
- Research and Development
- Central Supply and Maintenance
- Training, Medical, and Other General Personnel Activities
- Administration and Associated Activities
- Support of Other Nations
- Special Operations Forces

These different categorization frameworks make it difficult to assess capabilities and resource allocation at the enterprise level. To the extent that the requirements, acquisition, and budget communities group investments by portfolio, they do so using different portfolio constructs. GAO spoke with several OSD officials who were involved with early attempts to rectify this problem. These officials explained the task of mapping portfolios in trying to construct a universal enterprise framework was nearly impossible. They were not able to find a construct that aligned with all the stakeholders' responsibilities and equities. Their comments were in line with GAO's findings.³⁵ As illustrated in Table 1-1, the different categorization frameworks add complexity to the mapping and remapping of resources among the DSS communities. There is no enterprise coding to provide a common language for enterprise decision makers to reference when making enterprise trades. Current analysis is focused more on individual programs than on portfolios of capabilities. Establishing an enterprise-level categorization framework would enable alignment of DoD requirements, acquisition, and budget systems at the enterprise level.

To optimize DoD's resources, the stakeholder communities must have reliable data and systems to support detailed analysis. Currently, the data systems used in planning and resource allocation are not interconnected or integrated. When data are needed, DoD often depends on a series of data calls to organizations. This practice is an inefficient, time-consuming, and resource-intensive activity that often involves data quality issues. According to GAO, analysts at the OSD level, both acquisition and Joint Staff, stated that they lacked systems and access to data.³⁶ This lack of readily accessible data hampers OSD analysts' ability to provide analysis to support resource allocation decisions. The Military Services often have more analytical capability and readily accessible data than the OSD staff. This lack of visibility from the enterprise level also inhibits greater understanding and transparency into the analysis generated by the Military Services. The lack of enterprise-level data and analysis often gives Military Services the upper hand when defending budgets and programs.³⁷

³⁵ Ibid, Table 3: Examples of Enterprise-Level Portfolio Constructs, 13.

³⁶ GAO, *Weapon Systems Acquisition: Opportunities Exist to Improve the Department of Defense's Portfolio Management*, GAO-15-466, August 2015, accessed June 7, 2018, <https://www.gao.gov/assets/680/672205.pdf>.

³⁷ Ibid.

DoD Does Not Maximize Use of Portfolio Management as a Best Practice

Portfolio management is a managerial framework focused on optimizing groups of programs instead of individual programs to maximize the effect toward achieving an organization's strategic goals.³⁸ When implemented to best practice, the value in a portfolio management framework is alignment of an organization's resources to the overall strategy.³⁹ Strategic alignment is one of the prerequisites for overall organizational success.⁴⁰ For DoD, this alignment translates to basing the enterprise portfolio on outcomes or objectives tied to the priorities and guidance provided in the National Defense Strategy, Military Defense Strategy, and other strategy documents.

Another notable attribute of organizations with mature portfolio management processes is their inclusion of both investments and operations programs in the portfolio, which represents the entire budget. In this situation, rather than default to optimizing individual programs, portfolio management focuses on selecting the optimum mix of programs and modifying that mix as needed over time to accomplish strategic goals. Portfolio management also provides a decision-support framework to enable decision makers to make more strategic, better-informed trades across the enterprise.⁴¹

Below is a list of portfolio management benefits and how they could add value within DoD:⁴²

- **Enable strategic view of enterprise capability.** Despite recent increases to its budget, DoD cannot assume long-term resource stability. DoD's needs and wants will always exceed the funds available, forcing the need to maximize capability and value from constrained resources. Strengthening the system with portfolio management principles will increase the likelihood of delivering maximum capability and meeting strategic goals.
- **Ensure tactical alignment.** DSS is fragmented and misaligned among the three subprocess communities (requirements, resources, and acquisition). This situation causes unintended and adverse effects. Portfolio management implemented with best practices can be a key enabler in aligning the DSS communities to the overarching strategy.
- **Achieve balanced resource allocation.** A balanced resource allocation plan contains the best mix of programs within funding projections that drive the organization to its near-term tactical and future strategic goals. GAO noted it is difficult to assess whether DoD has the *right mix* of

³⁸ Mike Janiga and Pete Modigliani, *Think Portfolios, Not Programs*, Defense AT&L: November-December 2014, accessed June 7, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a612303.pdf>.

³⁹ PricewaterhouseCoopers, *Strategic portfolio management: How governance and financial discipline can improve portfolio performance*, June 2012.

⁴⁰ Ibid.

⁴¹ GAO, *Weapon Systems Acquisition: Opportunities Exist to Improve the Department of Defense's Portfolio Management*, GAO-15-466, August 2015, accessed June 7, 2018, <https://www.gao.gov/assets/680/672205.pdf>.

⁴² Mike Janiga and Pete Modigliani, *Think Portfolios, Not Programs*, Defense AT&L: November-December 2014, accessed June 7, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a612303.pdf>. Project Management Institute, Inc., *The Standard for Portfolio Management, Fourth Edition*, 2017. Susan S. Bivins and Michael J. Bible, *Portfolio decisions to maximize strategic benefits*, paper presented at PMI Global Congress 2013, Newtown Square, PA: Project Management Institute, accessed June 7, 2018, <https://www.pmi.org/learning/library/decisions-maximize-strategic-benefits-5842>.

optimized investments and programs because it is impossible to look across the enterprise and have a more robust understanding of the trade space, dependencies, and desired outcomes.

- **Track innovation.** The portfolio view would enable understanding of technology innovation initiatives across the enterprise, which would allow decision makers an enterprise view of both technologies and supporting systems being developed and implemented.

A Notional DoD Capability Portfolio Management Structure

DoD has recognized the potential for enterprise portfolio management but has struggled to implement this management approach. Instead, DoD policy has required capability portfolio management for more than a decade. DoDD 7045.20, Capability Portfolio Management, signed in 2008 and updated in 2017, directs:⁴³

the DoD shall use capability portfolio management to advise the Deputy Secretary of Defense and the Heads of the DoD Components on how to optimize capability investments across the defense enterprise (both materiel and non-materiel) and minimize risk in meeting the Department's capability needs in support of strategy. The existing joint capability area (JCA) structure shall serve as the Department's common framework and lexicon for the organization of capability portfolios.

DoDD 7045.20 identified leads for civilian and military capability portfolio managers (CPMs) and senior warfighter forums from across OSD, Joint Staff, and Combatant Commanders. It also directed the Deputy's Management Action Group (DMAG) to be the governance forum responsible for reviewing Capability Portfolio Strategic Plans annually. The capability portfolio management experienced implementation challenges for the following reasons:

- Lack of consistent leadership and an overall owner and advocate.
- Complexity in developing a universal portfolio categorization scheme.
- Resistance from community stakeholders who perceived a loss of influence or power.

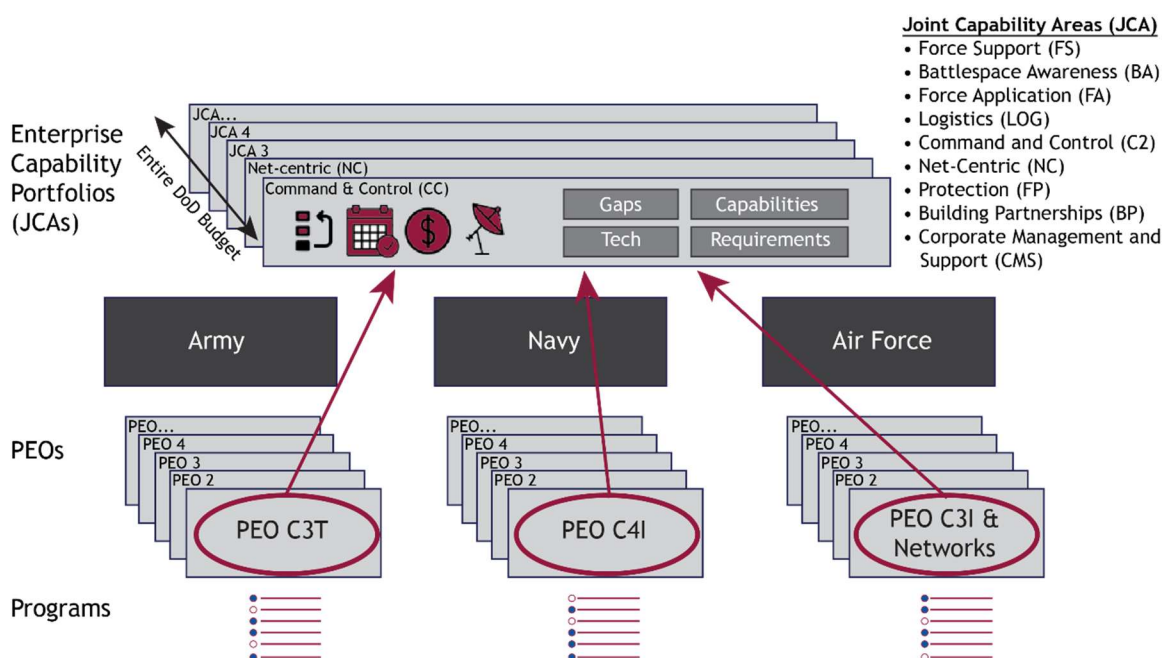
The assessment strategy directed in DoDD 7045.20 contains many of the attributes needed to enable successful portfolio management. DoDD 7045.20 should be used as the basis for establishing a modified assessment structure. This structure could include two CPMs—one civilian and one military—as set out in DoDD 7045.20. A civilian manager could offer policy or technical expertise and a military manager could offer end-user/warfighter perspective. By integrating warfighter involvement throughout the capability delivery process, this model allows for more transparency and visibility. The leadership of Enterprise Capability Portfolio will also include senior representatives from Military Services, OSD, and the Joint Chiefs of Staff (JCS). Each of the Enterprise Capability Portfolios would need funded analytical support. A Capability Portfolio Council would also be needed to organize decision recommendations for the DMAG. The council's membership would consist of the CPMs and

⁴³ Capability Portfolio Management, DoDD 7045.20 (2017).

would be chaired by the CAPE Director. The revised DoDD 7045.20 would incorporate ongoing DoD organizational changes, business process improvements, and portfolio management best practices.

The Section 809 Panel developed a notional enterprise portfolio framework and structure (see Figure 1-9) based on the governance structure in DoDD 7045.20 and portfolio management best practices.

Figure 1-9. Notional Enterprise Capability Portfolio Management



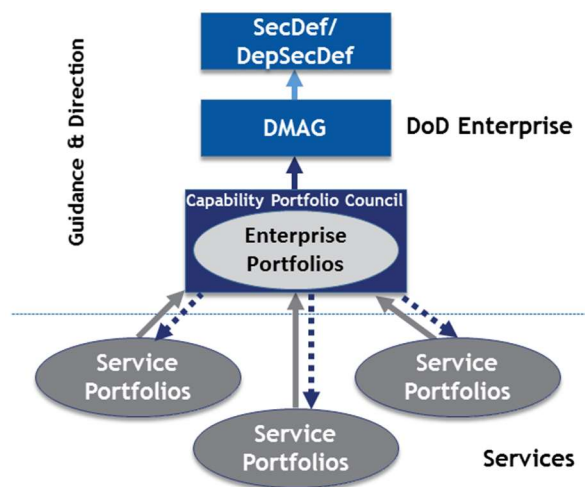
The CPMs' primary role is to analyze the enterprise portfolio and provide insight into enterprise capabilities, gaps, overlaps, alternatives, and trades. CPMs provide recommendations or advice to DMAG and other DoD decision makers and forums on integration, coordination, and synchronization of capability requirements to capability. They also provide independent programmatic recommendations and cross-component perspectives on planned and proposed capability investments to inform leadership decisions.⁴⁴ This analysis would enable more informed decisions, avoid unwanted duplication of capabilities, allow more affordable programs, and create a better balanced enterprise portfolio.

Figure 1-10 depicts the alignment between the Service Execution Portfolio and the Enterprise Portfolio. This alignment allows CPMs to compile the necessary data to provide independent recommendations and advice to decision makers.⁴⁵ This cross-cutting view of enterprise capability would allow key decision makers to make better-informed decisions.

⁴⁴ Ibid.

⁴⁵ Ibid.

Figure 1-10. Service Execution Portfolio and Enterprise Portfolio Information Flow



Discussion

Defense Acquisition System Objectives in National Defense Strategy

In the National Defense Strategy, Secretary of Defense James Mattis provided his vision for the Acquisition System: “We must transition to a culture of performance where results and accountability matter.”⁴⁶ Secretary Mattis indicated this new culture must do the following:⁴⁷

- **Deliver performance at the speed of relevance:** The current processes emphasize exceptional performance over need, consequently sacrificing the ability to provide timely decisions, policies, and capabilities to warfighters. Implementing a performance model requires shedding outdated management practices and structure and integrating business innovations.
- **Organize for innovation:** Service Secretaries and agency heads need to act when current structures hinder lethality or performance. DoD leadership supports changing authorities, granting waivers, and securing external support to remove barriers.
- **Drive budget discipline and affordability to achieve solvency:** DoD must exercise effective financial stewardship to improve financial management and reduce costs.
- **Streamline rapid, iterative approaches from development to fielding:** DoD needs to realign incentive and reporting structures for faster delivery, enable design tradeoffs in the requirements process, integrate more warfighter involvement and intelligence analysis throughout the acquisition process, and use nontraditional suppliers.

⁴⁶ DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military’s Competitive Edge*, 10, accessed June 5, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

⁴⁷ Ibid, 10-11.

- **Harness and protect the national security industrial base:** With congressional support, DoD needs to provide the defense industry sufficient predictability to inform long-term investments in critical skills, infrastructure, and research and development (R&D).

Decision Support System (DSS) Objectives

DSS must provide decision makers with the framework to accomplish the Secretary of Defense's overall objectives by doing the following:

- **Enterprise crosscutting view:** Enable the Secretary and Deputy Secretary to use a cross-cutting view of the enterprise decision space to facilitate better informed and more timely decisions, policies, and warfighter capabilities.
- **Innovation:** Establish an Enterprise and Execution Capability Portfolio framework that enables technological and business process innovation to increase delivery speed, make tradeoffs, and expand the role of warfighters throughout DSS.
- **Dynamic environment:** Recognize the dynamic nature of warfighter needs that DoD must continuously accommodate.
- **Aligned processes.** Align, synchronize, and integrate the requirement, funding, and acquisition processes to eliminate fragmentation, overlaps, and gaps among stakeholder communities; minimize unwanted or unplanned duplication across Military Services.
- **Resource allocation:** Tightly align the National Defense Strategy to resource allocation and capability delivery.
- **Risk assessment:** Identify strategic operational risks from capability gaps and future/current threats to support a variety of innovative mission solutions when needed by the warfighter.
- **Decentralized decision making:** Military Services own the requirement, resource, and acquisition decision space, with insight instead of oversight from OSD and JCS.
- **Incentivized innovation:** USD(R&E) focuses on innovation in each portfolio, with a Defense Wide Funding budget line for innovative concepts to transition to execution capability portfolios.

Conclusions

DoD needs to improve the acquisition system's speed, flexibility, and innovation to deliver capabilities to warfighters to defeat future threats. The disjointed defense requirements, acquisition, and budget systems in DSS inhibit meeting this goal. DSS should be more responsive to warfighter needs and provide timely delivery of materiel solutions. Recent changes move the acquisition process in the right direction toward more rapid and flexible responses. Another major step in improving DSS is implementation of Capability Portfolio Management.

Capability Portfolio Management is not another layer of oversight or bureaucracy designed to check and approve the Military Service's work, but instead multiplies value. It enables analysis and

integration of cross-cutting data and creates an enterprise view, allowing enterprise and Military Service decision makers to make better-informed decisions on “capability investments across the defense enterprise (both materiel and non-materiel) and minimize risk in meeting the DoD’s capability needs in support of strategy.”⁴⁸

The Section 809 Panel is considering the following changes to support enterprise portfolio management:

- Implement an enterprise-level portfolio management framework, fully synchronized with DoD’s execution-level portfolios, to align DSS based on portfolio management best practices.
- Leverage DoDD 7045.20, Capability Portfolio Management, as a starting point for establishing the governance structure and joint processes for portfolio management.
- Align the DSS by establishing an overarching, resource-allocation governance structure that aligns DoD processes, roles, and responsibilities at the enterprise and execution level (rewrite DoDD 5000.01).
- Codify enterprise portfolio roles, responsibilities, and organizational sources for CPMs and members.
- Establish a Defense Wide Budget RDT&E line in the DoD budget, administered by USD(R&E).
- Align congressional subcommittees to mirror DoD enterprise portfolios.
- Align and consolidate PEs to Capability Portfolios; use the structure to plan, program, allocate funds, and submit budgets to Congress at the enterprise portfolio level.
- Assist Military Services; do not trespass on their Organize, Train, Equip, and Administer authorities.

SUSTAINMENT

Problem

DoD must be able to immediately counter multipronged, sustained threats, yet the current logistics and sustainment system lacks the agility needed to do so.⁴⁹ For decades, logistics and sustainment management have been secondary to development and procurement within the defense acquisition system.⁵⁰ Military systems have remained in service far longer than originally planned. Maintaining required spares levels for postproduction systems has been challenging as the government and industry have placed higher priority on new acquisitions. This lack of attention to logistics and sustainment management has led to degraded weapon system readiness, rising sustainment costs, and

⁴⁸ Capability Portfolio Management, DoDD 7045.20 (2017).

⁴⁹ DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military’s Competitive Edge*, accessed June 5, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

⁵⁰ GAO, *Best Practices: Setting Requirements Differently Could Reduce Weapon Systems Total Ownership Costs*, GAO-03-57, February 2003, accessed June 7, 2018, <https://www.gao.gov/assets/160/157396.pdf>.

insufficient supply support. In parallel, it has created suboptimal conditions in maintenance training, maintenance publications, provisioning, and repair capability.⁵¹

DoD's current state of readiness is characterized by the following:

- Readiness statistics at the lowest levels since the post-Vietnam era.⁵²
- Inadequate spares and asset visibility.⁵³
- Inadequate planning and funding for sustainment.
- Inadequate training and career development within the logistics arena.⁵⁴
- Statutes, regulations, and policies that prescribe responsibilities but provide no resources or authority to execute and accomplish those responsibilities.

Service Vice Chiefs, in recent testimony before the Senate Armed Services Subcommittee on Readiness, underscore concern about readiness:

- Vice Chief of Staff of the Air Force Gen. Stephen W. Wilson indicated that restoring readiness is a top priority: "Nearly 3 decades of nonpeer, nontraditional conflict has consumed our readiness attention. Today's world requires an Air Force ready for great power competition."⁵⁵
- The Navy's fleet is over taxed and under maintained, according to Vice Chief of Naval Operations ADM William Moran: "At the height of the Cold War, approximately one in six ships were deployed on any given day. Today almost one in three are deployed on any given day." This demand level exceeds the Navy's capacity and drives operational tempo to unsustainable levels.⁵⁶
- The Army is at a critical point in terms of readiness, as Vice Chief of Staff of the Army, Gen. James McConville testified: "We can no longer afford to defer modernizing our capabilities

⁵¹ Statements of General James C. McConville (USA), Admiral William F. Moran (USN), General Glenn M. Walters (USMC), and General Stephen W. Wilson (USAF), before the U.S. Senate Committee on Armed Services Subcommittee on Readiness and Management Support, February 14, 2018, accessed June 7, 2018, <https://www.armed-services.senate.gov/hearings/18-02-14-current-readiness-of-us-forces>.

⁵² GAO, *Military Readiness: DOD's Readiness Rebuilding Efforts May Be at Risk without a Comprehensive Plan*, GAO 16-841, September 2016, accessed June 7, 2018, <https://www.gao.gov/assets/680/679556.pdf>.

⁵³ GAO, *Defense Logistics: DOD Has a Strategy and Has Taken Steps to Improve Its Asset Visibility, but Further Actions Are Needed*, GAO-15-148, January 2015, accessed June 7, 2018, <https://www.gao.gov/assets/670/668088.pdf>.

⁵⁴ GAO, *Weapon Systems Management: DOD Has Taken Steps to Implement Product Support Managers but Needs to Evaluate Their Effects*, GAO-14-326, April 2014, accessed June 7, 2018, <https://www.gao.gov/assets/670/662809.pdf>.

⁵⁵ Statement of General Stephen W. Wilson, USAF, before the U.S. Senate Committee on Armed Services Subcommittee on Readiness and Management Support, February 14, 2018, accessed June 7, 2018, https://www.armed-services.senate.gov/imo/media/doc/Wilson_02-14-18.pdf.

⁵⁶ Statement of Admiral William F. Moran, USN, before the U.S. Senate Committee on Armed Services Subcommittee on Readiness and Management Support, February 14, 2018, accessed June 7, 2018, https://www.armed-services.senate.gov/imo/media/doc/Moran_02-14-18.pdf.

and developing new ones without eroding competitive advantages of our technology and weapon systems.”⁵⁷

- Assistant Commandant of the Marine Corps Gen. Glenn Walters said the Military Services cannot continue to build readiness after a conflict has already commenced: “We must be ready to respond immediately. Previous strategies focused our investment on readiness to defeat violent extremist organizations and meet steady-state geographic combatant commander (GCC) requirements.... Our strategy now defines readiness as our ability to compete, deter, and win against the rising peer threats we face.”⁵⁸

Background

The defense acquisition system has repeatedly failed warfighters.⁵⁹ PMs have been forced to make design trades, favoring operational requirements early in a program’s lifecycle, consuming resources that would otherwise have been used to cover sustainment needs.⁶⁰ For example, in the F-22 Raptor program, design features that would have given maintenance staff direct access to frequently changed hardware items were sacrificed for the platform’s low observable (LO) requirements.⁶¹ Although these trades were necessary to meet the users’ stated operational performance needs, they resulted in greatly increased maintenance hours. In turn, crew chiefs were forced to remove (rather than just open) larger panels and perform more LO restoration at substantial cost of time and funds. This situation directly affected aircraft availability.

When DoD is forced to make such sacrifices, reliability and maintainability suffer, lifecycle costs grow dramatically, and operational availability of many systems hovers in the 50 percent range.⁶² Shifting the logistics and sustainment management component to an outcome-based focus could provide a responsive approach to meet present and future challenges.

Previous efforts to address sustainment as part of prior reform initiatives have fallen short of desired outcomes.⁶³ Two specific examples of previous initiatives include the Life Cycle Sustainment Plan (LCSP) and creation of the Product Support Manager (PSM) position.

The Principal Deputy for Acquisition, Technology, and Logistics in late 2011 created the LCSP as part of the Acquisition Document Streamlining Task Force in 2010. The program’s main purpose was to

⁵⁷ Statement of General James C. McConville, USA, before the U.S. Senate Committee on Armed Services Subcommittee on Readiness and Management Support, February 14, 2018, accessed June 7, 2018, https://www.armed-services.senate.gov/imo/media/doc/McConville_02-14-18.pdf.

⁵⁸ Statement of General Glenn M. Walters, USMC, before the U.S. Senate Committee on Armed Services Subcommittee on Readiness and Management Support, February 14, 2018, accessed June 7, 2018, https://www.armed-services.senate.gov/imo/media/doc/Walters_02-14-18.pdf.

⁵⁹ Data collection interviews, conducted by Section 809 Panel, February 5-7, 2018 and March 13-14, 2018.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Data collection interviews, conducted by Section 809 Panel, from March to December 2017.

⁶³ Ibid.

define a sustainment strategy and plan that would align warfighter needs and prescribed budget to produce a product that would meet requirements in an affordable manner.⁶⁴

The LCSP does the following:

- Documents the statutory and regulatory requirements that impact sustainment planning.
- Identifies sustainment funding needs (affordability).
- Lays out the program management approach to include roles and responsibilities of the product support organization.
- Outlines the sustainment risk management process.
- Provides a supportability analysis, including the design interface, product support package, and sustaining engineering.

The sustainment outline is conceptually sound, but in execution, many programs bow to stakeholder pressures to meet performance needs at the expense of sustainment needs.⁶⁵ For example, in the F-22 situation described above, the PM and the product support team intended to consider maintenance staff and sustainability upfront, but user demand for a stealthy aircraft forced compromises that drove up sustainment costs.

The PSM position needs attention as well.⁶⁶ The position was intended to bring logistics and sustainment experience and expertise to the upper-management levels of the program office.⁶⁷ Although the PSM roles and responsibilities are clearly defined, no specific resources are identified to support these efforts. PSMs must compete for program funding to achieve appropriate levels of sustainment planning and performance.⁶⁸ Funding is often provided only in the year of execution, further hampering the PSM's ability to establish long-term strategies to improve sustainment performance or incentivize lifecycle cost reductions.

Discussion

Sustainment management is implemented differently across DoD, but it is generally characterized by the following:⁶⁹

- Lack of command unity.

⁶⁴ Terry Emmert, "The Life Cycle Sustainment Plan: A Review of the Annotated Outline," *Defense AT&L Product Support Issue*, March-April 2012, accessed June 7, 2018, <http://dau.dodlive.mil/files/2012/03/Emmert.pdf>.

⁶⁵ GAO, *Weapon Systems Management: DOD Has Taken Steps to Implement Product Support Managers but Needs to Evaluate Their Effects*, GAO-14-326, April 2014, accessed June 7, 2018, <https://www.gao.gov/assets/670/662809.pdf>.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Life-Cycle Management and Product Support, 10 U.S.C. § 2337.

⁶⁹ Data collection interviews, conducted by Section 809 Panel, February 5-7, 2018.

- Metrics that indicate satisfactory performance but do not necessarily support or contribute to the desired overall result.
- Intellectual property rights issues that inhibit sustainment.
- Contracting issues that are constricted by statutes, regulations, and policies.

Lack of Command Unity

PMs are solely responsible for weapon systems' cost, schedule, and performance; however, they often have little control over budget and programmatic decisions that can affect readiness. Currently, no controls exist that govern early stage planning and ensure development of an executable sustainment strategy and plan for most major weapon systems. Although LCSP provides an outline for how to sustain weapon systems, it does not drive separate funding lines for sustainment during development. PMs often reallocate some of the sustainment budget to development early in the lifecycle and assume they have time to recover sustainment funding later in the program's life. In reality, approximately 75 percent of programs' lifecycle costs occur after production is complete, so deferred sustainment decisions can substantially affect sustainment execution. Decisions made by other elements of the materiel enterprise (Defense Logistics Agency, commercial and organic depots, supply, manpower, facilities, transportation, and training) are often made without communication with the PM and can affect long-term weapon system sustainability.

DoD and Military Service sustainment organizations often garner incentives to operate like businesses. These incentives can drive internal policies that contribute to the business health of the organization without regard to potential effects on individual weapon system readiness. Each organizational element perceives that its individual risk contribution to overall readiness is small, but there is no collective *risk stacking* that measures the total risk to readiness.

Metrics

Each element of the sustainment organization devises, constructs, and implements its own metrics.⁷⁰ Currently, there is no complete set of metrics visible to all stakeholders that provides a reliable indication of the sustainment health of each weapon system or the overall capacity of the capability portfolio within which the platforms reside.

Intellectual Property Rights

Acquisition of data rights as part of weapon systems development has changed in recent years. If a weapon system is to be sustained through a combination of commercial and organic support, access to intellectual property (IP) rights that allow component repair—and in some cases, competition to provide those capabilities—is crucial.⁷¹ Appropriate planning, funding, and contracting for government acquisition of necessary IP is best accomplished up front, not as an afterthought. Requesting a complete data package might not be cost effective either. Instead, the government should consider obtaining rights to those specific portions and for the specific purposes (e.g., organic depot maintenance/

⁷⁰ Data collection interviews, conducted by Section 809 Panel, March 13-14, 2018.

⁷¹ Data collection interviews, conducted by Section 809 Panel, February 5-7, 2018 and March 13-14, 2018.

acceptance testing versus detailed design/material data required to enable a future reprourement of the component) of the system it foresees acquiring in the future.

Statutes, Regulations, and Policies

The PSM has no dedicated funding and must compete for program office resources. Sustainment is often allocated Operations and Maintenance (O&M) funding that expires each year. Solving obsolescence issues, particularly for avionics parts, is constrained by real or perceived regulations or policies governing the funding source. With rapid technology advances, the capability of replacement avionics, as well as other categories of components, usually exceeds that of the item it is replacing. Because replacement technology typically increases speed, throughput, or some other performance aspect, it is perceived as adding functionality. This perception often drives procuring agencies to determine that R&D funds are required to counter the obsolescence, adding unnecessary time and complexity to the sustainment process.

Developing appropriate supplier relationships for commercial repair activities is complicated by single-year contracting and funding constraints.⁷² If sustainment funds were made available to support multiyear, long-term contracts, industry would be more apt to form long-term supplier relationships. This situation could result in outcome-based incentives instead of transactional contracts and ultimately lead to reduced costs and improved component and system performance and reliability.

Vision for the Future

Sustainment management is a discipline encompassing all logistics elements. It also has the broader context of strategy, planning, and budgeting to ensure weapon systems' full potential can be attained. Several concepts for achieving this discipline are being explored to support forthcoming recommendations. The following are included among them:⁷³

- Improving sustainment planning in initial stages of an acquisition.
- Establishing a SPB.
- Maturing LCSPs to enhance appropriate and affordable sustainment.
- Clarifying funding rules crucial to readiness and obsolescence management.
- Developing effective analytical tools to support decision making.

Improve Sustainment Planning

Consistent, stable funding allocated directly to sustainment planning would allow investigation of alternative strategies during AoA. All elements of weapon system support—from manpower to training, to sparing and repair—must be aligned and focused on common goals. Developing effective

⁷² Ibid.

⁷³ Ibid.

metrics, available to all stakeholders, is crucial. All parties need to be aware of the issues and the effects of their decisions.

Establish a Sustainment Program Baseline

SPB, as envisioned, will govern programs' sustainment performance and cost requirements and establish thresholds. Developed by the PSM and approved by the PM with support from the resource sponsor, the type commander, and the supply support commands (Defense Logistics Agency and Service System or Materiel Command), SPB is intended to form an enduring agreement among the government stakeholders. It prevents any stakeholder or group of stakeholders from independently affecting weapon systems operational readiness by moving resources to satisfy other priorities.

SPB is analogous to the APB—developed from program inception, signed at Milestone B, and enforced throughout the program with recurring reviews, documentation, and reporting. It would provide the PM with authority, resourcing, and controls to ensure sustainment strategy and planning take place and result in sustainable, affordable weapon systems. It would gain additional importance and detail as programs unfold and, at Milestone C, would become the guiding document for weapon systems for the remainder of their lifecycles.

SPB would cover the subsequent 5-year period of weapon systems' life, be updated and approved prior to program milestones, and be reviewed biennially after Milestone C. Exceeding sustainment cost projections or failing to meet specified performance thresholds would result in a sustainment breach with appropriate reporting one level above the MDA. To allow PMs maximum flexibility, DoD should not specify parameters to be measured, instead leaving that task to the lead Military Service for the weapon system.

Mature LCSPs to Enhance Appropriate and Affordable Sustainment

A need exists to assess where manufacturing, rework, and overhaul work is currently being performed and where it should be conducted in the future.⁷⁴ This assessment should include all workload aspects, including support engineering, contracting, IP requirements, and funding mechanisms. PMs and PSMs share the responsibility for ensuring weapon systems receive appropriate and competitive component repair. To maintain competition throughout the lifecycle, data rights and IP—as applicable to both hardware and software—must be addressed up front, not as an afterthought. Particularly for software, sustainment depends on knowledge of the system from its inception. Access to data at the appropriate time may be one solution. Data on demand describes a concept to achieve this objective and must be explored further to allow implementation through appropriate contract vehicles.

Clarify Funding Rules

Rules contained in Financial Management Regulations (FMR) are not always interpreted in the same manner across DoD. Some flexibility in how and when funds are obligated and expended is necessary to support sustainment. Organic activities have some ability to implement long-term contracts with suppliers. Both organic and commercial activities are constrained by expiration of O&M funding. Changing the statutes and FMR to allow more time for obligation of these funds and long-term

⁷⁴ Data collection interviews, conducted by Section 809 Panel, February 5-7, 2018.

contracting would stabilize the supplier base, incentivize more suppliers to do business with DoD, expand smart and targeted use of outcome-based (rather than transactional) contracts, and provide additional sustainment options.

Develop Effective Analytic Tools to Support Decision Making

Metrics exist to measure many sustainment aspects, but they are developed independently, do not adequately portray the overall readiness situation, and have little or no predictive capability.⁷⁵ DoD needs to develop effective analytic tools that produce appropriate metrics and result in an accurate portrayal of overall readiness (for individual weapon systems as well as portfolios of capability). Data analytics must be employed to support data-driven decisions.⁷⁶

Conclusions

Sustainment management is complex, and there is no single organizational entity responsible for the negative effects that frequently occur to weapon system readiness. Degradation has been exacerbated by a continuing series of reform initiatives that did not directly address problems, but instead established more unfunded policy and regulations; continued to address sustainment on an annual, rather than lifecycle, basis; and employed metrics that masked the enormity of readiness problems. It has taken decades to reach this state. Even with a substantial funding influx, training, and statute and policy changes, marked improvement will take time.

The sustainment system needs realignment that places appropriate emphasis on sustainment, is consistent with the portfolio management model being recommended, and brings renewed long-term focus to the overall state of readiness. It would also benefit from establishing an SPB tied closely to the APB that drives planning, budgeting, and oversight to enable delivery of total logistic support to the weapon system. If PMs are incentivized to make decisions considering the portfolio management concept, warfighters will ultimately benefit. The Section 809 Panel's specific recommendations required to implement Logistics and Sustainment Management at a program and portfolio level will be addressed in the *Volume 3 Report*.

REQUIREMENTS MANAGEMENT

Problem

Historically, DoD drove U.S. technology R&D; today, global commercial investments are driving this environment. U.S. adversaries have access to most of the same commercial technologies, and those countries that can rapidly and effectively exploit leading technologies for military advantage will win future wars. The 2018 National Defense Strategy stresses these points in several of its key conclusions:⁷⁷

⁷⁵ Ibid.

⁷⁶ "Pentagon 'can't afford the sustainment costs' on F-35, Lord says," Aaron Mehta, Defense News, accessed March 29, 2018, <https://www.defensenews.com/air/2018/02/01/pentagon-cant-afford-the-sustainment-costs-on-f-35-lord-says/>.

⁷⁷ DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge*, accessed June 5, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

- New commercial technology will change the character of war.
- DoD must deliver performance at the speed of relevance.
- DoD must organize for innovation.
- A rapid, iterative approach to capability development will reduce costs, technological obsolescence, and acquisition risk.

The JCIDS lacks the speed, agility, and innovation required to successfully compete in the current environment. JCIDS still uses a rigid, *requirements pull* approach to predefine a solution. It lacks a *technology push* pathway by which leading technologies can drive innovative military solutions in reaction to threats and new warfighting approaches.

JCIDS policies and processes lead to premature assumptions about the future operational environment and specific materiel solutions required. These assumptions contribute to lengthy development timelines, limited flexibility, and stovepiped systems. Requirements are often written with a specific materiel solution in mind—typically an upgraded version of the command’s legacy system. System requirements are written without considering a system-of-systems perspective or enterprise architectures. As a result, many major systems are unable to communicate with each other or leverage network effects in operations.

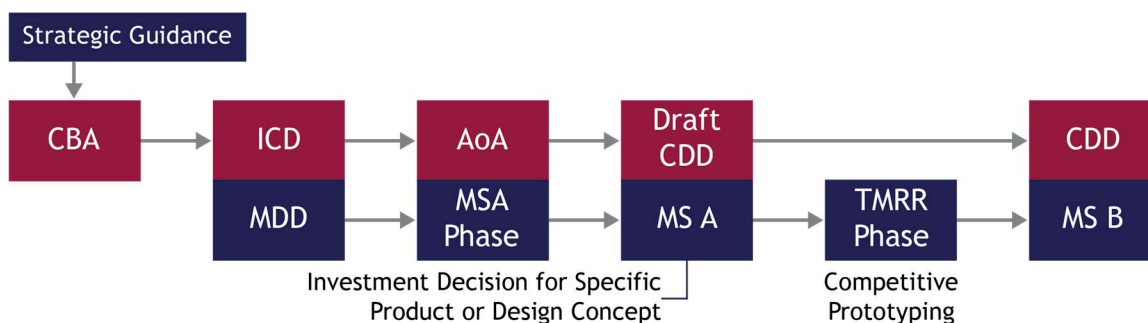
Bureaucracies often become wedded to certain missions, technologies, and industry providers and fiercely resist changes or perceived threats to them. A small team from a single organization with a bias toward a specific alternative often conducts lengthy AoAs and related JCIDS analyses. This approach inhibits innovation and limits assessment of all available technical alternatives. The JCIDS process does not effectively leverage the defense R&D community or industry to prototype, experiment, and demonstrate potential unconventional solutions. The current system limits iterative analysis and tradeoff decisions on cost, schedule, and performance that are responsive to resource constraints and operational demands. Requirements documents based on the formal JCIDS process result in system-specific performance thresholds and are not predicated on addressing the broader operational outcomes the threat environment demands.

Software is a driving force for most modern weapon systems capability designs and future innovation, yet JCIDS does not effectively manage software requirements. The JCIDS process demands that future requirements be defined to meet specific needs far in advance of the real-time discovery of global threat data and entails restrictive, lengthy change processes. These processes inhibit adoption of Agile (rapid, iterative developments with users), DevOps (unifies software development and operations), and other commercial software development practices. Commercial software companies pursue a need, then iteratively develop the scope and requirements based on active user feedback on rapid deliveries, interim performance, and shifting stakeholder priorities. The *IT Box* model in JCIDS bounds software requirements by development and lifecycle costs and requires a flag-level board to iteratively approve requirements. This approach alleviates software programs from JROC oversight and from developing traditional, large requirements documents, yet it constrains needed speed and flexibility.

Background

Major technical decisions about a program's characteristics occur prior to Milestone A, too early in the process. As illustrated in Figure 1-11, the JCIDS requirements process typically begins with a Capabilities Based Assessment (CBA) based on strategic guidance to develop an ICD as the entrance criteria to the Materiel Development Decision (MDD).

Figure 1-11. The JCIDS Requirements Process



An AoA and related analysis is conducted during the Materiel Solution Analysis Phase to prepare for Milestone A, which, as outlined in DoDI 5000.02, Operation of the Defense Acquisition System, is an “investment decision to pursue specific product or design concepts.”⁷⁸ Even at this early stage, crucial decisions have already been made about the nature of the solution.⁷⁹ A draft CDD, including several Key Performance Parameters (KPPs), is also required for Milestone A approval.⁸⁰ Milestone A authorizes the program to advance to the Technology Maturation and Risk Reduction Phase, the point at which the agency can engage industry and contract for competitive prototyping to reduce risk for the selected materiel solution. Typically, once a request for proposal for technology maturation or risk reduction is released, it either signals or clearly identifies the preferred solution with detailed specifications and technical requirements. These early commitments severely constrain innovative options.

The JROC or the Military Service's requirements council must approve the final CDD before system development begins. A 2015 GAO report indicated that completing a CDD takes, on average, 24 months—the longest of all the program documentation processes GAO reviewed.⁸¹ The CDD essentially locks down a major program's scope for a decade or longer for development, testing, and production. During this timeframe, changes occur constantly across operations, threats, priorities, budgets, technologies, and related systems; however, the requirements remain fixed unless changes are approved by an SAE, OSD, and JCS Configuration Steering Board.

Operational sponsors know that the subsequent increment or another program will follow many years later, and they are incentivized to include most known requirements in the current CDD. This practice

⁷⁸ Operation of the Defense Acquisition System, DoDI 5000.02 (2017).

⁷⁹ “Failures of Imagination: The Military's Biggest Acquisition Challenge,” Jarrett Lane and Michelle Johnson, War on the Rocks, April 3, 2018, accessed June 7, 2018, <https://warontherocks.com/2018/04/failures-of-imagination-the-militarys-biggest-acquisition-challenge/>.

⁸⁰ “Key Performance Parameters (KPPs)” DAU Acquisition Encyclopedia (Acquipedia), accessed June 7, 2018, <https://www.dau.mil/acquipedia/Pages/ArticleDetails.aspx?aid=7de557a6-2408-4092-8171-23a82d2c16d6>.

⁸¹ GAO, *Acquisition Reform: DOD Should Streamline Its Decision-Making Process for Weapon Systems to Reduce Inefficiencies*, GAO-15-192, February 2015, accessed June 7, 2018, <https://www.gao.gov/assets/670/668629.pdf>.

compounds risk by expanding the program scope, the number of critical technologies to mature, and variances in estimates. These compounded risks drive longer timelines and higher costs to achieve initial operational capability.

The failure of the CDD and overall JCIDS processes to deliver timely, innovative solutions is broadly observed. For example, Commander of U.S. Strategic Command Gen. John Hyten has emphasized the critical need for DoD to deliver capabilities faster. In an interview he said,

The key is to focus on capabilities. We should not define the systems in the JROC. We should define the capabilities we need and then leverage the innovation in industry to deliver those capabilities. The reason JROC has taken so long is that we define the system through the requirements process. That will change.⁸²

Congressional Direction

There is bipartisan agreement in Congress that many problems with the defense acquisition system stem from the requirements development process. House Armed Services Committee Chairman Mac Thornberry has said,

Too often programs start the acquisition process in an unstable position, with significant technical and programmatic risks. And, unfortunately, this leads to delays, cost overruns, performance shortfalls, and cancelation of programs. Many argue that the stovepipe requirements, budgeting, and acquisition processes contribute to this problem and that better aligning these three could shorten, simplify, and improve our acquisition system.⁸³

Senate Armed Services Committee Ranking Member Jack Reed stressed at a hearing:

One of the major challenges in acquisition reform is reviewing the weaknesses and shortfalls in our requirements development processes. Some argue that requirements are developed without being informed by cost or technical realities, and that they are too ambitious, or continually change over the course of a program—which drives up costs and extends schedules.⁸⁴

Recognizing these issues, in Section 810 of the FY 2016 NDAA, Congress directed the Secretary of Defense and the Chairman of the JCS to review the requirements processes to establish an agile and streamlined system. They directed DoD to develop time-based requirements processes based on capabilities to be deployed urgently, within 2 years, within 5 years, and longer than 5 years. The Section 809 Panel will research the DoD implementation of these time-based processes to support final recommendations.

⁸² “Q&A: Air Force Gen. John Hyten says U.S. space strategy, budget moving ‘down the right path’,” Sandra Erwin, Space News, April 3, 2018, accessed June 7, 2018, <http://spacenews.com/qa-air-force-gen-john-hyten-says-u-s-space-strategy-budget-moving-down-the-right-path/>.

⁸³ House Armed Services Committee Hearing 114-83, *Acquisition Reform: Starting Programs Well*, February 13, 2016, accessed April 10, 2018, <https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg98892/pdf/CHRG-114hhrg98892.pdf>.

⁸⁴ Senate Armed Services Committee Hearing 114-394, *Acquisition Reform: Next Steps*, December 1, 2015, accessed April 10, 2018, <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg22200/pdf/CHRG-114shrg22200.pdf>.

Section 802 of the FY 2016 NDAA modified the roles of the JCS in the acquisition process. The changes were to “reinforce the role and responsibilities of the Chiefs of Staff in decisions regarding the balancing of resources and priorities, and associated tradeoffs among cost, schedule, technical feasibility, and performance” of MDAPs. The Chiefs of Staff, as the MDAP customer, will advise the MDA, and their tradeoff views will be “strongly considered by program managers and program executive officers in all phases of the acquisition process.”

Sections 801 and 808 of the FY 2016 NDAA required the Military Service Chiefs to review Title X authorities and report to Congress on linking and streamlining requirements, acquisition, and budget processes. The Military Service Chiefs reported on their current efforts and concerns on requirements, recommending the following:

- Streamline the oversight process by decreasing the volume of requirements at every level.
- Provide greater flexibility in IT funding, including a “small trial of colorless money for cyber.”⁸⁵
- Use the Service Requirements Oversight Councils as a documentation approval forum.
- Integrate long-term planning processes and shorter-term, requirements-development processes.
- Give Chiefs of Staff authority throughout the process; Chiefs of Staff currently have authority over Milestones A and B, but no authority over MDD and Milestone C.

Congress introduced new rapid acquisition pathways and allowed rapid programs to proceed without having to go through JCIDS. Section 804 of the FY 2016 NDAA required DoD to establish guidance for a middle tier of acquisition programs using acquisition pathways for rapid prototyping and fielding. Section 806 of the FY 2017 NDAA allowed SAEs to identify priority prototyping projects to be completed within 2 years for less than \$10 million (or \$50 million with Military Service Secretary approval). Absent a timely process in JCIDS, Congress allowed DoD to proceed with an ambiguous reference to *approved requirements*.

Discussion

Iterative

Given the rapid pace of technology change, DoD can no longer afford to lock in requirements for a decade or more. Programs must focus on incremental advances rather than attempting to predict long-term operational and technical needs prior to defining short-term operational capabilities. Broader portfolio capability needs would enable greater system interoperability than the large, fixed-requirements documents used for major weapon systems. The requirements system must embrace change and exploit leading technologies. As DoD rolls out multiple acquisition pathways to field a solution, it also requires a dynamic array of pathways to define and approve requirements. These requirements pathways, aligned with acquisition and budget processes, must support delivery timelines—driven by operational needs and threats—to stay ahead of adversaries.

⁸⁵ U.S. Air Force, Report to Congressional Committees, *Acquisition-Related Authorities of the Chief of Staff of the Air Force*, April 2016.

To effectively implement a portfolio acquisition approach, DoD will need to tailor the requirements system to enable greater speed and agility. DoD needs to transition from stovepiped, program-centric requirements documents with system performance thresholds to integrated requirements for portfolios of capabilities. This portfolio approach to requirements, aligned with a more dynamic portfolio resource allocation model, provides the flexibility to iteratively fund and execute priority capabilities.

Collaborative

DoD must promote active collaboration among the government research community, federally funded R&D centers, universities, and industry. This collaboration is critical to enabling healthy competition of ideas and true innovation in early program development.⁸⁶ Prototyping, experimentation, and demonstrations should be used to regularly shape the scope, requirements, and potential solutions. Prototyping should take place not only before defining a program, but also during continual efforts to incrementally improve a system or ideally a suite of portfolio capabilities. These processes should complement or replace lengthy CBAs and AoAs. This approach enables an evidence-based, decision-making process to validate requirements. Silicon Valley executive Marty Cagan defines a Minimum Viable Product (MVP) as the smallest possible product that is valuable, usable, and feasible.⁸⁷ Delivering an MVP as soon as possible accelerates learning. Early delivery allows end users to react to potential solutions and provides feedback to acquirers and developers to iteratively shape the solution. As promising new technologies and commercial solutions emerge, DoD needs a streamlined requirements document and process to validate military need or opportunity based on the technology/solution.

User Input Structures

The proposed PAE should regularly collaborate with operational and requirements commands on CONOPS, requirements, threats, and potential solutions and opportunities. Operational commands (with threat inputs from the intelligence community) should develop and maintain the following capstone data points for each portfolio:

- **Enduring Enterprise Requirements (EER):** Captures enduring enterprise requirements needed now and in the future by the Military Services and Combatant Commands (CCMDs) based on the relevant CONOPs.
- **Measures of Force Effectiveness (MOFE):** Specific measures of how a force mix (a system of systems consisting of sensors, weapons, communications systems, etc.) performs against the EERs. MOFEs are the culmination of the measures of effect and measures of performance currently captured in ICDs and CDDs.
- **Mission Threads/Effects Chains:** Representative vignettes that illustrate specific operational scenarios.

⁸⁶ Testimony of Michèle A. Flournoy, before the U.S. Senate Armed Services Committee, December 8, 2015, accessed June 7, 2018, https://www.armed-services.senate.gov/imo/media/doc/Flournoy_12-08-15.pdf.

⁸⁷ "Minimum Viable Product," Marty Cagan, Silicon Valley Product Group, August 24, 2011, accessed June 7, 2018, <https://svpg.com/minimum-viable-product/>.

Military Service Chiefs and their associated requirements boards could approve the initial capstone data points in collaboration with new enterprise portfolios recommended by the Section 809 Panel. These data points serve as general descriptors of operational portfolio needs to iteratively deliver capabilities with maximum effect. Program or project requirements documents could be iteratively developed to focus on more detailed, specific-capability needs.

Operational requirements should be simple: The smaller the scope, the faster capabilities can be delivered. CDDs (or related documents) should be constrained to a few KPPs that address only the core mission capabilities required. The lower-level requirements traditionally appearing in CDDs should be moved to the Technical Requirements Document used in the contracting phase of the acquisition process.

Streamlined Management

Although the IT Box model in JCIDS provided greater flexibility for software development than the traditional process, further reforms are needed to provide for software speed and agility. DoD needs a streamlined, dynamic requirements system for software development, including defense business systems and software as a part of major weapon system platforms.⁸⁸ Empowered representatives from the operational community should manage requirements via a *series of dynamic backlogs* rather than large static documents.⁸⁹ A backlog is a prioritized list of requirements written from an operational user's perspective but can also include technical requirements like cybersecurity. Each new, small, development iteration should focus on the highest priority requirements in the backlog. The backlog should dynamically reprioritize, add or delete, and shape requirements based on operational needs, threats, technical performance, systems engineering, security, feedback from earlier releases, and other factors. Flag officer approval of requirements should be limited to starting major new programs or increments and portfolio reviews. Lower-level officials who regularly collaborate with end users and stakeholders should be empowered to iteratively define, approve, and prioritize requirements.

The backlog approach to managing requirements can be applied beyond software development. Execution portfolios can manage unmet requirements via a portfolio backlog. The highest priority requirements with mature technologies can be scoped to form the next program, project, increment, or capabilities release. A program or increment can further manage its requirements via a dynamic backlog to be addressed via a series of iterative developments. As interim developments are demonstrated or fielded, user feedback and system performance can generate new requirements or shift priorities for the backlog. The goal should be to ensure that each successive set of capabilities addresses the users' highest-priority needs and strengthens force effectiveness.

The operational community should assign *empowered operational representatives* to the PAE's staff to do the following:

- Contribute to Portfolio Capability Roadmaps.
- Set the vision for key capability area.

⁸⁸ See related recommendations in Section 3, "Defense Business Systems: Acquisition of Information Technology Systems," and Section 4, "Earned Value Management for Software Programs Using Agile," in *Volume 1 of the Final Report*.

⁸⁹ "What is a Product Backlog?" Scrum.org, accessed June 7, 2018, <https://www.scrum.org/resources/what-is-a-product-backlog>.

- Share insights on operations and threats.
- Provide rapid feedback on interim developments.
- Define, shape, and prioritize lower-level requirements.
- Foster active collaboration with operational commanders and end users.

These operational representatives should own the portfolio requirements backlog to ensure the portfolio is focused on meeting the highest operational priorities first. During regular portfolio reviews with boards of directors or Military Service leadership, PAEs could present the requirements backlog to ensure alignment to Military Service and CCMD operational priorities and outcomes.

There are successful examples DoD can use as templates for shifting its requirements process to a problem-solving process. The Hacking for Defense (H4D) program could be a starting point.⁹⁰ The program teaches students to break down and thoroughly explore problems, then cultivate and iteratively develop smart solutions. The program recently received a nod from Congress, which gave the Secretary of Defense authority to fund H4D training and education programs.⁹¹ Teaching both the operational and acquisition communities to identify and clearly articulate problems will help open the door to innovation and new ways to achieve the mission. H4D's problem-solving process could complement or replace lengthy CBA and AoA processes.

The requirements process must be streamlined and flexible to support shorter-increment timelines. DoD Directive 5000.01⁹² states:

Advanced technology shall be integrated into producible systems and deployed in the shortest time practicable. Approved, time-phased capability needs matched with available technology and resources enable evolutionary acquisition strategies. Evolutionary acquisition strategies are the preferred approach to satisfying operational needs. Incremental development is the preferred process for executing such strategies.

Breaking the scope of large systems into multiple smaller releases enables organizations to respond to changing operations, risks, budgets, priorities, contractors, and technologies. The National Defense Strategy stresses iterative development: "Streamline rapid, iterative approaches from development to fielding. A rapid, iterative approach to capability development will reduce costs, technological obsolescence, and acquisition risk."⁹³ To implement this approach, PAEs must be empowered with the ability to rapidly and iteratively scope and shape lower-level requirements within their respective portfolios, in close collaboration with the operational community. Streamlining the acquisition system will not achieve the desired results unless the requirements and budget systems are aligned and time constrained.

⁹⁰ "Hacking for Defense," accessed June 7, 2018, <https://www.h4di.org/>.

⁹¹ Section 225 of FY 2018 NDAA, Pub. L. No. 115-91.

⁹² The Defense Acquisition System, DoDD 5000.01 (2007).

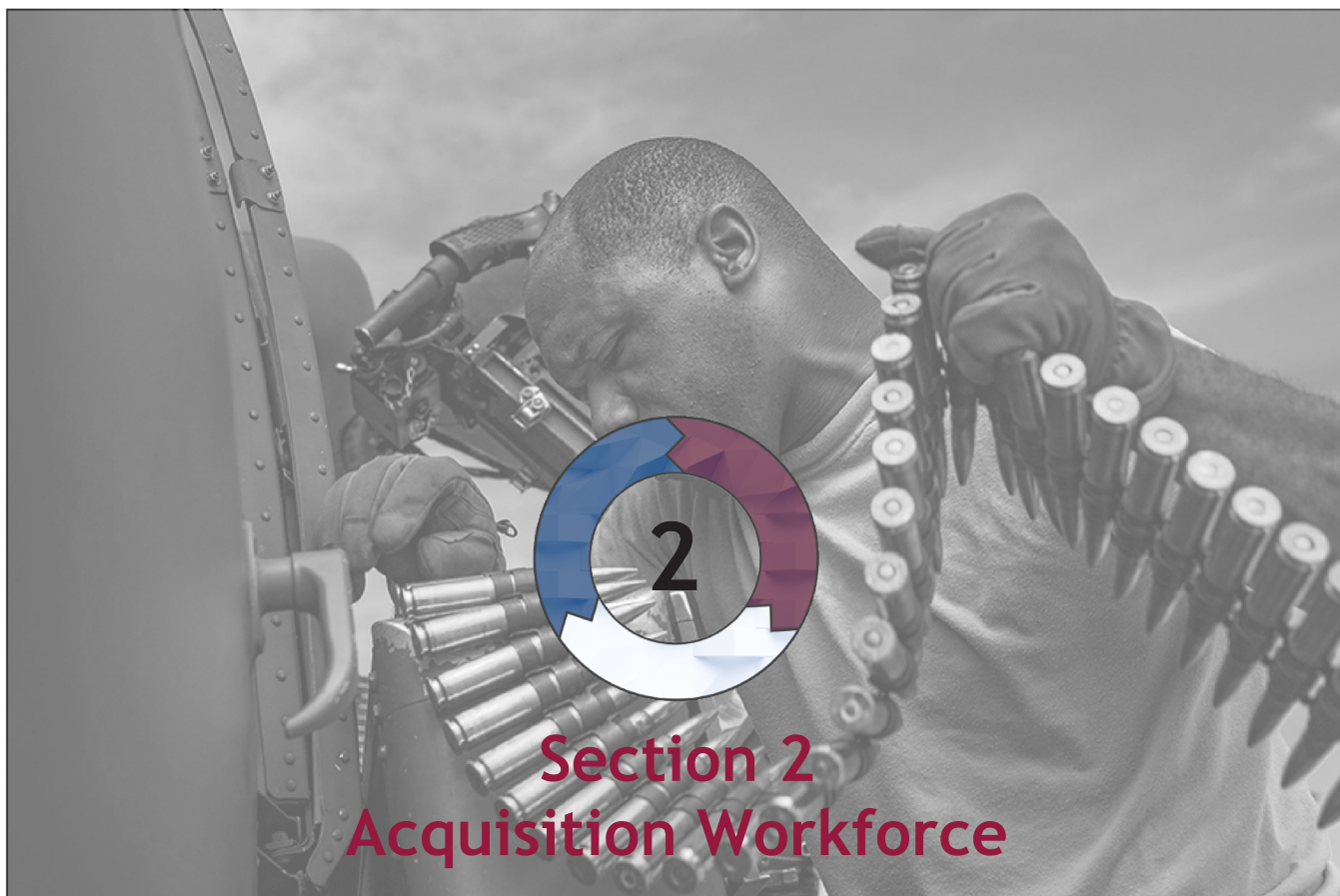
⁹³ DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge*, 11, accessed June 5, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

Each Military Service could pilot a portfolio requirements approach. Congress, JCS, and OSD could empower them to implement these concepts via one of their current PEO portfolios or new PAE-led portfolios. Best practices and lessons learned from these pilot portfolios would shape the way in which DoD might apply a future, departmentwide portfolio requirements system.

Conclusions

The requirements system is a key constraint to DoD's ability to deliver capabilities with greater speed, agility, and innovation. Lengthy analyses and reviews by many layers of bureaucracy encumber the current system. Delivering high-mission-impact capabilities requires close alignment with, and active representation from, the operational community. DoD can no longer afford to spend years analyzing, documenting, and coordinating system-specific requirements. Effectively transitioning the acquisition system to a portfolio approach requires a similar approach for requirements. Prototyping, experimentation, and demonstrations by government and industry offer an array of innovative ideas to shape portfolio solutions. Focusing on strategic objectives instead of predefined materiel solutions will allow consideration of a broader spectrum of cost, schedule, performance, and risk tradeoffs. By focusing on individual mission areas, a portfolio approach will improve the pipeline for innovation between government and industry. The requirements system needs to be designed to enable changes; managing via dynamic backlogs is one approach to consider. The H4D approach should be used as a template for modernization of the DoD requirements system.

The *Volume 3 Report* will offer more detailed recommendations to reorganize DoD's requirements system and align it with a portfolio management approach in budgeting and acquisition.



DoD must address limitations of the acquisition workforce head-on to ensure implementation of much-needed reforms to safeguard U.S. warfighting dominance.

RECOMMENDATIONS

Rec. 25: Streamline and adapt hiring authorities to support the acquisition workforce.

Rec. 26: Convert the Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) from an indefinite demonstration project to a permanent personnel system.

Rec. 27: Improve resourcing, allocation, and management of the Defense Acquisition Workforce Development Fund (DAWDF).

INTRODUCTION

The Section 809 Panel's *Interim Report* identified the DoD acquisition workforce (AWF) as a pivotal factor in the success of acquisition reform. As the panel stated, "the ultimate effectiveness and efficiency of defense acquisition depends on and is determined by the people who are responsible for all phases of acquisition."¹ Accordingly, the panel concluded it should address the AWF in its analysis and recommendations. U.S. national security relies on harnessing the efforts of "the innovative and the inventive, the brilliant and the bold" in the service of the nation.² The AWF must bring those individuals into its ranks and use the achievements of broader American society for its own ends. It is necessary to directly address the limitations of the AWF to ensure the workforce is capable of implementing much-needed acquisition reforms and safeguarding U.S. warfighting dominance in the 21st Century.

Just because the challenges the AWF faces are well-known, does not mean they are easy to overcome. Some challenges are structural: a cumbersome hiring process; budgetary constraints that hinder recruitment incentives, training, and development; and a professional certification process that is increasingly disconnected from the practical skills and experience required for the acquisition field. Other challenges are cultural: a personnel system that fails to incentivize success, political and administrative decisions that promote adherence to process and procedure instead of creativity and innovation, and a lack of authority on the part of key actors in the acquisition system to properly perform their duties. Underlying these challenges are rigid, bureaucratic rules; overly prescriptive regulations; and a slow process of integrating new technologies into existing processes. These problems are longstanding for the AWF. DoD appreciates the scale of the reforms that are needed: In an August 2017 report to Congress, DoD called for a new emphasis in the AWF on "critical thinking, risk management, flexible decision-making" that would require "a cultural change and the re-education of our workforce" and would constitute a *significant cultural shift* away from *existing regimented process* and *zero-risk mentality*.³ Reforming these deficiencies is a crucial component of acquisition reform as a whole.

An entity as complex as the DoD AWF defies easy categorization. The Section 809 Panel organized its approach to examining the AWF into a framework built around the main pillars of the workforce life cycle: *recruitment*, *retention*, *development*, and *removal*. *Recruitment* encompasses the hiring authorities, procedures, and incentives that exist to hire new employees into the AWF. *Retention* comprises the talent management programs, promotional pathways, and incentives that support efforts to keep employees. *Development* embraces the certification and training programs, mentoring efforts, special career opportunities (such as educational sponsorships and private-sector leaves of absence), and incorporation of emerging technologies that ensure the ongoing capabilities of acquisition employees. *Removal* concerns the ability of the AWF to transition employees away from their positions in favor of

¹ Advisory Panel on Streamlining and Codifying Acquisition Regulations, *Section 809 Panel Interim Report*, May 2017, accessed May 7, 2018, https://section809panel.org/wp-content/uploads/2017/05/Sec809Panel_Interim-Report_May2017_FINAL-for-web.pdf.

² The President of the United States, *National Security Strategy of the United States of America*, December 2017, accessed May 7, 2018, <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

³ Secretary of Defense, *Report to Congress Restructuring the Department of Defense Acquisition, Technology and Logistics Organization and Chief Management Officer Organization*, August 2017, accessed May 7, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/Section-901-FY-2017-NDAA-Report.pdf>.

more suitable assignments when necessary. This framework guided the panel as it considered which subjects constituted the most pressing concerns for the AWF. The panel's recommendations are designed to address different aspects of the framework in a manner that reinforces broader aims of acquisition reform, namely the continued support of U.S. warfighting dominance.

The Section 809 Panel intends to issue two sets of recommendations regarding the AWF. The first set is contained within this chapter; the second set will be presented in *Volume 3* of the panel's *Final Report* in January 2019. In this chapter, the panel's recommendations revolve around three crucial aspects of AWF policy: hiring authorities, the DoD Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo), and the Defense Acquisition Workforce Development Fund (DAWDF). The necessity of engaging with these issues became evident over the course of the panel's research and outreach to AWF stakeholders.

Hiring authorities are a central element of the hiring process, and shortcomings in the framework of AWF hiring authorities threaten DoD's ability to recruit talented employees. Streamlining and adapting these authorities could help eliminate critical skill gaps. AcqDemo is a bold experiment in reshaping employee compensation to incentivize greater individual contributions to the DoD mission. The program could have a substantial effect on workforce recruitment and retention policies. AcqDemo should be made permanent and mandatory, and the ceiling on overall participation should be lifted. DAWDF is a vital resource for recruiting, training, developing, and retaining acquisition employees, but changes to how the fund is resourced have created a growing sense of uncertainty among its users. DAWDF should be retained, and it should be appropriated and managed as a multiyear fund, afforded adequate management resources, and streamlined in its execution. The Section 809 Panel also proposes streamlining the statutory framework for AWF personnel by codifying in Chapter 87 of Title 10 a number of free-standing NDAA provisions that are currently shown in the U.S. Code as *notes* within that chapter. This change is part of a larger effort aimed at a logical restructuring of the defense acquisition provisions within Title 10 (and is discussed in another section of this report). Panel recommendations address current problems and facilitate applying the underlying policies to their fullest potential. The panel anticipates completing a comparable set of workforce recommendations in *Volume 3*. The following are potential areas for attention:

- The certification and training standards established by the Defense Acquisition Workforce Improvement Act should be assessed to ensure the process remains relevant and beneficial to the AWF of the 21st Century.
- The role of emerging technologies should be considered to improve accuracy, fairness, oversight capabilities, and process time.
- The role of human resources personnel in the hiring process should be evaluated to ensure human resources process is properly aligned with the hiring objectives of the AWF.
- The potential of educational exchange programs between acquisition employees and the private sector should be explored to determine whether they can be used to the greater benefit of the workforce.

Other subjects are likely to arise as well during panel deliberations. Defense acquisition is affected by the same forces that are remaking American society as a whole, and the rapid pace of technological and social change is placing stress on the AWF to evolve with it.⁴ The panel is resolved to prioritize addressing the most important challenges facing the AWF. This sentiment will guide both the current and future sets of workforce recommendations.

RECOMMENDATIONS

Recommendation 25: Streamline and adapt hiring authorities to support the acquisition workforce.

Problem

The primary dilemma confronting the hiring process for the defense AWF is the need to fill critical skill gaps. The AWF experiences shortfalls in certain positions and career fields that require specialized skills and backgrounds. The slow pace and rigidity of the hiring process undermines DoD's ability to successfully recruit desirable candidates. Hiring authorities are an important aspect of those process shortcomings. Hiring authorities should allow DoD to hire with speed and flexibility, particularly for high-priority positions. Instead, DoD hiring authorities are too complex to take full advantage of the flexibility offered, and the hiring authorities with the greatest potential for creating speed and flexibility are hindered by internal limitations. As a result, DoD struggles to hire the right applicants with the right skills for the AWF. Hiring authorities must be streamlined and adapted to address the current and evolving AFW needs.⁵

Background

Different government institutions have assigned meanings to the term *hiring authority*, but these definitions are neither precise nor consistent. According to the Government Accountability Office (GAO), a hiring authority is "the law, executive order, or regulation that allows an agency to hire a person into the federal civil service."⁶ In broader terms, hiring authorities determine the rules that a federal agency must adhere to during the hiring process. The traditional federal hiring process, codified in Title 5 of the U.S. Code, is the Competitive Examining Hiring Authority, which establishes uniform hiring rules and procedures across the entire Executive Branch.⁷ All other hiring authorities permit federal agencies to fill open positions under different procedures, as opposed to the traditional competitive examining process. The Congressional Research Service (CRS) defines these flexible hiring authorities as "a suite of tools that are intended to simplify, and sometimes accelerate, the hiring process."⁸ The fundamental purpose of flexible hiring authorities is to modify the traditional competitive hiring process to make a particular type of hiring easier for the federal government. Most flexible hiring authorities advance one of two goals: to promote a certain category of applicants in the

⁴ Deloitte, *Rewriting the Rules for the Digital Age: 2017 Deloitte Global Human Capital Trends*, 2017, accessed May 7, 2018, <https://www2.deloitte.com/us/en/pages/human-capital/articles/introduction-human-capital-trends.html>.

⁵ The composition of the defense acquisition workforce is established at 10 U.S.C. § 1721 (Designation of Acquisition Positions).

⁶ GAO, *Federal Hiring: OPM Needs to Improve Management and Oversight of Hiring Authorities*, August 2016, accessed September 29, 2017, <https://www.gao.gov/assets/680/678814.pdf>.

⁷ Ibid.

⁸ CRS, *The Civil Defense Acquisition Workforce: Enhancing Recruitment Through Hiring Flexibilities*, November 2016, accessed August 14, 2017, <https://fas.org/spp/crs/natsec/R44695.pdf>.

federal hiring process, such as technical acquisition experts, or to ease the hiring process for certain positions, such as scientific and engineering positions in certain DoD laboratories.⁹ Flexible hiring authorities can take many different forms and be used to pursue many different specific objectives. Some flexible hiring authorities grant exemptions from aspects of competitive hiring; others provide an agency with greater hiring autonomy. Some flexible hiring authorities apply to the entire Executive Branch; others apply solely to a particular agency. Some authorities are temporary; others are permanent.¹⁰ Most federal hiring authorities are statutory, rather than regulatory.

The entire federal government used 105 different hiring authorities in FY 2014. Most federal hiring authorities do not apply to the defense AWF. A 2016 CRS report, supplemented by a Section 809 Panel analysis of subsequent NDAA's, determined that 44 separate hiring authorities can be applied to the civilian AWF.¹¹ Among those 44 hiring authorities, five are solely available to the AWF; another 15 are available to DoD as a whole; and 24 are available to the entire federal government.¹² The 44 hiring authorities constitute the universe of alternatives to the competitive examining process for the AWF. This landscape has changed rapidly in recent years, as Congress has become increasingly active in using hiring authorities to shape the hiring process for the AWF. Congress has created 12 hiring authorities that are unique to DoD and the AWF since the FY 2016 NDAA. Congress appears to be highly attuned to the use of hiring authorities as a tool to improve the AWF.

Discussion

Shifting Challenges Confronting the AWF Hiring Process

The defense AWF has undergone a substantial overhaul during the past decade. Targeted policy responses have supported overcoming some problems, yet other problems have persisted and become more prominent. The current AWF hiring process arose in response to a widespread employee shortfall that occurred after budget cuts in the 1990s, combined with an increased willingness to outsource acquisition activities to contractors in the 1990s and 2000s.¹³ Between 1998 and 2008, the size of the AWF decreased by 14 percent from 146,000 to 126,000 employees.¹⁴ Concurrent with those downsizing efforts, the burden placed on the AWF increased substantially due to the wars in Iraq and Afghanistan, which defined the role of the U.S. military in the 2000s.¹⁵ By 2008, both Congress and DoD recognized the AWF lacked capacity to fulfill its responsibilities and jointly committed to reversing the cuts of the previous decade. DoD pledged to increase the AWF by 20,000 employees by FY 2015. Congress created DAWDF in the FY 2008 NDAA and the Expedited Hiring Authority (EHA) in the FY 2009 NDAA.¹⁶ EHA provides substantial hiring flexibility, at the Secretary of Defense's discretion, for AWF positions that are experiencing a *shortage of candidates* or a *critical hiring need*.¹⁷ The combination of EHA, DAWDF,

⁹ Management Policies, 10 U.S.C. § 1701. Research and Development Projects, 10 U.S.C. § 2358.

¹⁰ CRS, *The Civil Defense Acquisition Workforce: Enhancing Recruitment Through Hiring Flexibilities*, November 2016, accessed August 14, 2017, <https://fas.org/sgp/crs/natsec/R44695.pdf>.

¹¹ Ibid.

¹² Ibid.

¹³ GAO, *Defense Acquisition Workforce: Actions Needed to Guide Planning Efforts and Improve Workforce Capability*, GAO-16-80, December 2015, accessed August 14, 2017, <https://www.gao.gov/assets/680/674152.pdf>.

¹⁴ Ibid.

¹⁵ RAND, *The Defense Acquisition Workforce Growth Initiative: Changing Workforce Characteristics and the Implications for Workforce Retention*, September 2016, accessed March 23, 2018, https://www.rand.org/pubs/rgs_dissertations/RGSD383.html.

¹⁶ Section 833 of FY 2009 NDAA, Pub. L. No. 110-417, 122 Stat. 4535 (2008).

¹⁷ Department of Defense Acquisition Workforce Development Fund, 10 U.S.C. § 1705.

and DoD's AWF hiring efforts erased the overall employee shortfall. By March 2015, the AWF had increased from 126,000 to 153,000 employees, exceeding DoD's growth goal by a sizeable margin.¹⁸ EHA was the most frequently-used hiring authority for the AWF during this period.¹⁹

The broad realization of the AWF's growth goals did not extend evenly throughout the workforce. As the overall employee shortfall ended, shortfalls in certain career fields and positions emerged. Between September 2008 and March 2015, six out of 13 career fields missed their growth goals, including the priority career fields of contracting, business, and engineering, which fell more than 3,500 combined employees short.²⁰ Contracting and engineering, in particular, suffered from "high attrition rates and difficulty in hiring qualified personnel."²¹ As a result, competency gaps in critical skills and career fields have become the most pressing challenge confronting the AWF hiring process.

GAO identified the problem as early as December 2015. Because DoD had successfully "surpassed its overall growth goals," the agency urged DoD to emphasize "reshaping career fields to ensure the most critical acquisition needs are being met" and "focus future hiring efforts on priority career fields."²² AWF stakeholders confirmed that competency gaps remain an ongoing hiring dilemma. One DoD official identified "current and emerging technical skill gaps" as one of the two greatest challenges facing a career field, describing an imperative need to hire the right people with the appropriate skill sets.²³ Another DoD official maintained the key challenge facing the AWF was managing career field skill deficits through "the ability to attract and retain excellent talent."²⁴ A third DoD official emphasized the need to aggressively identify competency gaps in AWF functional areas to "hire the right people with the right competencies for the right positions."²⁵

The existing hiring process has failed to address persistent skill gaps in the AWF. Although hiring authorities are not the only relevant factor in the AWF hiring process—the role of human resources and its relationship to hiring offices is another critical element—the shortcomings in the framework of hiring authorities constitute a key concern that must be reformed.²⁶

Excessive Complexity and Undue Constraints on AWF Hiring Authorities

As noted above, the AWF has access to 44 distinct hiring authorities. Rather than benefitting the hiring process, however, the large number of hiring authorities has hindered the AWF's ability to exploit the

¹⁸ GAO, *Defense Acquisition Workforce: Actions Needed to Guide Planning Efforts and Improve Workforce Capability*, GAO-16-80, December 2015, accessed August 14, 2017, <https://www.gao.gov/assets/680/674152.pdf>.

¹⁹ CRS, *The Civil Defense Acquisition Workforce: Enhancing Recruitment Through Hiring Flexibilities*, November 2016, accessed August 14, 2017, <https://fas.org/spp/crs/natsec/R44695.pdf>. According to a 2016 GAO report, EHA was the 17th most frequently-used hiring authority in the entire federal government in FY 2014, despite being limited to a portion of the DoD workforce.

²⁰ GAO, *Defense Acquisition Workforce: Actions Needed to Guide Planning Efforts and Improve Workforce Capability*, GAO-16-80, December 2015, accessed August 14, 2017, <https://www.gao.gov/assets/680/674152.pdf>. In 2010, the "business" career field was divided into two separate career fields: business-cost estimating and business-financial management. Nevertheless, GAO reported both career fields under "business" to maintain consistency within the data, and this paper will follow that convention.

²¹ GAO, *Defense Acquisition Workforce: Actions Needed to Guide Planning Efforts and Improve Workforce Capability*, GAO-16-80, December 2015, accessed August 14, 2017, <https://www.gao.gov/assets/680/674152.pdf>.

²² Ibid.

²³ DoD official, meeting with Section 809 Panel, November 13, 2017.

²⁴ DoD official, meeting with Section 809 Panel, December 6, 2017.

²⁵ DoD official, meeting with Section 809 Panel, January 30, 2018.

²⁶ The Section 809 Panel plans to address the role of human resources in the AWF hiring process in a future report. This report will focus entirely on AWF hiring authorities.

hiring flexibilities at its disposal. There are two primary factors undermining the effectiveness of AWF hiring authorities: the excessive complexity of the existing array of hiring authorities and the unnecessary constraints under which many of them operate.

Officials at every level of the AWF support hiring flexibility, which presents an alternative to a competitive examining process, featuring mandatory procedures for job posting, ranking and rating, and candidate referral, which is universally derided as too slow, cumbersome, and restrictive to support the hiring process the AWF requires. DoD's annual time-to-hire under competitive examining exceeded 100 days on average during 4 of the 6 years between FY 2009 and FY 2014. By contrast, annual time-to-hire exceeded 100 days on average only twice for EHA and once for Direct-Hire Authority (DHA) during the same period.²⁷ One human resources official described competitive examining as an authority to be avoided at all costs.²⁸ Nevertheless, an unintended irony continues to sustain competitive examining beyond DoD's intent. Although dozens of hiring authorities exist to serve as alternatives to competitive examining, the very number of hiring authorities has created enough confusion to maintain competitive examining's presence in the hiring process.

Representatives from across the Military Services argued the number and variety of hiring authorities available to the AWF was overwhelming and bred confusion among human resources personnel and hiring offices alike.²⁹ Multiple officials asserted the large number of hiring authorities has created excessive complexity, leaving both local human resources personnel and hiring offices struggling to fully realize the potential of the hiring flexibilities at their disposal.³⁰ Officials also said the number of different hiring authorities contributed to tension between human resources personnel and hiring offices over the proper authority to use for a particular job opening.³¹ Even when hiring offices are determined to use a particular hiring authority, overly cautious legal guidance can induce them to revert back to the traditional competitive process. As a practical consequence, confusion over hiring authorities has undermined DoD's ability to address critical skill gaps in the AWF by reducing the effectiveness of the hiring authorities that exist for that purpose. Opportunities to use the faster, more flexible EHA or DHA processes have been forsaken in favor of competitive examining; between FY 2012 and FY 2014, a form of competitive examining with no hiring exemptions constituted the second-most frequently used hiring authority for the AWF.³² One human resources official lamented, "Some folks have not taken advantage of these authorities even though they are sitting right in front of them."³³ The complexity caused by the large number of AWF hiring authorities drives human resources

²⁷ CRS, *The Civil Defense Acquisition Workforce: Enhancing Recruitment Through Hiring Flexibilities*, November 2016, accessed August 14, 2017, <https://fas.org/sgp/crs/natsec/R44695.pdf>.

²⁸ DoD official, meeting with Section 809 Panel, January 25, 2018.

²⁹ DoD officials, interviews conducted by Section 809 Panel, from January to April 2018.

³⁰ Ibid.

³¹ Ibid.

³² CRS, *The Civil Defense Acquisition Workforce: Enhancing Recruitment Through Hiring Flexibilities*, November 2016, accessed August 14, 2017, <https://fas.org/sgp/crs/natsec/R44695.pdf>. The form of competitive examining currently used by DoD is Delegated Examining Authority, which allows DoD (rather than OPM) to oversee its own hiring procedures but otherwise does not alter the requirements established by Title 5 in any way. For the sake of simplicity, and due to the fact that the two authorities uphold the same Title 5 competitive hiring structure, this paper includes Delegated Examining Authority under the broader term "competitive examining."

³³ DoD official, meeting with Section 809 Panel, January 30, 2018.

officials to use competitive examining even when they could use hiring authorities designed to accelerate and simplify the hiring process.

A number of potentially vital hiring authorities are stymied by statutory constraints. In the past three NDAAAs, Congress has created 12 new hiring authorities that can be applied to the AWF. The new hiring authorities have contributed to the problem of excessive complexity, yet they also contain potentially powerful new tools to streamline the AWF hiring process. Among these recently enacted hiring authorities are multiple new DoD-unique DHAs, a type of authority that expedites the hiring process by providing exemptions from provisions of Title 5, including competitive rating and ranking procedures and veterans' preference.³⁴

DoD officials have expressed eagerness to maximize the potential of these new hiring authorities, which are directed at key competencies and applicant groups such as science, technology, engineering, and math (STEM) researchers; financial management experts; and recent college graduates. One military official said the Military Service intended to go "full throttle" in maximizing the new DHAs.³⁵ This top-level enthusiasm on the part of acquisition leaders is starting to produce results. For example, hiring data provided by the Air Force Personnel Center revealed that in FY 2017, the first year many of the new DHAs were implemented, the Air Force hired 125 AWF employees through the new DHAs despite a hiring freeze.³⁶ The effect of the new hiring authorities is circumscribed, however, by their statutory language. Each of the hiring authorities contains strict limitations on the scope of implementation. Most authorities impose ceilings on the number of applicants that can be hired annually, either in the form of a hard numerical cap or as a percentage of the existing workforce in a respective category during the previous fiscal year. Most authorities are also temporary, with authorizations that expire in the early 2020s. As DoD fully implements these hiring authorities over the next few years, statutory constraints will limit their ability to simplify and accelerate the AWF hiring process. In conversations with the Section 809 Panel, multiple senior AWF officials endorsed eliminating statutory constraints by lifting hiring caps and removing sunset dates. One official summed up the prevailing attitude declaring that in terms of hiring authorities, "if it's a skill shortage category, the fewer restrictions, the better."³⁷

The current state of AWF hiring authorities defies a simple diagnosis. The total number of hiring authorities applicable to the AWF is too large, and the ensuing complexity has hindered DoD's ability to properly use the flexibilities at its disposal. Simultaneously, however, recently enacted hiring authorities offer considerable potential that is impeded by constraints in their statutory language. In seeking a policy solution, these dilemmas must be addressed in a complementary manner that strengthens DoD's ability to use the hiring process to address persistent AWF critical skill gaps.

³⁴ GAO, *Federal Hiring: OPM Needs to Improve Management and Oversight of Hiring Authorities*, GAO-16-521, August 2016, accessed September 29, 2017, <https://www.gao.gov/assets/680/678814.pdf>.

³⁵ DoD official, meeting with Section 809 Panel, January 25, 2018.

³⁶ Air Force Personnel Center email to Section 809 Panel, January 23, 2018. DoD's difficulty in quickly implementing new AWF hiring authorities was raised several times in Panel discussions with DoD stakeholders. The Panel plans to address this issue in a future report as a part of its recommendations regarding the role of human resources in the AWF hiring process.

³⁷ DoD official, meeting with Section 809 Panel, January 30, 2018.

New Horizon for Expedited Hiring Authority

As the AWF hiring process reorients itself to prioritize competency shortfalls, EHA's role must also be evaluated. EHA has been a critical instrument in DoD's recent AWF hiring, and its widespread implementation has succeeded, partially offsetting the complexities described above. In FY 2015, FY 2016, and FY 2017, for example, the Air Force used EHA to hire about 62 percent of all new external AWF hires.³⁸ EHA's ascent as the only hiring authority that has been used more often than competitive examining has also exposed its limitations. It is a tool devised to solve the problem of a general employee shortage, yet the most pressing workforce issue now is critical skill gaps.

Congress created EHA in the FY 2009 NDAA to address a distinct problem: the overall AWF employee shortfall. EHA was designed to mitigate this problem by allowing DoD—at its own discretion, rather than the Office of Personnel Management's (OPM's)—to use a streamlined, accelerated hiring process for any AWF position that was experiencing a “shortage of candidates” or a “critical hiring need.”³⁹ EHA accomplished its objective, and senior AWF officials expressed support for the authority, which they described in glowing terms as “huge,” an authority that DoD was “really lucky” to possess, and an authority that should be the preferred option for hiring “every time, all the time, no matter what.”⁴⁰ EHA played an essential role in solving the problem for which it was designed: increasing the total size of the AWF from 126,000 to 153,000 employees in a little more than 6 years. It has proven to be less effective in confronting the persistent critical skill gaps. Even as EHA has benefitted the AWF as a whole, these skill gaps have remained.

EHA's weakness in this regard is structural. EHA emphasizes the position itself, rather than the types of applicants that DoD wishes to hire. Under the current authority, a Military Service or Defense Agency must prove that positions are experiencing a shortage of candidates or a critical hiring need to gain access to EHA. As a result, DoD uses EHA for specific occupational series and positions in the AWF, but those positions are dictated by the hiring difficulties of the position rather than a strategic understanding of AWF hiring needs. This structure is effective at accelerating the overall pace of hiring, but less effective at advancing the individuals with competencies DoD needs to fill critical skill gaps. Such applicants often do not fit within the contours of EHA as currently applied.

This shortcoming of EHA explains the limits of its present-day effectiveness; yet EHA's ongoing centrality to the AWF hiring process and its potential to have an even greater effect cannot be overstated. EHA is a successful hiring authority that enjoys broad appeal among both congressional and DoD stakeholders. DoD is experienced at implementing EHA, having successfully applied the

³⁸ Air Force Personnel Center email to Section 809 Panel, January 23, 2018. In FY 2015, 2016, and 2017, the Air Force used EHA to hire 4,556 new external employees out of 7,374 total external hires.

³⁹ Department of Defense Acquisition Workforce Development Fund, 10 U.S.C. § 1705. Under the original statutory authority of EHA, DoD's authority was more narrowly tailored to exclusively hire “highly qualified” applicants for positions experiencing a “severe shortage of candidates.” In subsequent years, Congress expanded EHA to permit the hiring of all qualified applicants, rather than merely highly qualified applicants, and to encompass positions facing a “critical hiring need” as well as a shortage of candidates. Congress also changed EHA's status from a temporary to a permanent hiring authority in 2015. See CRS, *The Civil Defense Acquisition Workforce: Enhancing Recruitment Through Hiring Flexibilities*, November 2016, accessed August 14, 2017, <https://fas.org/sgp/crs/natsec/R44695.pdf>.

⁴⁰ DoD official, meeting with Section 809 Panel, December 6, 2017. DoD official, meeting with Section 809 Panel, January 25, 2018.

hiring authority for nearly a decade.⁴¹ Because of this popularity and familiarity, reorienting EHA to support hiring to fill critical skill gaps appears more practical than creating a new hiring authority. If EHA can be adapted to address competency shortfalls as effectively as it addressed overall employee shortfalls, it would become an even more powerful tool for the AWF. An effective policy would modify EHA to meet the challenges of the moment while maintaining the characteristics that have made it so valuable since its creation.

Conclusions

The existing framework of hiring authorities for the AWF fails to support DoD's efforts to address critical skill gaps through the hiring process. The Section 809 Panel's proposed response is twofold: streamlining the total number of hiring authorities used by the AWF, and introducing a new element to expedited hiring authority specifically designed to confront the AWF's critical skill deficiencies. The two parts of the proposal pursue the same objective and complement each other. Streamlining would simplify use of hiring authorities and allow DoD to emphasize hiring authorities that exist to mitigate present-day critical skill gaps. Broader authority under EHA would allow DoD to quickly respond to emerging critical skill gaps within this familiar framework. Streamlining hiring authorities strengthens DoD's ability to realize the potential of its current hiring tools; broadening EHA provides DoD with the flexibility it needs to adapt hiring tools for the future. The two elements work together to ensure hiring authorities target critical skill gaps, the primary challenge confronting today's AWF hiring process. The proposed recommendations are structured to avoid unintended consequences. They are designed to increase flexibility in the AWF hiring process and broaden EHA, yet maintain existing flexibilities.

A Streamlined List of Hiring Authorities for the Acquisition Workforce

DoD aspires to maximize use of its hiring authorities to eliminate critical skill gaps within today's AWF. Its efforts are undermined by a framework that features too many applicable hiring authorities and too many statutory constraints. The solution to these problems requires action on the part of both DoD and Congress. DoD should act on its own initiative to streamline the hiring authorities available to the AWF. At the same time, Congress should act to lift the limitations on the hiring authorities that remain. By acting in tandem, AWF hiring authorities can be simultaneously simplified and enhanced, with a small number of hiring authorities providing greater speed and flexibility to the AWF hiring process in addressing competency shortfalls. Simplicity and scope can be complementary, rather than contradictory, for AWF hiring authorities.

A streamlined framework for DoD's AWF hiring authorities, with fewer hiring authorities, would offer greater latitude for DoD in addressing critical skill gaps and supporting general AWF hiring. The central element of this framework should be a master list of primary hiring authorities, established through DoD regulatory guidance, which would elevate the selected authorities to a paramount position in the hiring process for civilian external hires. DoD's guidance would direct human resources agencies and hiring managers to use the primary hiring authorities to the greatest extent possible when

⁴¹ OSD Memorandum, *Extension of Expedited Hiring Authority for Select Defense Acquisition Workforce Positions – Removal of Sunset Date*, September 6, 2017, accessed May 8, 2018, [http://www.hci.mil/docs/Policy/OUUSD\(AT&L\)%20Memoranda/09-06-2017_JointATL_PR_Memo-Expedited_Hiring_Auth_Permanence.pdf](http://www.hci.mil/docs/Policy/OUUSD(AT&L)%20Memoranda/09-06-2017_JointATL_PR_Memo-Expedited_Hiring_Auth_Permanence.pdf).

filling AWF positions through external hires. Under the guidance, hiring officials would be required to consult the list of primary hiring authorities first when attempting to hire externally.

As part of its regulatory guidance, DoD could support human resources personnel and hiring managers charged with implementing the master list. The guidance should explain why the hiring authorities were included on the master list and direct employees to training resources that are generated by the Office of the Secretary of Defense (OSD), Defense Acquisition University (DAU), or the Military Serves.

Only after determining that no primary hiring authority could feasibly be used would other, nonprimary hiring authorities provide a last resort. Congress should act in concert with DoD by expanding the scope of primary hiring authorities, where necessary, by lifting caps that limit the number of annual hires and repealing existing sunset dates. Congressional action to remove the restrictions on key AWF hiring authorities would ensure DoD's streamlined set of authorities would still provide the hiring speed and flexibility essential to addressing critical skill gaps. DoD stakeholders are amenable to both regulatory action to streamline AWF hiring authorities and statutory action to eliminate restrictions. Regulatory action to create a list of primary AWF hiring authorities is preferable to streamlining through the statutory repeal of nonprimary authorities. The reason is straightforward: Hiring authorities that are redundant or unnecessary for DoD's AWF may nonetheless serve important functions for other elements of the DoD workforce, and other departments and agencies throughout the federal government. In seeking to avoid unintended consequences, DoD regulatory guidance is the most tailored mechanism to achieve the benefits of streamlining.

Primary AWF hiring authorities should prioritize mitigating competency shortfalls throughout the AWF while maintaining the general hiring rate. The logical focus of DoD's master list of AWF hiring authorities lies in directing flexible hiring authorities toward desirable applicant categories and positions suffering from critical skill gaps. These goals shaped the panel's assessment of existing AWF hiring authorities. The following table details the seven AWF hiring authorities the panel supports for inclusion on the master list for civilian external hires, as well as any recommended statutory changes to those hiring authorities:

Table 2-1. Master List of Primary AWF Hiring Authorities

Primary Hiring Authority	Rationale for Inclusion	Recommended Statutory Changes
Expedited Hiring Authority	EHA is vital to general AWF hiring.	See EHA section, below
"Super-DHA": A new, consolidated hiring authority encompassing five existing DHAs (Technical Acquisition Experts; Financial Management Experts; Post-Secondary Students and Recent Graduates; Domestic Defense Industrial Base Facilities, Major Range and Test Facilities Base, and Office of DOT&E; Business Transformation and Management Innovation) and an existing pilot program (Enhanced	The Super-DHA would unite six different hiring authorities targeting specific gaps in the civilian AWF and establish a consistent set of hiring flexibilities for all of them. As a result, a single DHA would become the focal point for the hiring flexibilities intended to address critical skill gaps, and the use of DHA would be streamlined for the hiring process. The existing requirements governing	Consolidate statutory authorities into one hiring authority
		Technical Acquisition Experts DHA: Lift Annual Hiring Cap; Repeal Sunset
		Financial Management Experts DHA: Lift Annual Hiring Cap; Repeal Sunset
		Post-Secondary Students and Recent Graduates DHA: Lift Annual Hiring

Primary Hiring Authority	Rationale for Inclusion	Recommended Statutory Changes
Personnel Management System for Cybersecurity and Legal Professionals)	applicable categories of positions and applicants would remain unchanged.	<p>Cap; Repeal Sunset; Harmonize Title 5 Exemption with other DHAs</p> <p>Domestic Defense Industrial Base Facilities, Major Range and Test Facilities Base, and Office of DOT&E DHA: Repeal Sunset; Harmonize Title 5 Exemption with other DHAs</p> <p>Business Transformation and Management Innovation DHA: Lift Overall Hiring Cap; Repeal Sunset</p> <p>Cybersecurity and Legal Professionals Pilot Program: Convert into permanent DHA for Cyber and IT positions in civilian AWF with no hiring cap and similar Title 5 exemption as other DHAs</p>
DoD ST: A new, DoD-unique Scientific and Professional Positions (ST) hiring authority	A DoD-unique ST hiring authority would provide greater flexibility to DoD in using ST to hire for advanced scientific research positions, which is a critical competency for DoD. The current rules governing ST would remain unchanged, but would be administered by the Secretary of Defense rather than OPM.	<p>Provide Title 10 statutory authority</p> <p>Enable Secretary of Defense to oversee ST positions and qualifications</p> <p>Establish position cap equivalent to the number of ST positions currently allocated to DoD by OPM</p>
Pathways Program	Even after the creation of the Post-Secondary Students and Recent Graduates DHA, Pathways internships remain critical to DoD's recruitment of certain types of applicants, including high school graduates and vocational school graduates.	No change
Science, Mathematics, and Research for Transformation (SMART) Defense Education Program	The SMART Scholarship Program is an important recruitment tool for STEM undergraduate and graduate students, which represents an ongoing critical skill gap for the AWF.	No Change
Cyber Scholarship Program	The Cyber Scholarship Program is an important recruitment tool for IT undergraduate and graduate students. They represent an ongoing critical skill gap for the AWF.	No Change

Primary Hiring Authority	Rationale for Inclusion	Recommended Statutory Changes
AcqDemo	AcqDemo possesses unique hiring authorities that pertain solely to positions covered by the demonstration project. At the same time, positions covered by AcqDemo can still use the full suite of hiring authorities available to the broader AWF. This distinct arrangement should remain unchanged at present.	No change (see the AcqDemo proposal in this chapter for recommended statutory changes to the AcqDemo program and further discussion of AcqDemo hiring authorities)

The master list consolidates existing AWF hiring authorities. The Section 809 Panel advocates several substantial changes, but none of the seven primary hiring authorities have been invented wholesale, and each of them is based in existing hiring authorities. The panel selected these hiring authorities for two broad reasons: their ability to introduce greater speed and flexibility into the AWF hiring process, particularly in regards to critical competencies, and the large extent to which they render other AWF hiring authorities redundant or unnecessary, in turn facilitating streamlining and easing the complexity of the hiring process. The benefits of the primary hiring authorities in terms of addressing critical skill gaps are highlighted above. Those benefits would be diminished if other, similarly useful hiring authorities were excluded from common use.

The Section 809 Panel sought to ensure the primary hiring authorities, despite their small number, still encompassed the entire range of necessary hiring flexibilities that currently serve the AWF. For example, different types of applicants to scientific and engineering positions at DoD Science and Technology Reinvention Laboratories (STRL) currently benefit from DHA hiring flexibilities. Comparable flexibility for those STRL positions in the AWF is conveyed through the Technical Acquisition Experts DHA, which is consolidated into the Super-DHA and therefore renders the STRL DHAs redundant. A DHA for positions involved in Iraqi reconstruction efforts has existed for more than a decade and focuses solely on relevant linguistic skills at a time when the scale of DoD's acquisition requirements in Iraq have dramatically declined. Finally, the highly qualified experts (HQE) hiring authority is simply underused due to confusion surrounding its requirements on the part of hiring managers.⁴² These examples represent the large number of hiring authorities that offer insufficiently unique value to the AWF, increase the complexity of the hiring process, and undermine the small number of hiring authorities that should be prioritized.⁴³ By contrast, a master list would provide a simplified set of primary AWF hiring authorities that human resources personnel and hiring managers would find easier to understand and implement.

The proposed framework for AWF hiring authorities, centered on a master list of seven primary hiring authorities, offers substantial benefits to DoD. By removing dozens of AWF hiring authorities from common consideration, the framework would ease the complexity of the hiring process, minimize confusion for officials involved in hiring decisions, and elevate use of DoD's preferred hiring

⁴² CRS, *The Civil Defense Acquisition Workforce: Enhancing Recruitment Through Hiring Flexibilities*, November 2016, accessed August 14, 2017, <https://fas.org/sgp/crs/natsec/R44695.pdf>.

⁴³ A comprehensive table of hiring authorities applicable to the AWF can be found in Appendix C.

authorities. By promoting use of the seven primary hiring authorities described above, the framework would emphasize the speed and flexibility of the AWF hiring process for critical skill positions (such as STEM and financial management) and desirable categories of applicants (such as college and graduate students). Setting clear regulatory guidance to create a set of paramount hiring authorities, would allow DoD to send a strong message to human resources personnel regarding the priorities for AWF hiring. The message would help to ensure that human resources entities are aligned with DoD hiring objectives by assisting human resources and hiring offices in using the tools provided to them in support of those objectives.

A Broader Orientation for Expedited Hiring Authority

EHA occupies a unique position in the current framework of AWF hiring authorities. It is the single most important hiring authority for AWF general hiring and must remain in any reorganization. As the AWF hiring process confronts the fundamental challenge of the present moment—the need to eliminate critical skill gaps by hiring the right candidates, with the right skill sets, to the right positions—EHA should be equipped to play an even larger role. To do so, EHA must be updated to reflect the current priorities of the AWF hiring process. To fully realize its potential, EHA must do more than accelerate the pace of general AWF hiring; it must also provide DoD with the adaptability it needs to quickly direct hiring flexibilities toward emerging competency shortfalls as they are identified. EHA can provide the AWF with the necessary hiring tools to overcome unexpected problems of the future, as well as acknowledged shortcomings of the present.

EHA can be reoriented to prioritize AWF critical skill gaps by adding a new category designation to the EHA statutory authority: *critical skill deficiency* (CSD). Unlike the two existing EHA category designations, which cover AWF positions that are experiencing a *shortage of candidates* or a *critical hiring need*, CSD authority would explicitly focus on the characteristics of the applicants rather than the hiring conditions of the position. Under the proposal, Congress would authorize DoD to designate up to 10 CSDs within each Military Service and the 4th Estate on an annual basis.⁴⁴ The CSD designation would permit the Military Services and the 4th Estate to use EHA to hire applicants who possess the identified critical skill. A single CSD designation would cover much more than a single hire; each CSD could encompass a broad swath of the AWF, depending on the nature of the critical skill and its value to different kinds of positions within the AWF. The CSD designation could be applied across different occupational series, position categories, and career fields, as long as the critical skill was lacking. Allowing each Military Service to designate no more than 10 CSDs would be a manageable number to ensure senior DoD officials can maintain effective oversight during the authority's implementation. The number of CSDs could be reevaluated to determine if an increase would benefit DoD.

DoD would be permitted to delegate the designation authority for the 10 CSDs to the Military Services and the 4th Estate, which would allow them to define their own critical skill deficiencies according to their own AWF competency shortfalls. Under that scenario, each Military Service and the 4th Estate would be authorized to designate up to 10 CSDs annually, which would apply only to their own workforce. The number of CSDs would remain 10 for each year, regardless of the previous year's activity; if a Military Service or the 4th Estate failed to designate the maximum 10 CSDs in a given year,

⁴⁴ The 4th Estate encompasses the DoD components outside of the Military Services and consists of 33 separate Defense Agencies.

it would not be able to roll over the unused CSDs to the following year, but it would also not be at risk of losing the unused CSDs permanently. The purpose of the CSD designation process would be to identify critical skill deficiencies in the AWF and create a set of criteria related to the respective critical skills, such as educational credentials or professional experience, which could be used during the hiring process to evaluate whether an applicant possessed the critical skill. Beyond that requirement, however, the Military Services and 4th Estate would possess considerable latitude to develop the annual CSD designation process in accordance with their own internal structures. Each Military Service and the 4th Estate would be able to select its own office to oversee the process, create its own method for identifying critical skill deficiencies in the AWF, and forge its own consultative practices to ensure that hiring offices and senior leaders reached a consensus regarding the qualifications of a critical skill. Freedom for the Military Services and 4th Estate in implementing the CSD authority would allow them to develop a nimble process that would be capable of rapidly responding to AWF skill gaps.

The Military Services and 4th Estate would also be free to apply CSD authority creatively. A variety of skill gaps exist in the AWF, some of which might not be considered conventional acquisition skill sets. Through the CSD designation process, DoD would possess a tool to use EHA to address both orthodox and unorthodox AWF skill gaps. Thus, CSD authority could assist the AWF in recruiting candidates with skills that are widely acknowledged as desirable, such as private-sector negotiating experience and quantitative data competence. At the same time, it could also assist the AWF in recruiting candidates with skills that fill emerging or less obvious gaps, such as experts from the commercial innovation sector, or individuals with experience in the use of cloud computing services, or skilled supply chain managers, or even talented writers. The need for these kinds of critical skills exists throughout the AWF. For example, a CSD designation for supply chain management expertise could benefit positions in multiple acquisition career fields such as contracting, program management, purchasing, and business. The CSD designation process would allow each Military Service and the 4th Estate to broaden its assessments of critical skills for the AWF and take tangible action to acquire those skills.

After a Military Service or the 4th Estate had designated its annual CSDs, the organization would declare which types of positions stood to benefit from employees who possess corresponding critical skills. Those declared positions, which could extend across multiple occupational series, position categories, and career fields, would subsequently be covered by that CSD. A single position could be covered by multiple CSDs if it would benefit from multiple critical skills. For the remainder of that year, if an office had a job opening in a CSD-covered position, EHA would be available to fill the position. The decision to use EHA would belong solely to the hiring manager.

If a hiring manager opted to use EHA for a CSD-covered position, human resources personnel would be required to accept the use of EHA for that position and would not possess any leeway to suggest otherwise. From that point on, the process could proceed on one of two different tracks. If a hiring manager was prepared to directly select a candidate, which is permitted under EHA, human resources personnel would simply be required to verify the candidate possessed the relevant critical skill, as defined by the aforementioned critical skill criteria. If a hiring manager was not prepared to directly select a candidate and requested the assistance of human resources in generating a group of candidates to choose from, human resources personnel could only advance those applicants who possess the relevant critical skill. The hiring manager could then select a candidate from the group produced by

human resources. In either case, the candidate selected by the hiring manager would subsequently be processed by human resources, and the hiring process would be complete. The CSD process would ensure that offices could harness the benefits of EHA for the sake of hiring particularly qualified candidates with precisely the skill sets required for the open position. It would guarantee that for CSD-covered positions, hiring managers would be able to prioritize applicants with desirable skill sets and act on those priorities.

An expansion of EHA to include CDS authority would benefit the AWF. In a meeting with the Section 809 Panel, one senior AWF official argued in favor of “a blanket hiring authority for the critical skills we need,” because skill gaps can extend across the AWF and pose “larger issues across career fields” than the current hiring process is equipped to address.⁴⁵ CSD authority is designed to provide such capability. The structure of EHA would be reoriented toward the applicants’ qualifications, which would align the hiring authority more effectively with the goals of the current AWF hiring process. Rather than emphasizing the need to hire for certain positions, CSD authority would emphasize the need to hire certain types of candidates. The Military Services and the 4th Estate would possess the capability to identify their own AWF hiring needs and quickly redirect hiring flexibilities to address them. By extension, they would also gain a stronger incentive to develop more effective mechanisms for measuring competency shortfalls in the AWF, as well as a rationale for using them systematically and frequently to take full advantage of the CSD authority.

The scope of EHA would expand as well, because every AWF position would enjoy the possibility of benefiting from CSD authority in any given year, based on the annual CSD designations. Hiring managers would be empowered through the CSD process. CSD designations would provide hiring managers with a simple framework for using EHA: Positions covered by a CSD designation would be clearly defined, and if hiring managers for a CSD-covered position sought to use EHA, they would understand that they possessed the authority to do so on their own prerogative. They would also be guaranteed to review applicants who possessed the critical skills that they sought for the position. This clarity would address much of the current disconnect between hiring managers and human resources personnel over using EHA and evaluating applicants.

CSD authority is a preferred vehicle in pursuing hiring flexibility for persistent and emerging AWF skill gaps. As a part of EHA, CSD authority would benefit from the broad support among stakeholders that EHA has earned since its enactment. CSD authority would also be enhanced by the experience DoD has acquired through its successful implementation of EHA during the previous decade. The flexibility that CSD authority would provide to DoD—the ability to identify its own critical skill gaps and act on its own initiative to direct hiring flexibilities toward those areas of the AWF—would preclude the need for constant congressional action in the same sphere. Rather than requiring a new hiring authority for each critical skill gap in the AWF, DoD would possess the authority to act on its own. DoD would be capable of achieving the same ends that Congress has desired in recent years at a much faster pace, and through a permanent structure that would be agile enough to respond to new and unanticipated competency shortfalls in the AWF in the years to come.

⁴⁵ DoD Official, meeting with Section 809 Panel, January 31, 2018.

Implementation

Legislative Branch

- Consolidate six hiring authorities— Technical Acquisition Experts DHA; Financial Management Experts DHA; Post-Secondary Students and Recent Graduates DHA; Domestic Defense Industrial Base Facilities, Major Range and Test Facilities Base, and Office of DOT&E DHA; Business Transformation and Management Innovation DHA; and Enhanced Personnel Management System for Cybersecurity and Legal Professionals Pilot Program into a single Super-DHA statutory hiring authority at 10 U.S.C. XXX and repeal restrictions on Super-DHA hiring flexibilities.
 - Technical Acquisition Experts DHA (10 U.S.C. § 1701 note): Lift 5 percent annual hiring cap and repeal December 31, 2020 sunset date.
 - Financial Management Experts DHA (10 U.S.C. Ch. 81): Lift 10 percent annual hiring cap and repeal December 31, 2022 sunset date.
 - Post-Secondary Students and Recent Graduates DHA (10 U.S.C. Ch. 81): Lift 15 percent annual hiring cap, extend statutory exemption to encompass all of Subchapter I of Chapter 33 of Title 5, and repeal September 30, 2021 sunset date.
 - Domestic Defense Industrial Base Facilities, Major Range and Test Facilities Base, and Office of DOT&E DHA (10 U.S.C. Ch. 81): Extend statutory exemption to encompass all of Subchapter I of Chapter 33 of Title 5 and repeal sunset date at the end of FY 2021.
 - Business Transformation and Management Innovation DHA (10 U.S.C. Ch. 81): Lift 10-employee hiring cap and repeal September 30, 2021 sunset date.
 - Enhanced Personnel Management System for Cybersecurity and Legal Professionals Pilot Program (10 U.S.C. Ch. 81): Convert into a permanent DHA for cyber and information technology positions in civilian AWF, exempt from Subchapter I of Chapter 33 of Title 5 and without a hiring cap.
- Create a DoD-unique Scientific and Professional Positions (ST) hiring authority, based in Title 10, under the authority of the Secretary of Defense.
 - Limit the number of DoD ST positions to the corresponding number of traditional ST positions that are allocated to DoD by OPM at the date of enactment
- Amend Expedited Hiring Authority at 10 U.S.C. § 1705(f) to add critical skill deficiency category of positions, alongside existing shortage of candidates and critical hiring need categories.
 - Authorize DoD to designate 10 critical skill deficiencies annually within each of the Military Services and the 4th Estate
 - Allow each critical skill deficiency designation to permit use of EHA for AWF positions in need of the critical skill.
 - Provide the Military Services and the 4th Estate 10 critical skill deficiency designations each year, regardless of whether they used all 10 during the previous year.

Executive Branch

- Create a master list of seven primary AWF hiring authorities within 6 months: Expedited Hiring Authority (10 U.S.C. § 1705(f)); Super-DHA (10 U.S.C. XXX); DoD Scientific and Professional Positions (10 U.S.C. XXX); Pathways Program (EO 13562 and 5 CFR Part 362); Science, Mathematics and Research for Transformation (SMART) Defense Education Program (10 U.S.C. § 2192a); Cyber Scholarship Program (10 U.S.C. § 2200a); AcqDemo (10 U.S.C. § 1762).
 - Promulgate the master list throughout Military Services and the 4th Estate
 - Direct human resources personnel and hiring managers to prioritize master list primary hiring authorities for all civilian AWF external hires.
 - Instruct human resources personnel and hiring managers that non-master-list hiring authorities should only be utilized as a last resort for all civilian AWF external hires.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 2.

Implications for Other Agencies

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

Recommendation 26: Convert the Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) from an indefinite demonstration project to a permanent personnel system.

Problem

Since February 1999, Congress, OPM, and DoD have strived to improve acquisition outcomes by providing DoD with greater control over personnel processes and functions that enable DoD to attract and retain employees who contribute most to successful organizational mission outcomes. The DoD Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) is a congressionally mandated endeavor DoD developed and implemented to achieve that end. AcqDemo administrators and DoD leadership have used the demonstration project's personnel flexibilities to improve the DoD AWF and reward high-contributing AcqDemo participants. The AcqDemo Program Manager has requested permanency each fiscal year since 2016. Although the FY 2018 request for permanency resulted in major program revisions, including transfer of management authority from OPM to the Secretary of Defense, AcqDemo remains a temporary authority. AcqDemo is exceeding its goals and should become the permanent, sole personnel system for the DoD acquisition workforce.

Background

In Section 4308 of the FY 1996 NDAA, as amended by Section 845 of the FY 1998 NDAA, Congress permitted DoD, with the approval of OPM, to conduct a personnel demonstration project within DoD's civilian AWF and supporting personnel assigned to work directly with that workforce.⁴⁶ The purpose

⁴⁶ OPM: Civilian Acquisition Workforce Personnel Demonstration Project; DoD; Notice, 64 Fed. Reg. 1426-1492 (Jan. 8, 1999).

Note: A version of this notice that includes several amendments can be accessed at <https://www.acq.osd.mil/dpap/ops/docs/ACQDEMO%20FedReg%20WAdmts.pdf>.

was to enhance DoD's acquisition mission by "allowing greater managerial control over personnel processes and functions and, at the same time, expand the opportunities available to employees through a more responsive and flexible personnel system."⁴⁷ On February 7, 1999, DoD implemented AcqDemo, a contribution-based, broadband compensation and personnel system.⁴⁸ Congress limited the covered workforce to 95,000 participants.⁴⁹

When initially implemented, the AcqDemo project evaluation plan addressed how DoD would evaluate the project for the first 5 years and allowed for major changes and modifications through announcements in the *Federal Register*. At the 5-year point, Congress and DoD, with OPM approval, were to reexamine AcqDemo for "(a) permanent implementation; (b) modification and additional testing; (c) extension of the test period; or (d) termination."⁵⁰ Since then, Congress has extended AcqDemo and increased the covered workforce size several times, except for an interruption from 2007 through 2010 when Congress directed DoD to implement the now defunct National Security Personnel System (NSPS).⁵¹

Congress has extended the temporary authority through December 31, 2023, and increased the number of covered AWF members to 130,000, and through Section 867 of the FY 2017 NDAA, enhanced AcqDemo by transferring management authority from OPM to the Secretary of Defense. Eliminating OPM oversight reduced bureaucracy and empowered DoD to execute demonstration project flexibilities more efficiently and effectively.⁵² In Section 841 of the Senate Armed Services Committee's recommendations for the FY 2019 NDAA, the committee recommends making AcqDemo permanent. The panel concurs with this opinion.

Discussion

In researching AcqDemo, the Section 809 Panel interviewed DoD AWF acquisition executives and members, acquisition career managers, human resources subject matter experts, AcqDemo Program Management Office personnel, and various labor union representatives. The panel also reviewed the November 9, 2017 *Federal Register Notice* (FRN) description of AcqDemo, the AcqDemo operating guide, AcqDemo annual evaluations, and the literature posted on the AcqDemo library.⁵³

⁴⁷ DoD, *DoD Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) Operating Guide Version 2.2*, ii, accessed March 8, 2018, <http://acqdemo.hci.mil/docs/Operating%20Guide.pdf>.

⁴⁸ A contribution-based system links pay and awards to mission contribution and value of a position. Broadbanding allows for more competitive hiring and compensation by using a larger pay range (band) than the GS system allows.

⁴⁹ "Frequently Asked Questions," DoD Civilian Acquisition Workforce Personnel Demonstration Project, accessed March 8, 2018, <http://acqdemo.hci.mil/faq.html>.

⁵⁰ OPM: Civilian Acquisition Workforce Personnel Demonstration Project; DoD; Notice, 64 Fed. Reg. 1426-1492 (Jan. 8, 1999).

Note: A version of this notice that includes several amendments can be accessed at <https://www.acq.osd.mil/dpap/ops/docs/ACQDEMO%20FedReg%20WAdmts.pdf>.

⁵¹ NSPS was also a broadband system. AcqDemo differs in its design and management flexibilities and it garners union support as it requires local union bargaining agreements.

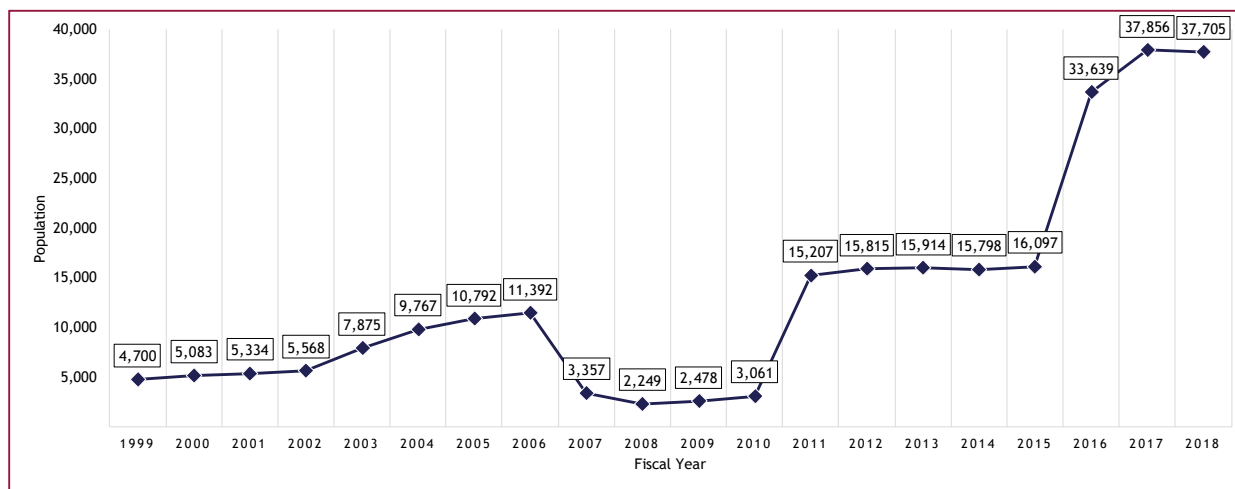
⁵² Demonstration project relating to certain acquisition personnel management policies and procedures, 10 U.S.C. § 1762.

⁵³ The AcqDemo Program Office staff is required to publish its project plan and any modifications in the *Federal Register*. The staff responds to public comments in *Federal Register Notices* (FRNs) and the most current FRN serves as the AcqDemo regulatory framework.

Demonstration Project Characteristics

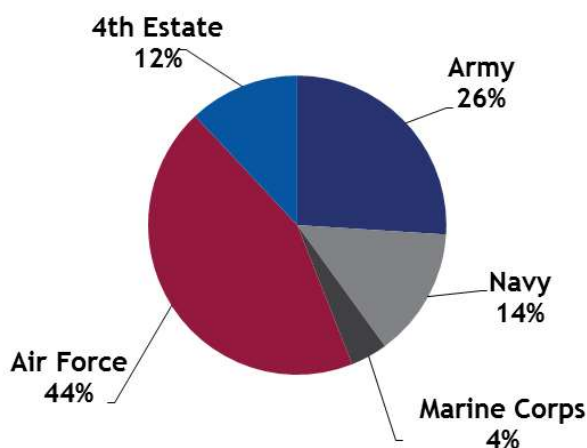
Participation in AcqDemo is voluntary for eligible organizations and teams.⁵⁴ When the demonstration project began in February 1999, the participating workforce population consisted of 4,700 participants, but as of February 2018, that population has grown to more than 39,000 participants.⁵⁵

Figure 2-1. AcqDemo Participation from 1999 to 2018



The current population distribution across DoD is shown in Figure 2-2:

Figure 2-2. Distribution of Acquisition Workforce Across DoD Components⁵⁶



The two most popular characteristics of AcqDemo that differentiate it from the General Schedule (GS) classification and pay personnel system under which the majority of federal civilian employees work

⁵⁴ At least one-third of an AcqDemo participating organization must be AWF members and at least two-thirds of the organization must be AWF members and supporting personnel assigned to work directly with the AWF.

⁵⁵ DoD, *DoD Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) Operating Guide Version 2.2*, ii, accessed March 8, 2018, <http://acqdemo.hci.mil/docs/Operating%20Guide.pdf>.

⁵⁶ "Workforce Demographics," DoD Civilian Acquisition Workforce Personnel Demonstration Project, accessed March 8, 2018, <http://acqdemo.hci.mil/demographics.html>.

are its use of broadbanding to classify employees and its use of a contribution-based compensation and appraisal process.⁵⁷ Broadbanding gives supervisors pay-setting flexibility for new personnel, which helps to make the DoD AWF more agile and improves its ability to compete for talent and meet changing mission requirements.⁵⁸ Generally, organizations pay their AcqDemo employees higher salaries than they pay their GS counterparts when they are hired, but over time their salaries even out.⁵⁹ The contribution-based compensation and appraisal process links employees' pay and awards to their contribution to mission outcomes rather than longevity, meaning within participating organizations, high-contributing AcqDemo employees increase their compensation at a faster rate than they would if they were in the GS system.⁶⁰ In short, higher contributors have the ability to earn more, faster.⁶¹ Employees who are considered high contributors in terms of organizational outcomes are retained at greater rates than employees considered low contributors.⁶² Although there is not a statistically significant difference in retention rates, employee retention is slightly higher for AcqDemo participants than it is for GS employees in AcqDemo eligible organizations (ADEOs). Table 2-2 shows retention rates for employees hired on September 30, 2011.

Table 2-2. AcqDemo Participant Retention Rate, 2011-2015⁶³

Months Since September 30, 2011	AcqDemo Participants	GS Employees in ADEOs
12	94.4	93.9
24	89.3	88.5
36	83.5	82.7
48	78.4	77.5

The AcqDemo Program Management Office staff recognizes the necessity to improve DoD's ability to compete with the private sector for talent. In November 2017, the AcqDemo Program Management Office staff incorporated into the demonstration project five external hiring authorities: Direct Hire Appointments for the Business and Technical Management Professional Career Path, Veteran Direct Hire Appointments for the Business and Technical Management Professional and Technical Management Career Paths, Acquisition Student Intern Appointments, Scholastic Achievement Appointment, and Expedited Hiring.⁶⁴

⁵⁷ DoD, *DoD Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) Operating Guide Version 2.2*, 3-4, accessed March 8, 2018, <http://acqdemo.hci.mil/docs/Operating%20Guide.pdf>.

⁵⁸ RAND National Defense Research Institute, *2016 Assessment of the Civilian Acquisition Workforce Personnel Demonstration Project*, xxi, accessed May 7, 2018, http://acqdemo.hci.mil/docs/AcqDemo_Independent_Assessment_FY16.pdf.

⁵⁹ Ibid, 73.

⁶⁰ Ibid, 17.

⁶¹ Ibid, 83.

⁶² Ibid, x.

⁶³ Ibid, Table 5.1, 55.

⁶⁴ DoD, *DoD Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) Operating Guide Version 2.2*, v, accessed March 8, 2018, <http://acqdemo.hci.mil/docs/Operating%20Guide.pdf>.

Other key AcqDemo characteristics developed to help participating organizations meet their mission needs include the following:⁶⁵

- Mandated regular supervisor–employee interactions throughout the annual appraisal cycle.
- Opportunities for greater professional development.
- Career growth and development through use of sabbaticals.
- A voluntary emeritus program that allows separated or retired civilians and former military members an opportunity to keep working after retirement or a buyout.

AcqDemo Participant Views

Senior Leaders

Senior leaders interviewed by the Section 809 Panel expressed interest in increasing participation in the demonstration project because of the flexibilities it allows, and they indicated high performers want to be in AcqDemo. For example, one interviewee told the panel, “If we can move contracting positions into AcqDemo that could help significantly with retention.” Senior leaders also applauded improved communication between supervisors and their employees regarding expectations and performance. Under AcqDemo, supervisors are able to set clear contribution goals at the beginning of a rating period and offer meaningful feedback at the end. AcqDemo employees believe these communications result in improved trust and confidence in appraisals.⁶⁶ One DoD senior leader told the panel, “The strength of AcqDemo is that it forces regular conversations [between supervisors and employees] where previously conversations were not being had. It puts the ‘so what’ question back into the conversation.” A third person praised AcqDemo for its ability to refocus the AWF on mission performance and support warfighters while rewarding strong employees for their performance in a manner other than promotion.⁶⁷

DoD senior leaders also endorse making AcqDemo permanent, and they believe that if the project became permanent, more ADEOs would join. One interviewee explained that due to the disruption caused by moving in and out of NSPS, some ADEOs have resisted joining due to the temporary nature of the authority; however, these ADEOs are ready to join AcqDemo should it become permanent. Another interviewee told the panel, “because AcqDemo was not permanent, some employees were sitting back and waiting to see what happens.”⁶⁸

Labor Unions

Most of AcqDemo criticisms stem from labor unions, which are mistrustful of alternative personnel management systems. Labor unions prefer longevity-based systems like the GS system because longevity is a transparent, quantifiable metric, not subject to supervisor bias. The labor unions’ major

⁶⁵ Ibid.

⁶⁶ RAND National Defense Research Institute, *2016 Assessment of the Civilian Acquisition Workforce Personnel Demonstration Project*, xxi, accessed May 7, 2018, http://acqdemo.hci.mil/docs/AcqDemo_Independent_Assessment_FY16.pdf.

⁶⁷ DoD senior leader interviews, conducted by Section 809 Panel, from October 2017 to March 2018.

⁶⁸ Ibid.

objection is that AcqDemo is heavily subjective. Union complaints of this nature led to the upending of NSPS. Despite this overarching perspective, labor union representatives told the panel they generally are neutral with regard to AcqDemo. One local union president told the panel he believed individual members' views vary based on their experience. "AcqDemo is popular when organizations are well funded and when employees feel they can trust management." When managers in participating organizations are transparent about how they assess their employees and make data available to employees for review, the system works better than the GS system.⁶⁹ Another union leader, who represents employees in three participating organizations, told the panel, "It is 10 times better than the GS system," and "even where things are bad, it is five times better than GS." A third representative told the panel, "During the recent furlough, union members in AcqDemo were better off than those in the GS system."⁷⁰

The facts support these assertions. AcqDemo administrators encourage union participation and unionized AcqDemo participants are achieving successful outcomes. They are generally paid higher salaries, are more likely to be promoted, and are retained at a higher rate than those in the GS system.⁷¹

Union leaders told the Section 809 Panel they like having the ability to choose between the two personnel systems; however, when their members trust management, and are compensated appropriately based on their contributions, they prefer AcqDemo.⁷²

AcqDemo works best when management makes pay pool data available to employees, so unions can verify that management rates its employees fairly and that all employees have an equal opportunity to be assigned special projects and meaningful work that will allow them to excel. This process instills confidence that management is not reserving plum assignments for supervisors' favorite employees. AcqDemo also works well when management is willing to talk to union representatives about their issues. The union representatives that talked to the Section 809 Panel explained they have been able to resolve their issues when given the opportunity.⁷³

Supervisors and Nonsupervisor Employees

Twenty-three percent of AcqDemo participants are supervisors. Supervisors' starting salaries were better, and their salaries rose faster in AcqDemo than in the GS system.⁷⁴ AcqDemo participating organizations have the option of paying cash differentials to incentivize and compensate supervisors and team leaders.⁷⁵ Accordingly, supervisors' perceptions of the project are generally positive, and the retention rates for supervisor participants in AcqDemo are high.⁷⁶ Among nonsupervisory employees, there is a perceived lack of transparency regarding how employee ratings are calculated and translated to pay, how the pay pool process works, how management shares pay pool results, and the use of

⁶⁹ Labor union representative and AcqDemo Program Office staff interviews, conducted by Section 809 Panel, from March to April 2018.

⁷⁰ Ibid.

⁷¹ RAND National Defense Research Institute, *2016 Assessment of the Civilian Acquisition Workforce Personnel Demonstration Project*, 71, accessed May 7, 2018, http://acqdemo.hci.mil/docs/AcqDemo_Independent_Assessment_FY16.pdf.

⁷² Labor union representative and AcqDemo Program Office staff interviews, conducted by Section 809 Panel, from March to April 2018.

⁷³ Ibid.

⁷⁴ RAND National Defense Research Institute, *2016 Assessment of the Civilian Acquisition Workforce Personnel Demonstration Project*, 75, accessed May 7, 2018, http://acqdemo.hci.mil/docs/AcqDemo_Independent_Assessment_FY16.pdf.

⁷⁵ Ibid, 167.

⁷⁶ Ibid, 75.

control points.⁷⁷ This skepticism, coupled with the perception that supervisors fare better under AcqDemo than nonsupervisory employees, may result in a lack of confidence that could undermine AcqDemo goals. Some employees may believe management does not fairly link compensation to employee contributions; however, data does not support this perception.⁷⁸ An FY 2016 independent analysis of AcqDemo states, “we empirically assessed the relationship between contribution to organizational mission, as measured by [the difference between actual and expected employee overall contribution score], and the various career outcomes.”⁷⁹ The independent analysis also indicates AcqDemo leadership may be able to combat this misperception through improved communication strategies.⁸⁰ In that vein, the AcqDemo Program Management Office has sought to improve transparency and dispel any misperception regarding biases and fairness by publishing and disseminating its business rules, providing training to new and existing AcqDemo participants, requiring supervisors meet with employees regularly, requiring employee self-assessments, and creating a formal grievance process for employees.⁸¹ The program management office staff also holds town hall meetings and maintains a website that provides program guidance, metrics, training, answers to frequently asked questions, and other programmatic information. AcqDemo proponents told the Section 809 Panel they designed the pay pool forum so that pay pool participants will hold one another accountable in ensuring equitable distribution of the pay pool.

Another characteristic of the project that has proven to be a challenge involves time. The time-consuming AcqDemo implementation process of writing appraisals, participating in feedback sessions, and administering pay pools might discourage both supervisors and employees from fully engaging in the system.⁸² AcqDemo program management sought improvement in this area by modifying the project to reduce the six classification and appraisal factors to three factors, thus reducing the time for employee self-assessments, supervisor assessments, and pay pool administration.⁸³

Conclusions

AcqDemo has performed well since its implementation nearly 20 years ago. It has proven more flexible than the GS pay system, and retention is higher among high-contributing employees than among low-contributors. The managerial control that AcqDemo allows has improved DoD’s ability to compete for talent, retain the most highly qualified AWF employees, and motivate those employees to maximize their contributions to the DoD mission. The AcqDemo Program Office has modified its program plan over time to improve the project. Even union leaders, who generally oppose implementation of

⁷⁷ “Control points are defined as compensation limits within a broadband level based on an organization’s position management structure and assessment of the difficulty, scope, and value of positions developed to ensure equity and consistency within the organization. Compensation limits may be stated as a monetary value, internal pay range within the broadband level, or an overall contribution score and published in local business rules.” DoD, *DoD Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) Operating Guide Version 2.2*, v, accessed March 8, 2018, <http://acqdemo.hci.mil/docs/Operating%20Guide.pdf>.

⁷⁸ RAND National Defense Research Institute, *2016 Assessment of the Civilian Acquisition Workforce Personnel Demonstration Project*, 117, accessed May 7, 2018, http://acqdemo.hci.mil/docs/AcqDemo_Independent_Assessment_FY16.pdf.

⁷⁹ *Ibid*, 85.

⁸⁰ *Ibid*, 117.

⁸¹ *Ibid*, xxi-xxv.

⁸² *Ibid*.

⁸³ OPM: Civilian Acquisition Workforce Personnel Demonstration Project; DoD; Notice, 64 Fed. Reg. 1426-1492 (Jan. 8, 1999).

Note: A version of this notice that includes several amendments can be accessed at <https://www.acq.osd.mil/dpap/ops/docs/ACQDEMO%20FedReg%20WAdmts.pdf>.

alternative personnel management systems, believe AcqDemo works as long as employees can trust management.

Convert AcqDemo from an Indefinite Project to a Permanent Personnel System

Both SASC and DoD acquisition senior leaders unanimously agree the ability to control its own personnel processes and functions has yielded successful mission outcomes, and they endorse making AcqDemo permanent. Successful outcomes and increasing participant satisfaction throughout the lifespan of the temporary authority is sufficient evidence AcqDemo is a proven personnel system. Permanency would allow DoD to continue its efforts without the limitations that may serve as a deterrent for eligible participating organizations. As such, the panel recommends converting AcqDemo to a permanent acquisition personnel system and retaining the authorities applicable to the demonstration project as described below, along with other improvements.

Make AcqDemo the Sole Personnel System for the DoD Acquisition Workforce

As the project has evolved, the AcqDemo program office staff has worked to improve perceived shortcomings by improving transparency, offering training, reducing administration time, and incorporating processes to simplify the hiring process. Senior leaders, union representatives, supervisors, and employees agree AcqDemo works better for them than the GS system when participating organizations are transparent and work with local union representatives. Participating organizations would improve their ability to manage their staffs if they focused their attention on managing AcqDemo properly, rather than dividing their attention between the management of two or more different systems. AcqDemo participation should be mandatory for all members of the DoD AWF and nonacquisition supporting personnel if their rating chain is within the organizations using the new AWF personnel system. All members of the DoD AWF should be enrolled in the new DoD acquisition personnel system. For the purposes of this system, *acquisition workforce* means one of the following:

- Employees in positions designated under 10 U.S.C. § 1721
- Other DoD employees designated as members of the acquisition workforce by
 - The USD(Acquisition and Sustainment) for employees not assigned to a Military Service
 - The senior acquisition executive of a Military Service for employees assigned to them.

Expand AcqDemo Coverage by Eliminating the Limitation on the Number of AcqDemo Participants

As evidenced by a rise of the AcqDemo population from 16,000 to 39,007 when Congress extended the demonstration project in the FY 2016 NDAA, AcqDemo participation has increase as the program's longevity has increased. ADEOs have communicated apprehension to participation in AcqDemo based on sunset dates in the past, but they are ready to join should it become permanent. Permanence would likely increase participation. Currently, Congress caps employee participation in the project at 130,000 employees; however, 147,000 civilian AWF employees would be eligible to participate should AcqDemo become permanent. The scope of supporting staff that could transition into the program varies. Eliminating the AcqDemo participation cap would have no effect on the participant eligibility criteria.

Allow AcqDemo Hiring Authority Policy to Continue Concurrent with Implementation of Section 809 Panel Hiring Authority Policy

The AcqDemo Program Management Office efforts to improve DoD's ability to compete with the private sector for talent are commendable; however, the master list of primary hiring authorities set forth in the Section 809 Panel Recommendation 25, *Streamline and adapt hiring authorities to support the acquisition workforce*, goes a step beyond the capabilities currently available under AcqDemo. The master list will better afford DoD speed and flexibility required to address the evolving needs of the AWF. Because AcqDemo's new hiring authority policy has not had sufficient time to be tested, those authorities should be maintained and used concurrently during the transition to the Section 809 Panel's recommended hiring authorities for the broader AWF. In the future, Congress and DoD should assess the existing AcqDemo hiring authorities to determine whether they should continue to exist, or whether they are redundant in light of the hiring authorities currently available to the entire AWF.

Improve Transparency

The AcqDemo Program Office has taken steps to ensure AcqDemo is fair and transparent, yet mistrust from labor unions and a perceived lack of transparency related to the link between contribution scores and compensation still exists. This situation is generally limited to certain organizations that have less transparency. If the AcqDemo Program Office is not already doing so, it should consider implementing measures in the new AWF personnel system similar to the following:

- Establish a minimum criterion, consistent with the Privacy Act of 1974 and 5 U.S.C. § 552a Records Maintained on Individuals, that participating organizations post on an organizational website regarding the process by which ratings are calculated and how their employees compare with their peers in other organizations.
- Require participating organizations to allow labor unions to provide input into the development of business rules and to attend pay pool meetings.
- Develop a process that will allow labor unions to appeal to the AcqDemo Program Office when a participating organization is less than transparent with the union.
- Provide annual, or more frequent, AcqDemo training for the participating organizations.
- Perform an annual or more frequent, assessment of participating organizations business rules and pay pool process and post assessment outcomes on the AcqDemo home page.
- Regularly post on the AcqDemo home page data that explain when and how either the AcqDemo Program Office or participating organizations use AcqDemo professional development, sabbaticals, and the voluntary emeritus program opportunities.

Implementation

Legislative Branch

- Repeal 10 U.S.C. § 1762, Demonstration Project Relating to Certain Acquisition Personnel Management Policies and Procedures.

- Replace 10 U.S.C. § 1762 with 10 U.S.C. § 1763 Personnel System for the Acquisition Workforce.
 - Make the personnel system established pursuant to 10 U.S.C. § 1763 the sole, mandatory personnel system for the DoD AWF.
 - Do not include an expiration date.
 - Do not include a limitation on the number of AWF participants.
 - Allow a 5-year phase-in period from the effective date of enactment of the new AWF personnel system, to transition all DoD AWF employees into the new system.
 - Allow collective bargaining agreements between labor unions and participating organizations that are in place prior to the effective date to continue for the duration of their existence without options to extend.
 - Limit new collective bargaining agreements entered into between labor unions and participating organizations after the date of enactment to participation under the new AWF personnel system.

Executive Branch

- There are no Executive Branch changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 2.

Implications for Other Agencies

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

Recommendation 27: Improve resourcing, allocation, and management of the Defense Acquisition Workforce Development Fund (DAWDF).

Problem

DoD faces three primary challenges with the operation of DAWDF: defining the most efficient approach for its operational funding, determining the proper method for allocating DAWDF, and addressing the ongoing management of DAWDF by Human Capital Initiatives (HCI). Collectively, failure to address these challenges undermines DAWDF's purpose of recruiting, training, and retaining acquisition personnel with necessary skills to properly perform their mission and ensure DoD receives the best value for the taxpayers.⁸⁴

DAWDF has experienced resourcing changes since its establishment in 2008. Initially, it was a multiyear fund resourced by a *tax* imposed on the amount spent by DoD on contract services (labelled as a *credit* in the statute). It later changed to a multiyear fund resourced by expired, unobligated funds, and in 2019, has been changed to an appropriation with 2-year availability.⁸⁵ These funding changes

⁸⁴ Section 852 of FY 2008 NDAA, Pub. L. No. 110-181 (2008). Defense Acquisition Workforce Development Fund, 10 U.S.C. § 1705.

⁸⁵ Section 852 of FY 2008 NDAA, Pub. L. No. 110-181 (2008). OMB, *Budget of the U.S. Government, FY 2019, Appendix: Detailed Budget Estimate by Agency, Department of Defense–Military*, 244.

have contributed to a growing sense of uncertainty by DAWDF users about its reliability and maintenance.⁸⁶ These changes have substantially reduced the flexibility of DAWDF to address its intended purpose. This uncertainty over DAWDF's sources creates risk of its decreased use, and threatens its existence at the current funding level of \$400 million. Resourcing, allocation, and management of DAWDF must be improved to ensure the defense AWF benefits from its full use.

Background

DAWDF was established in the FY 2008 NDAA to provide funds for the "recruitment, training, and retention of acquisition personnel of the Department of Defense" to ensure "the acquisition workforce has the capacity, in both personnel and skills, needed to properly perform its mission, provide appropriate oversight of contractor performance, and ensure the Department receives the best value for the expenditure of public resources."⁸⁷ The intent was to address the shortfall of trained and certified acquisition workforce personnel that defined the post-Cold War era in the 1990s and early 2000s.⁸⁸ The overreliance on contractors during this time of acquisition workforce drawdown (at its lowest 126,000 personnel) contributed to a sense of unease in Congress regarding workforce-mix imbalance and subsequent critical acquisition skills gaps.⁸⁹ Some analysts believed the reduction in acquisition personnel had a negative effect on acquisition outcomes.⁹⁰ Subsequent congressional reforms aimed to improve AWF quality through training and certification, while increasing the number of personnel to adequately support warfighter needs.⁹¹ As envisioned by Congress, DAWDF would allow DoD to grow and develop acquisition workforce quality in ways not possible under existing budgets and annual budget constraints. Congress intended DAWDF to provide flexibility for recruitment, training, and retention initiatives; engender creativity; and make DoD an employer of choice in what is an increasingly competitive talent market.⁹²

Since DAWDF's establishment, DoD has obligated more than \$3.5 billion to initiatives supported by the fund.⁹³ Additionally, DAWDF has allowed DoD to develop a professional workforce defined by an increase in bachelor's and graduate degrees, improved certification levels, and expanded DAU's

⁸⁶ GAO, *Defense Acquisition Workforce: Improved Processes, Guidance, and Planning Needed to Enhance Use of Workforce Funds*, GAO-12-747R, June 20, 2012, 2, accessed May 9, 2018, <https://www.gao.gov/assets/600/591766.pdf>.

⁸⁷ Section 852 of FY 2008 NDAA, Pub. L. No. 110-181 (2008).

⁸⁸ Moshe Schwartz, Kathryn Frances, and Charles V. O'Connor, CRS, *The Department of Defense Acquisition Workforce: Background, Analysis, and Questions for Congress*, July 29, 2016, accessed May 9, 2018, <https://fas.org/sgp/crs/natsec/R44578.pdf>. From the report summary page: "Between FY1989 and FY1999 the acquisition workforce decreased nearly 50% to a low of 124,000 employees. This decline is attributable in large part to a series of congressionally mandated reductions between FY1996 and FY1999. These cuts reflected Congress's then-view that the acquisition workforce size was not properly aligned with the acquisition budget and the size of the uniformed force."

⁸⁹ GAO, *Defense Acquisition Workforce: DoD Has Opportunities to Further Enhance Use and Management of Development Fund*, GAO-17-332, March 2017, 3, accessed May 8, 2018, <https://www.gao.gov/assets/690/683748.pdf>.

⁹⁰ Moshe Schwartz, Kathryn A. Frances, and Charles V. O'Connor, CRS, *The Department of Defense Acquisition Workforce: Background, Analysis, and Questions for Congress*, July 29, 2016, accessed May 9, 2018, <https://fas.org/sgp/crs/natsec/R44578.pdf>.

⁹¹ Two of the most significant reforms during this time were the Defense Acquisition Workforce Improvement Act (DAWIA) in 1990 and The Clinger Cohen Act in 1996 that both addressed definitions of the acquisition workforce as well as a framework for training and certification. For further discussion, see GAO, *Acquisition Workforce: Agencies Need to Better Define and Track the Training of Their Employees*, GAO-02-737, July 2002, accessed May 9, 2018, <https://www.gao.gov/assets/240/235272.pdf>.

⁹² DoD, *DoD Acquisition Workforce Strategic Plan, FY 2016 – FY 2021*, 3, accessed May 9, 2018, http://www.hci.mil/docs/DoD_Acq_Workforce_Strat_Plan_FY16_FY21.pdf.

⁹³ GAO, *Defense Acquisition Workforce: DoD Has Opportunities to Further Enhance Use and Management of Development Fund*, GAO-17-332, March 2017, accessed May 8, 2018, <https://www.gao.gov/assets/690/683748.pdf>.

capacity to provide in-person and online training.⁹⁴ With the initial priority of growing the AWF complete, DoD has turned its focus to using DAWDF for sustaining the workforce through training, development, and retention, which requires a stable source of funds to align DoD workforce sustainment priorities with workforce outcomes.⁹⁵

DAWDF's original structure—a multiyear fund resourced by a combination of credits and direct appropriations—allowed workforce development continuity. This structure offered immediate relief by boosting the AWF by 10,000 new positions in the first 3 years of DAWDF.⁹⁶ Multiyear availability maximized strategic support that would allow DoD to build complex, innovative programs to sustain the AWF long term.

There are three ways DAWDF can be funded according to 10 U.S.C. § 1705, Department of Defense Acquisition Workforce Development Fund:

- **Credits to the fund.** This approach involves crediting DAWDF with an amount equal to the applicable percentage for a fiscal year of all amounts expended by DoD for contract services funding by Operations and Maintenance (O&M) appropriations, other than research and development and military construction.⁹⁷
- **Appropriations.** This approach uses appropriations, available for obligation for 1 fiscal year in the year for which they were appropriated.⁹⁸
- **Transfers of expired unobligated funds.** During the 3-year period following expiration of the obligation period for appropriations to DoD for research, development, test and evaluation; procurement; or operation and maintenance, DoD may transfer such funds to DAWDF to the extent provided in appropriations acts.⁹⁹

⁹⁴ DoD OUSD(AT&L), *Department of Defense Acquisition Workforce Development Fund, FY 2015 Annual Report to Congress*, April 2016, accessed May 9, 2018, http://www.hci.mil/docs/Policy/Reports%20to%20Congress/FY15_DAWDF_Annual_Report_to_Congress.pdf. In particular, certification levels improved from 86 percent in FY 2008 to 96 percent in FY 2015, the number of people with Bachelor's degrees or higher increased from 77 percent in FY 2008 to 84 percent in FY 2015. The number of individuals with a graduate degree increased from 29 percent in FY 2008 to 38 percent in FY 2015.

⁹⁵ "Workforce Metrics," OUSD(A&S) HCI, accessed March 22, 2018, <http://www.hci.mil/about/workforce-metrics.html>. The general makeup of the 165,275 acquisition personnel workforce is 15,493 military acquisition personnel and 149,782 civilian acquisition personnel. GAO, *Defense Acquisition Workforce: DoD Has Opportunities to Further Enhance Use and Management of Development Fund*, GAO-17-332, March 2017, 9, accessed May 8, 2018, <https://www.gao.gov/assets/690/683748.pdf>.

⁹⁶ John A. Ausink et al, *Air Force Management of the Defense Acquisition Workforce Development Fund, Opportunities for Improvement*, RAND Corporation (2016), 5, accessed May 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1400/RR1486/RAND_RR1486.pdf. DoD OSD, *Defense Acquisition Workforce Development Fund (DAWDF): FY 2009 Annual Report to Congress*, August 2010, iii, accessed May 9, 2018, <http://www.hci.mil/docs/Policy/Reports%20to%20Congress/5a.%20FY09%20DAWDF%20Annual%20Report%20to%20Congress.pdf>. Section 852 of the FY 2008 NDAA, Pub. L. No. 110-181 (2008).

⁹⁷ Section 852 of the FY 2008 NDAA, Pub. L. No. 110-181 (2008).

⁹⁸ GAO, *Defense Acquisition Workforce: DoD Has Opportunities to Further Enhance Use and Management of Development Fund*, GAO-17-332, March 2017, 4, accessed May 8, 2018, <https://www.gao.gov/assets/690/683748.pdf>.

⁹⁹ Ibid.

There is evidence DAWDF has improved the defense acquisition workforce, and AWF stakeholders indicated that DAWDF is vital to the development of their workforce.¹⁰⁰ DAWDF's original source of funding by credits and remittances was plagued by lengthy delays in the reallocation process inherent in collecting a tax on contract services funding by O&M funds, and compromised vital initiatives.¹⁰¹ DAWDF users submitted credits to the DoD Comptroller to meet the \$500,000,000 baseline, then those credits were reallocated as a lump sum to HCI, which in turn reallocated the credits based on requirements submitted to HCI for workforce initiatives.¹⁰² GAO found the DoD Comptroller delayed sending out remittance notices and allowed Military Components to delay remitting funds to DAWDF, resulting in the Military Components not completing remitted credit funds within the time frames required by DoD for any year that credit funding process was used.¹⁰³ Within this model, it took the Comptroller up to 24 months to distribute the funds to HCI, which then had to further distribute the funds to each of the Services and the 4th Estate.¹⁰⁴ As GAO reported:

For example, the notice of fiscal year 2013 was sent in June 2013 and required components to remit credits by October 2013. However, the remittance process was not completed until September 2014, or 11 months past the required deadline. Similarly, for fiscal year 2014, the remittance process was not completed until May 2016, or 24 months after DoD submitted its written determination of the amount of DAWDF funding required for the fiscal year – the initiation of the funding process.¹⁰⁵

Congressional action improved DAWDF funding by authorizing DoD to transfer expired, unobligated funds for 3 years following their obligation expiration date.¹⁰⁶ This approach fundamentally changed how DAWDF was used, reducing the funding time from 24 months to 2. Changing how DAWDF was resourced decreased the risk of cancelling crucial recruitment and retention initiatives such as the Student Loan Repayment Plan (SLRP) and increased engagement with DAWDF. Availability of expiring-year monies enabled more expedient fund distribution, yet DAWDF's multiyear aspect resulted in large sums of money that appeared unobligated but were considered by the Military Components and Defense Agencies as obligated strategically over 3 years to sustain long-term recruitment, training, and retention initiatives.¹⁰⁷ This perception of large sums of *sitting* money made Congress uneasy and gave the impression DAWDF far exceeded what the Military Components and Defense Agencies required to develop the AWF. For example, the 2012 and 2017 GAO reports were triggered by Congress's unease with large unobligated balances.¹⁰⁸ Consequently, the appropriators

¹⁰⁰ DoD OUSD(AT&L), *Department of Defense Acquisition Workforce Development Fund, FY 2015 Annual Report to Congress*, April 2016, accessed May 9, 2018, http://www.hci.mil/docs/Policy/Reports%20to%20Congress/FY15_DAWDF_Annual_Report_to_Congress.pdf. AWF stakeholders, communication with Section 809 Panel, from September 2017 to April 2018.

¹⁰¹ GAO, *Defense Acquisition Workforce: DoD Has Opportunities to Further Enhance Use and Management of Development Fund*, GAO-17-332, March 2017, 4, accessed May 8, 2018, <https://www.gao.gov/assets/690/683748.pdf>.

¹⁰² *Ibid.*, 11-12.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, 12.

¹⁰⁶ *Ibid.*, 10. Pub. L. No. 113-76, div. C, tit VIII, § 8094. 10 U.S.C. § 1705(d)(3).

¹⁰⁷ DACMs and Defense Agencies, communications with Section 809 Panel, September 2017 to April 2018.

¹⁰⁸ The following quotes provide further context for why Congress was so alarmed by DAWDF management that they triggered a GAO report. "Congress was reducing the amount requested by DoD for the fund by \$200 million, in part because the fund had large unobligated balances that it had carried over for the past several years." GAO, *Defense Acquisition Workforce: Improved Processes, Guidance, and Planning Needed to Enhance Use of Workforce Funds*, GAO-12-747R, June 20, 2012, 2, accessed May 9, 2018, <https://www.gao.gov/assets/600/591766.pdf>. "Given the continued level of carry over funds that DoD reported to Congress –

have developed a draft positing DAWDF be changed to an appropriation with 2-year availability, with the support of the DoD Comptroller.¹⁰⁹

From 2008 to 2011 the president of DAU was responsible for the day-to-day management of DAWDF. In 2011, AT&L established HCI, which assumed responsibility for DAWDF management. The director, a member of the Senior Executive Service appointed by then AT&L, “provides leadership and facilitates an integrated team effort with the Defense Acquisition Career Managers (DACMs) and acquisition Functional Leaders (FLs)” and “assists in the execution of statutory workforce responsibilities and acquisition workforce strategic planning, policy, and programs, to include DAWDF.”¹¹⁰ Since 2011, HCI has been responsible for developing processes to better facilitate funding DAWDF initiatives, as well as developing metrics for measuring program execution rates. For example, the *DAWDF Desk Operating Guide*, provides much-needed guidance on use of DAWDF.¹¹¹ The joint governance forums of the Senior Steering Board (SSB), the Workforce Management Group (WMG), and the Functional Integrated Product Team (FIPT) support HCI’s management of DAWDF.

- **Senior Steering Board (SSB)** comprises the USD(AT&L) as the SSB Chair, Component Acquisition Executives (CAEs) of the Military Departments, Defense Contract Management Agency (DCMA), Defense Logistics Agency (DLA), Defense Contract Audit Agency (DCAA), Functional Leaders (FLs), the USD (Personnel and Readiness), the Director of HCI, and the President of DAU).¹¹² The purpose of this senior governance forum is to provide “strategic direction and oversee execution of the AWF program.” SSB is meant to meet quarterly.
- **Workforce Management Group (WMG)** comprises representatives of the SSB and serves as the “primary forum for reviewing elements of the AWF program to ensure integration of enterprise requirements and that supporting initiatives are aligned with strategic workforce goals and resources.” WMG is meant to meet quarterly.
- **Functional Integrated Product Team (FIPT)** oversees development of various acquisition career fields by ensuring there is adequate and relevant training and resources.¹¹³

HCI’s management of the fund also includes outreach efforts, advocating for DAWDF as an intermediary between DoD and Congress.

\$875 million at the beginning of fiscal year 2016 – you asked us to review DoD’s execution of DAWDF.” GAO, *Defense Acquisition Workforce: DoD Has Opportunities to Further Enhance Use and Management of Development Fund*, GAO-17-332, March 2017, 11-12, accessed May 8, 2018, <https://www.gao.gov/assets/690/683748.pdf>.

¹⁰⁹ OMB, *An American Budget: Budget of the U.S. Government, FY 2019*, accessed May 10, 2018, <https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf>.

¹¹⁰ DoD, *DoD Acquisition Workforce Strategic Plan, FY 2016 – FY 2021*, 9, accessed May 9, 2018, http://www.hci.mil/docs/DoD_Acq_Workforce_Strat_Plan_FY16_FY21.pdf.

¹¹¹ DoD, *OUSD(AT&L) Human Capital Initiatives Defense Acquisition Workforce Development Fund Desk Operating Guide Version 1.0 August 2016*, accessed June 25, 2018, <http://www.secnav.navy.mil/rda/workforce/Documents/DAWDF-Desk-Operating-Guide.pdf>.

¹¹² The recent AT&L split has not yet been updated to indicate changes to SBB; therefore, this paper uses the original terminology, but acknowledges the split has occurred.

¹¹³ DoD, *DoD Acquisition Workforce Strategic Plan, FY 2016 – FY 2021*, 10, accessed May 9, 2018, http://www.hci.mil/docs/DoD_Acq_Workforce_Strat_Plan_FY16_FY21.pdf.

Discussion

DAWDF's resourcing has implications for both its management and execution. Its evolution to an annual appropriation has the potential to undermine the initiatives DAWDF was intended to support. The combination of how DAWDF has been resourced and changes to the means by which it is resourced have caused execution challenges and contributed to a negative perception of how DAWDF is used. In particular, DAWDF's initial scope, defined mainly by what it was not to be used for, made the fund appear amorphous to its users. The FY 2008 NDAA stipulated the statutory restrictions for DAWDF:

- The funds may be used to recruit, train, and retain only acquisition personnel in Acquisition Professional Development Program coded positions.
- Funds may be provided to contractors only for the purpose of providing training to DoD employees.
- DAWDF funds may not be used for the base salary of someone who has been in the DoD acquisition workforce since January 28, 2008, unless that person has had a break in such employment of more than 1 year.¹¹⁴

Language in the FY 2017 NDAA aimed at increasing DAWDF's scope. The amended language included providing advanced training for DoD employees; developing acquisition tools and methodologies; performing research on acquisition policies and best practices; and supporting human capital and talent management of the acquisition workforce, including benchmarking studies, assessments, and requirements planning.¹¹⁵ DoD's increased demand for ways in which DAWDF can be used demonstrates how fundamental DAWDF is to AWF development. How DAWDF is resourced is at the crux of how this demand can be translated into high-quality initiatives that have repeatedly and empirically demonstrated they improve the AWF. DAWDF's financing mechanisms and its structure must be maximized to suit its original and expanded purpose.

Multiyear availability of DAWDF allows the following acquisition workforce development outcomes not attainable using a 1-year fund:

- Increased ability to implement initiatives that cross the fiscal year (for example, the SLRP, temporary duty (TDY), and Talent Management Programs) that require a higher level of effort, studies, and assessments. This approach provides continuity in the face of continuing resolutions.
- Increased engagement as a result of the stability a multiyear fund provides.
- Increased ability to conduct complex and innovative pilot programs that are of a quality to makes them likely to be accepted.

¹¹⁴ Section 852 of FY 2008 NDAA, Pub. L. No. 110-181 (2008). Defense Acquisition Workforce Development Fund, 10 U.S.C. § 1705.

¹¹⁵ Section 854 of FY 2017 NDAA, Pub. L. No. 114-328 (2016).

- Flexibility to submit and approve quality training opportunities later in the fiscal year to meet urgent needs of the command or meet evolving acquisition requirements, facilitated by multiyear funding.

DoD's management of DAWDF can be improved by implementing program management practices. Changes in how DAWDF is resourced affects DoD's management of the fund and presents. Overall, DAWDF is managed by a Joint Governance Forum comprising an SSB, a WMG, and FLs. For the purpose of the Section 809 Panel's research on DAWDF, analysis focuses only on SSB and WMG.

Case Study: Air Force Materiel Command Contracting

Problem

AFMC's contracting workforce needs a pipeline of high-caliber trainees/interns sufficient to offset annual manpower attrition.

Background

The Air Force Materiel Command (AFMC) contracting workforce comprises approximately 3400 civilians and 450 military members across six centers and 30 duty locations.¹¹⁶ Each year, the command receives a stream of contracting trainees/interns that graduate at the journeyman level. The Air Force COPPER CAP program provides AFMC with trainees/interns that it funds through a central salary account and from DAWDF, yet the annual allocation of these assets consistently falls short of AFMC's needs. Other than a very limited pool of military contracting professionals who separate from active duty each year, there are very few experienced government contracting professionals in the local labor markets. Consequently, to cover the shortfall in COPPER CAP trainees/interns, AFMC must convert locally-funded journeyman level positions to developmental trainee/intern positions and use their own local civilian salary budget. This degrades the effectiveness of the AFMC contracting workforce because the Centers' contracting manpower requirements assume that the locally-funded positions are filled with at least experienced, journeyman level employees versus trainees/interns. In addition to DAWDF paying the salary of a portion of the contracting trainees/interns AFMC needs each year, it also is leveraged to recruit and hire high caliber trainee/intern candidates by funding student loan re-payments, targeted recruiting trips to universities, job fairs, and professional events, and relocation incentives. Center O&M is an alternate funding source AFMC may use for these recruiting and hiring incentives, but competing priorities generally prevent using O&M funds.

Requirements

To stay ahead of the attrition rate, AFMC requires 250-300 funded trainees/interns each year.¹¹⁷ Ideally, these would all be funded via the central salary account or DAWDF, so that AFMC contracting can operate at full strength with all their locally-funded positions filled by experienced employees. In FY 2018 AFMC received only 85 of 270 requested trainees/interns and have requested 279 trainees/interns for FY 2019.¹¹⁸ Due to continuing budget constraints on the central salary account, the command anticipates a comparable or higher shortfall in trainees/interns in FY 2019 and needs DAWDF-funded trainees/interns to offset as much of the shortfall as possible to mitigate the need to encumber locally-funded positions with trainees/interns versus experienced contracting professionals. AFMC also requires continued funding for recruiting and hiring incentives.

¹¹⁶ Air Force Materiel Command Directorate of Contracting, email to Section 809 Panel, May 11, 2018.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

Case Study:
Air Force Materiel Command Contracting

What DAWDF Makes Possible¹¹⁹

- Recruitment at universities, job fairs, and professional events.
- Robust pool of high-quality intern/trainee candidates.
- Incentives such as the SLRP to attract high-quality candidates and offset noncompetitive government salaries.
- Relocation initiatives to attract high-caliber candidates in hard-to-fill positions.

Senior Steering Board

SSB is responsible for policy and oversight decisions regarding DAWDF initiatives.¹²⁰ SSB operates by providing strategic direction for, and overseeing execution of, the acquisition workforce program; ensuring that funds allocated to the AWF program are aligned with DoD's Human Capital Strategic Plan; and by holding board meetings called by the chair.¹²¹

SSB is organized as follows:

- USD(AT&L) – SSB Chair
- Director, HCI – SSB Executive Secretary
- SAEs of the Military Departments
- Director, Defense Contract Management Agency
- Director, Defense Logistics Agency
- Director, Defense Contract Audit Agency
- Functional Leaders
- USD (Personnel & Readiness)
- President, Defense Acquisition University
- Others, as the USD(AT&L) considers appropriate.¹²²

SSB is vital to DAWDF management, as it ensures strategic direction is prioritized and given across the enterprise. It is also an important source of support and guidance for HCI to allocate funding aligned with DoD's goals for its acquisition workforce. Without a functioning SSB, HCI risks managing DAWDF in a way that fails to maximize its purpose and exposes it to the risk of additional funding changes. AWF stakeholders stated that in the early years of DAWDF, SSB met regularly and meaningfully engaged under the leadership of what was then USD(AT&L) to determine the strategic priorities for DAWDF.¹²³ Stakeholders said meetings no longer occur and have been replaced with what

¹¹⁹ Ibid.

¹²⁰ DoD, *Defense Acquisition Workforce Management Group (WMG) Charter*, July 2011, 2, accessed May 9, 2018, [http://www.hci.mil/docs/Policy/Guidance%20Memoranda/23.%20WMG%20Charter%20\(July%2029,%202011\).pdf](http://www.hci.mil/docs/Policy/Guidance%20Memoranda/23.%20WMG%20Charter%20(July%2029,%202011).pdf).

¹²¹ Defense Acquisition Workforce Education, Training, Experience, and Career Development Program, DoDI 5000.66, 29 (2017).

¹²² Ibid. AWF stakeholders indicated to the Section 809 Panel that "Others" include the DACMs.

¹²³ AWF stakeholders, communication with Section 809 Panel, January 2018.

were described as *update briefs*.¹²⁴ AWF stakeholders indicated SSB meetings have not focused on setting strategic priorities for about 8 years. One DoD official explained there has been no need for strategic planning because every successfully submitted initiative has received funding. Another DoD official indicated that clear guidance from SSB would support higher execution rates for DAWDF.¹²⁵

AWF stakeholders perceive FLs' contributions are ascribed more merit than those of other meeting participants.¹²⁶ Stakeholders indicated they saw this situation as a type of *bottom up* approach to setting the strategic priorities for HCI.¹²⁷ This approach seems to lead to prioritizing funds based on the *strongest functional in the room* perspective as opposed to a more strategic acquisition enterprise perspective. A long-term management approach by SSB is most beneficial to the fund, including adequate time to set strategic priorities for DAWDF.

Workforce Management Group (WMG)

WMG is the support function to SSB in the Joint Governance Forum framework. It comprises the following:

- Director, HCI – Chair
- DACMs
- FLs
- President, DAU
- Others, as the Director, HCI considers appropriate

WMG is tasked with providing assistance, oversight, and review of the AWF program to SSB to integrate enterprise initiatives and cross-functional issues and to advise on workforce matters.¹²⁸ It is also tasked with communicating career field certification changes before implementation.¹²⁹ WMG was designed to meet 2 weeks ahead of SSB meetings to present any issues that could be resolved by SSB in terms of determining AWF strategic priorities. The consistency and quality of WMG meetings fall below the standard of its tasking. Although DoD's Acquisition Workforce Strategic Plan FY 2016–FY 2021 indicates WMG is the “primary forum for reviewing elements of the AWF program to ensure integration of enterprise requirements and that supporting initiatives are aligned with strategic workforce goals and resources,”¹³⁰ AWF stakeholders confirmed these meetings as being inconsistent and akin to “2-hour long PowerPoint meetings where no problems or issues are discussed.”¹³¹ They further conveyed a sense of unilateral decision-making by HCI versus a conversation between HCI and organizations using DAWDF. According to stakeholder feedback, WMG meetings can provide a valuable forum through which to communicate with the SSB on desired guidance for strategic

¹²⁴ AWF stakeholders, meetings with Section 809 Panel, from February to March 2018.

¹²⁵ DoD official, communication with Section 809 Panel, February 26, 2018.

¹²⁶ Section 809 Panel communication with AWF stakeholders, series of meetings from September 2017 to April 2018.

¹²⁷ Ibid.

¹²⁸ Defense Acquisition Workforce Education, Training, Experience, and Career Development Program, DoDI 5000.66, 29 (2017).

¹²⁹ Ibid.

¹³⁰ DoD, *DoD Acquisition Workforce Strategic Plan, FY 2016 – FY 2021*, 10, accessed May 9, 2018, http://www.hci.mil/docs/DoD_Acq_Workforce_Strat_Plan_FY16_FY21.pdf.

¹³¹ DoD officials, communication with Section 809 Panel, April 2, 2018.

priorities in relation to their workforce, and also as a forum in which to resolve problems or issues at the operational level.¹³² The infrequency and quality of WMG meetings cause the group to fall short of its original purpose, ultimately undermining DAWDF management.

Allocation of the Fund

Once DAWDF has been resourced (by whichever method), the Comptroller releases the funds to HCI, and the HCI director allocates the funds. Given the fund's history, HCI works to manage DAWDF in a way that protects against resourcing changes. As a result, HCI's current allocation model seeks to ensure there are funds available to pay critical requirements such as salaries or crucial retention initiatives (such as SLRP) should a gap in funding occur. The model relies on allocating 75 percent of an initiative's funding up front and withholding the remaining 25 percent until the initiative's midyear review with HCI. This model was intended to mitigate risk posed when DAWDF was resourced by credits.¹³³ Under previous legislation, DAWDF was not subject to funding shortfalls caused by continuing resolutions (CRs) or fiscal year ends because it was a multiyear fund. Although retaining 25 percent of funds may have helped bridge fiscal gaps, this model exacerbates an already problematic funding structure under which setting aside funds contributes to congressional perception that DAWDF monies largely go unobligated. Although HCI's Annual Reports to Congress indicate only .0069 percent of funds have expired of the \$3.7 billion obligated to DAWDF in the past 10 years, HCI's current allocation model furthers the misconception funds are not used.¹³⁴

Acquisition workforce stakeholders indicated the timing of the split percentage allocation model does not align with the midyear review in which program execution is reviewed by HCI and decisions are made about allocating the remaining 25 percent. When programs are not being executed successfully, HCI has authority to reassign the 25 percent allocation to another DAWDF initiative. In practice, this allocation model often leaves the Military Component or Defense Agency with a gap in funding between the full execution of its first distribution of 75 percent and the remaining 25 percent. This situation leaves some DAWDF users uncertain about the fund's stability and skeptical about DAWDF's ability to deliver a steady source of funding for vital workforce initiatives. According to one DoD official, when the 25 percent allocation is reallocated to another program it may stifle communication between HCI and DoD.¹³⁵ AWF stakeholders said this instinct to restrict communication with HCI stems from the perception that HCI makes unilateral decisions in these situations.¹³⁶

Midyear Reviews and Execution Reviews

HCI midyear reviews are intended to evaluate program execution against the 75 percent allocation and to allow an opportunity to discuss execution issues and share best practices. At these meetings, DAWDF recipients present to HCI what their program has achieved to date. AWF stakeholders indicate that although having a midyear review offers an opportunity for discussing problems and to discuss how initiatives fit into the overall strategic priorities of the workforce, the midyear review has

¹³² DoD officials, outreach meetings conducted by Section 809 Panel, from September 2017 to March 2018.

¹³³ GAO, *Defense Acquisition Workforce: DoD Has Opportunities to Further Enhance Use and Management of Development Fund*, GAO-17-332, March 2017, accessed May 8, 2018, <https://www.gao.gov/assets/690/683748.pdf>.

¹³⁴ "Policy," HCI, Office of the Under Secretary of Defense for Acquisition and Sustainment, accessed June 7, 2018, <http://www.hci.mil/policy.html>.

¹³⁵ DoD officials, communication with Section 809 Panel, April 2, 2018.

¹³⁶ Ibid.

instead become a brief financial execution review.¹³⁷ AWF stakeholders said the biweekly execution reviews, at which programs are reviewed by HCI, are phone conferences at which stakeholders simply state the numbers relevant to their programs.¹³⁸ Although participants are encouraged to raise issues during these phone meetings, AWF stakeholders indicated this format, with numerous stakeholders present, fails to foster meaningful engagement about strategic priorities against initiatives.¹³⁹ The format of both the midyear review and the biweekly and monthly execution reviews hinder the opportunity to align DoD's strategic workforce goals with DAWDF's strategic priorities, undermining how DAWDF is managed.

Human Capital Initiatives

HCI was tasked with assisting in “carrying out all statutory powers, functions, and duties of the Secretary of Defense with respect to the AWF, including all DoD-wide AWF strategic planning, policy, and programs, as well as direction, overseeing, budgeting central resources of, and evaluating the AWF Program.”¹⁴⁰ Under the “What We Do” section of its website, HCI translates this tasking as workforce development, DAWDF, AcqDemo, and the Defense Acquisition Workforce Awards.¹⁴¹ Staffed with eight people, HCI is a small operation that manages a wide portfolio providing vital support to the defense AWF.

Shifting DAWDF management from DAU to HCI allowed DAWDF to have *one voice* representing all DoD organizations, one official stated.¹⁴² Because DAU is a major DAWDF beneficiary—receiving approximately 20 percent of DAWDF monies to deliver certification training to the AWF—having HCI manage DAWDF mitigates perceived conflict of interest. AWF stakeholders indicated that HCI is a vital advocate for DAWDF with Congress and other government agencies such as GSA, and ensures reporting requirements are met.¹⁴³ HCI also provides value by ensuring DAWDF funds do not get used for anything other than DoD workforce development. HCI could benefit from additional resources to carry out its charter, to include its additional responsibility of managing the AcqDemo program (which, in another section of this *Volume 2* report, the Section 809 Panel recommends should be made permanent and expanded to the entire AWF). At a minimum, HCI should invest in additional resources, including at least one staff member in addition to the HCI Director. That staff member must have financial management experience and be capable of providing data analytics support.

In 2017 GAO recommended HCI improve its data collection and subsequent data reporting by adopting federal internal control standards. This recommendation was based on GAO finding a lack of processes to verify data collected by HCI on DAWDF recipients, and HCI not having complete and accurate data to meet reporting requirements.¹⁴⁴ Although DoD responded to GAO that improved processes were being adopted to address this issue, HCI's continued need for resources, to include a

¹³⁷ Outreach meetings with DoD officials, conducted by Section 809 Panel, from September 2017 to March 2018.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Defense Acquisition Workforce Education, Training, Experience, and Career Development Program, DoDI 5000.66, 8 (2017).

¹⁴¹ “What We Do,” OUSD(A&S) HCI, accessed May 9, 2018, <http://www.hci.mil/what-we-do/Workforce-Development.html>.

¹⁴² DoD officials, communication with Section 809 Panel, April 2, 2018.

¹⁴³ Ibid.

¹⁴⁴ GAO, *Defense Acquisition Workforce: DoD Has Opportunities to Further Enhance Use and Management of Development Fund*, GAO-17-332, March 2017, 24, accessed May 8, 2018, <https://www.gao.gov/assets/690/683748.pdf>.

data analyst, indicate that further support is required to enable DoD to fully and accurately collect data on DAWDF.

Conclusions

DAWDF should be resourced and managed as a multiyear fund from expiring-year, unobligated dollars, to be no less than \$450 million on an annual basis. Multiyear funding provides flexibility and strategic, innovative workforce development opportunities that are not always possible under a 1-year appropriation. Comparative analysis of the various DAWDF funding approaches over the past 10 years shows that when DAWDF is funded by expired funds with multiyear availability, DoD can execute almost all of its funding. At its most stable period in 2016, DAWDF executed 96 percent of available funds.¹⁴⁵ This multiyear funding approach allows DAWDF initiatives to be resilient to unanticipated events such as sequestration, hiring freezes, and continuing resolutions (CRs). In turn, this resiliency provides stability and continuity in execution. In 2017, GAO found the use of expired funds contributed to DAWDF's stability.¹⁴⁶ Recent changes in funding approach place DAWDF at a disadvantage. When DoD managed its workforce with 1-year appropriations pre-DAWDF, the AWF was not able to meet the challenges it faced. The logic behind DAWDF was to provide a framework in which to inject flexibility and innovation in developing a professional workforce. Multiyear availability supported this goal by allowing strategic, long-term AWF planning and development. Stabilizing the size of the workforce appears to be the first step in this long-term plan. Reducing DAWDF to a 1-year appropriation constrains workforce development with exposure to issues such as CRs, sequestration, and budget cuts; disrupts recruitment and retention initiatives; and works against DAWDF's intended purpose.

DAWDF stability is derived both from how the fund is resourced and how it is managed, the latter of which can, to a degree, mitigate risks imposed by the former. To maximize the usefulness of DAWDF, its structure and management must be stable and retain the confidence of its users. This stability should be derived from active SBB direction and multiyear availability resourced with expired unobligated funds.

Fundamental changes to DAWDF's current management approach—the Joint Governance Forum and HCI's allocation and management of DAWDF—are necessary. Despite changes regarding how DAWDF has been resourced and managed in the past 10 years, at no time in the funds' history until 2017 have there been insufficient funds for DAWDF initiatives. The challenge of having to prioritize initiatives against the substantial decrease of DAWDF has exposed structural weaknesses in how DAWDF is managed. Current DAWDF management practices are insufficiently robust to withstand the pressure now being leveraged on DAWDF by Congress and DoD Comptroller.

Despite DoD outlining enhancements to its execution reviews, HCI has not improved alignment of initiatives and improved staffing to indicate a clear alignment between DoD's Acquisition Workforce Strategic Plan and DAWDF funding. As cited in GAO's 2017 report on the use and management of

¹⁴⁵ DoD OUSD(AT&L), *Department of Defense Acquisition Workforce Development Fund, FY 2016 Annual Report to Congress, January 2017*, accessed May 9, 2018, http://www.hci.mil/docs/Policy/Reports%20to%20Congress/FY16_DAWDF_Annual_Report_to_Congress.pdf.

¹⁴⁶ GAO, *Defense Acquisition Workforce: DoD Has Opportunities to Further Enhance Use and Management of Development Fund*, GAO-17-332, March 2017, 26, accessed May 8, 2018, <https://www.gao.gov/assets/690/683748.pdf>.

DAWDF, these issues remain unresolved.¹⁴⁷ DAWDF management must be fully supported by the SSB, WMG, and by adequate staffing of HCI. The strategic direction SSB provides to HCI is crucial to HCI's implementation and execution of DAWDF. Without consistent engagement regarding how DoD's strategic AWF goals align to how DAWDF initiatives are prioritized by SSB, DAWDF's use cannot be maximized. Full engagement by SSB, including clear and precise direction as to the strategic priorities of DAWDF, must also be a consistent agenda item. At the operational level of DAWDF, WMG must be empowered to translate SSB's strategic priorities into day-to-day execution of DAWDF at the Military Component and Defense Agency level. To empower WMG, the format of the WMG meetings must enable discussion of strategic priorities as a consistent agenda item. For HCI to have the support to conduct these reviews and for support in data collection, HCI crucially needs additional personnel. HCI should add an individual with experience and qualifications in financial management. This individual could be either a member of staff or the director. If not the director, this individual should lead the midyear and biweekly execution reviews alongside the HCI director. A fund of DAWDF's size and complexity must be supported by the knowledge and experience of complex financial management. Additionally, HCI needs additional support from program managers and data analysts.

DoD's allocation of DAWDF must allow execution of initiatives without the risk of gaps imposed by the midyear review or other structural risks such as 1-year appropriation. Moving to a 100 percent allocation will allow the components to implement their strategic workforce plans amidst DAWDF's structural constraints and changes in resourcing. HCI should revoke funds for nonperforming initiatives at their midyear review.

These recommendations reinforce the purpose of the SSB and WMG as members of the Joint Governance Forum for robust management of DAWDF. Without consistent, clear, and precise strategic direction, DAWDF's current existence at \$400 million is at risk. By providing a strong framework from which discussions can occur at the operational and tactical level of fund implementation, DAWDF can be maximized.

Implementation

Legislative Branch

- Establish DAWDF as a permanent, multiyear fund and require it be resourced by expiring, unobligated funds at a level of no less than \$450 million.

Executive Branch

- Provide HCI with additional personnel who possess financial management qualifications and experience.
 - Require the HCI director and/or the deputy director (a new billet would be required for this position) to have financial management qualifications and experience.
 - Require that midyear and biweekly DAWDF execution reviews be led by someone with financial management qualifications and experience.

¹⁴⁷ Ibid, 24.

- Rewrite the *DoD Strategic Workforce Plan FY 2016–FY 2012* to clearly align AWF goals with how DAWDF should be used, applying a bottom-up approach similar to that used as the basis of the *DoD 2008 Strategic Workforce Plan*.
- Require the USD(AS) and USD(RE) to serve as the SSB cochair.
 - Issue strategic guidance on the uses of DAWDF consistent with the SSB approved Strategic Workforce Plan.
 - Require SSB to approve and review the annual DAWDF budget.
- Structure WMG to be led at the OSD level by both the Assistant Secretary for Acquisition and the Assistant Secretary for Research and Engineering and with the director of HCI serving as executive secretary.
 - Require each Military Service to provide a principal military or civilian acquisition deputy to represent the respective Military Service on WMG.
- Implement federal internal control standards for data collected to inform HCI’s annual review.
- Allocate 100 percent of DAWDF monies to Military Services and DoD agencies once HCI receives them from the Comptroller.
- Improve and standardize DAWDF initiative management at HCI level.
 - Provide transparent access to DAWDF financial status for major DAWDF recipients including, for example, total funds received, total funds distributed by component, and total funds distributed by line item. These data should be presented as of a report DAWDF users can easily access.
 - Formalize the DAWDF initiative approval process *decision framework* to align with DoD acquisition workforce strategic goals.
- Improve and standardize management of DAWDF initiatives at the Military Service and Defense Agency level.
 - Develop a framework for comparing potential effect of DAWDF proposals to goals set forth in the *DoD Acquisition Workforce Strategic Plan*.
 - Develop metrics to measure return on investment of DAWDF proposals against DoD *Acquisition Workforce Strategic Plan* goals.
 - Formalize and document DAWDF fund manager processes across the Military Services and Defense Agencies using the Army’s model of initiative progress as a standard for best practice.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 2.

Implications for Other Agencies

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

Section 2

Acquisition Workforce

Implementation Details

Recommendations 25, 26, and 27

RECOMMENDED REPORT LANGUAGE

SEC. 1001. Consolidation, Codification and Revision of Certain Direct Hire Authorities

This section would amend title 10, United States Code, by inserting a new section 1590 to consolidate and streamline several direct-hire authorities applicable to the defense acquisition workforce. This section also would lift restrictions on their use.

Currently, the defense acquisition workforce is authorized to utilize a large number of hiring authorities to support its hiring process. The committee is aware that the complexity of the numerous hiring authorities may hinder the ability of hiring managers and human resources personnel to use the flexibilities provided, undermining the authorities' impact. Consolidating and streamlining the varying direct-hire authorities into a single hiring authority will facilitate its use for the benefit of the defense acquisition workforce.

The committee also notes that the scope of the direct-hire authorities is limited by statutory restrictions, such as sunset dates and ceilings on the number of individuals who can be hired annually. The committee acknowledges that these restrictions constrain the direct-hire authorities and limit the extent to which they can be exploited by the defense acquisition workforce. Elimination of the restrictions would allow the full potential of the underlying direct-hire authorities to be realized.

This section would make several conforming repeals to legislative provisions associated with hiring authorities in title 10, United States Code.

RECOMMENDED REPORT LANGUAGE

SEC. 1002. Employment by Department of Defense of Specially Qualified Scientific and Professional Personnel

This section would amend title 10, United States Code, by inserting a new section 1599i to provide the Department of Defense with special authority to hire individuals to positions in scientific and engineering research and development.

The committee is aware that the Department confronts a highly competitive environment in its attempts to hire skilled researchers in scientific and engineering fields. Currently, the government-wide Scientific and Professional Positions hiring authority at section 3104, title 5, United States Code, includes the Department of Defense. The committee recognizes that the Department's unique workforce requirements necessitate a hiring approach managed directly by the Department, providing greater flexibility in the Department's pursuit of qualified individuals. The committee notes the status quo regarding the number of covered positions would remain unchanged.

This section would also make a conforming amendment to section 3104, title 5, United States Code, to exempt the Department of Defense from coverage under that section.

RECOMMENDED REPORT LANGUAGE

SEC. 1003. Expedited Hiring Authority for Certain Acquisition Workforce Positions

This section would create a new section 1765, title 10, United States Code, for Expedited Hiring Authority, and amend the current expedited hiring authority to add a new category of eligible candidates based upon critical skill deficiencies in the defense acquisition workforce.

The committee recognizes that eliminating critical skill deficiencies is an important objective for the defense acquisition workforce hiring process. The committee acknowledges that the expedited hiring authority, while successful at accelerating the overall rate of hiring, has not targeted specific critical skill deficiencies. This section would authorize a process designed to support the use of the expedited hiring authority for individuals in possession of skills that the defense acquisition workforce requires to ameliorate its skill gaps. Authority would be given to the Secretary of Defense, each military department and the defense agencies to identify its own critical skill deficiencies and to utilize the expedited hiring authority accordingly.

This section would make a conforming amendment to section 1705, title 10, United States Code.

RECOMMENDED REPORT LANGUAGE

SEC. 1004. Personnel System for Civilian Acquisition Workforce

This section would amend title 10, United States Code, by inserting a new section 1763 that would authorize the Secretary of Defense to establish a single mandatory personnel system for the Department of Defense acquisition workforce.

The committee is aware that, since 1999, the Department has been conducting a personnel demonstration project for its acquisition workforce, allowing the Department greater managerial control over personnel processes and functions. The committee acknowledges the demonstration project has yielded successful mission outcomes. This section would make permanent the existing defense acquisition workforce demonstration project. This section also would allow a five-year phase-in period to transition the entire acquisition workforce into the new personnel system and for any existing collective bargaining agreements to expire.

This section would also make a conforming amendment to repeal section 1762, title 10, United States Code, the defense acquisition workforce personnel demonstration project.

RECOMMENDED REPORT LANGUAGE

SEC. 1005. Department of Defense Acquisition Workforce Development Fund

This section would amend section 1705, title 10, United States Code, to provide multi-year funding for the Defense Acquisition Workforce Development Fund (DAWDF), resourced by expiring, unobligated dollars.

The committee notes that DAWDF was established for the recruitment, training, and retention of acquisition personnel in the Department of Defense with the purpose of ensuring the defense acquisition workforce has the capacity, in both personnel and skills, needed to properly perform its mission, provide appropriate oversight of contractor performance, and ensure that the Department receives best value for the expenditure of public resources. The committee is aware that the funding structure for DAWDF has undergone three changes since its inception in 2008, which has undermined the Fund's ability to fully execute its funding. The committee acknowledges that multi-year funding with expiring, unobligated dollars as opposed to a one year appropriated funding source would allow DAWDF the flexibility of crossing over fiscal years to achieve its strategic objective of improving the acquisition workforce. The committee further notes that multi-year funding provides DAWDF resiliency against issues such as sequestrations, continuing resolutions, and other budget constraints. The committee acknowledges multi-year funding with expired, unobligated funds provides greater stability for the fund and increases confidence of the fund's users.

RECOMMENDED REPORT LANGUAGE

SEC. 1006. Codification of Certain Acquisition Workforce-related Provisions of Law

This section would codify several statutory provisions currently included as legislative “note” sections under Chapter 87 of title 10, United States Code. This section also would repeal obsolete or otherwise expired legislative “note” sections in Chapter 87.

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[NOTE: The draft legislative text below is followed by a “Sections Affected” display, showing in “redline” form how the text of current provisions of law would be affected by the draft legislative text.]

1 **TITLE X—ACQUISITION WORKFORCE**

Sec. 1001. Consolidation, codification, and revision of certain direct hiring authorities.
Sec. 1002. Employment by Department of Defense of specially qualified scientific and professional personnel.
Sec. 1003. Expedited hiring authority for certain acquisition workforce positions.
Sec. 1004. Personnel system for civilian acquisition workforce.
Sec. 1005. Department of Defense Acquisition Workforce Development Fund.
Sec. 1006. Codification of certain acquisition workforce-related provisions of law.

2 **SEC. 1001. CONSOLIDATION, CODIFICATION, AND REVISION OF CERTAIN**

3 **DIRECT HIRING AUTHORITIES.**

4 (a) NEW TITLE 10 SECTIONS.—

5 (1) CONSOLIDATION, ETC.—Chapter 81 of title 10, United States Code, is amended
6 by inserting after section 1589 the following new sections:

7 **“§1590. Direct hiring authorities**

8 “(a) AUTHORITY.—

9 “(1) SECRETARY OF DEFENSE.—The Secretary of Defense may make appointments
10 without regard to the provisions of subchapter I of chapter 33 of title 5 as follows:

11 “(A) Appointment of qualified candidates to positions specified in
12 paragraphs (2) through (5) of subsection (b).

13 “(B) Appointment of individuals described in subsection (d) for the
14 purpose of assisting and facilitating the efforts of the Department in business
15 transformation and management innovation.

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“(C) Appointment in the Defense Agencies, under the program carried out under section 1590a of this title, of cybersecurity and legal professionals described in subsection (b) of that section.

“(2) SECRETARIES OF THE MILITARY DEPARTMENTS.—The Secretaries of the military departments may make appointments of qualified candidates in their respective military departments without regard to the provisions of subchapter I of chapter 33 of title 5 as follows:

“(A) Appointment to positions specified in paragraphs (1) and (2) of subsection (b).

“(B) Appointment, under the program carried out under section 1590a of this title, of cybersecurity and legal professionals described in subsection (b) of such section.

“(b) POSITIONS.—Positions specified in this subsection are the following:

“(1) Scientific and engineering positions within the defense acquisition workforce of the military departments.

“(2) The following positions within the Department of Defense workforce:

“(A) Financial management positions.

“(B) Accounting positions.

“(C) Auditing positions.

“(D) Actuarial positions.

“(E) Cost estimation positions.

“(F) Operational research positions.

“(G) Business and business administration positions.

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1 “(3) Competitive service positions in professional and administrative occupations
2 within the Department of Defense.

3 “(4) Positions in the competitive service at any defense industrial base facility or
4 the Major Range and Test Facilities Base.

5 “(5) Scientific and engineering positions within the Office of the Director of
6 Operational Test and Evaluation.

7 “(c) QUALIFICATIONS.—For appointment under subsection (a) to positions specified in
8 subsection (b) (other than paragraph (4)), an individual must possess qualifications as follows:

9 “(1) For appointment to a position specified in subsection (b)(1), an individual
10 must possess a scientific or engineering degree.

11 “(2) For appointment to a position specified in subsection (b)(2), an individual
12 must possess a finance, accounting, management, or actuarial science degree, or a related
13 degree or equivalent experience.

14 “(3) For appointment to a position specified in subsection (b)(3), an individual
15 must be a recent graduate or a current post-secondary student.

16 “(4) For appointment to a position specified in subsection (b)(5), an individual
17 must possess an advanced degree.

18 “(d) COVERED INDIVIDUALS FOR BUSINESS TRANSFORMATION AND MANAGEMENT
19 INNOVATION APPOINTMENTS.—The individuals described in this subsection are individuals who
20 have all of the following:

21 “(1) A management or business background.

22 “(2) Experience working with large or complex organizations.

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1 “(3) Expertise in management and organizational change, data analytics, or
2 business process design.

3 “(e) SECRETARY OF DEFENSE APPOINTMENTS.—The authority of the Secretary of Defense
4 under subsection (a) with respect to appointments to positions specified in subsection (b)(2) may
5 be exercised only for positions in the following components of the Department of Defense:

6 “(1) A Defense Agency.

7 “(2) The Office of the Chairman of the Joint Chiefs of Staff.

8 “(3) The Joint Staff.

9 “(4) A combatant command.

10 “(5) The Office of the Inspector General of the Department of Defense.

11 “(6) A Field Activity of the Department of Defense.

12 “(f) NATURE OF APPOINTMENT.—

13 “(1) An appointment under this section to a position specified in paragraph (1) or
14 (2) of subsection (b) shall be treated as an appointment on a full-time equivalent basis,
15 unless the appointment is made on a term or temporary basis.

16 “(2) An appointment under subsection (a)(1)(B) of an individual described in
17 subsection (d) shall be on a term basis and shall be subject to the term appointment
18 regulations in part 316 of title 5, Code of Federal Regulations (other than requirements in
19 such regulations relating to competitive hiring). The term of any such appointment shall
20 be specified by the Secretary at the time of the appointment.

21 “(g) PUBLIC NOTICE AND ADVERTISING FOR POSITIONS FOR RECENT AND POST-
22 GRADUATES.—To the extent practical, as determined by the Secretary, the Secretary shall
23 publicly advertise positions specified in subsection (b)(3) to which an appointment may be made

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under this section and which are available for appointment under this section. In carrying out the preceding sentence, the Secretary shall—

“(1) take into account merit system principles, mission requirements, costs, and organizational benefits of any advertising of positions; and

“(2) advertise such positions in the manner the Secretary determines is most likely to provide diverse and qualified candidates and ensure potential applicants have appropriate information relevant to the positions available.

“(h) DEFINITIONS.—In this section:

“(1) The term ‘recent graduate’, with respect to appointment of a person under this section to a position specified in subsection (b)(3), means a person who was awarded a degree by an institution of higher education not more than two years before the date of the appointment of such person, except that in the case of a person who has completed a period of obligated service in a uniformed service of more than four years, such term means a person who was awarded a degree by an institution of higher education not more than four years before the date of the appointment of such person.

“(2) The term ‘current post-secondary student’ means a person who—

“(A) is currently enrolled in, and in good academic standing at, a full-time program at an institution of higher education;

“(B) is making satisfactory progress toward receipt of a baccalaureate or graduate degree; and

“(C) has completed at least one year of the program.

“(3) The term ‘institution of higher education’ has the meaning given that term in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001).

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“(4) The term 'defense industrial base facility' means any Department of Defense depot, arsenal, or shipyard located within the United States.

“§1590a. Enhanced personnel management system for cybersecurity and legal professionals: pilot program

“(a) PILOT PROGRAM.—The Secretary of Defense shall carry out within the Department of Defense a pilot program to assess the feasibility and advisability of an enhanced personnel management system in accordance with this section for cybersecurity and legal professionals described in subsection (b) who enter civilian service with the Department on or after the date of the enactment of this section.

“(b) CYBERSECURITY AND LEGAL PROFESSIONALS.—

“(1) IN GENERAL.—The cybersecurity and legal professionals described in this subsection are the following:

“(A) CIVILIAN CYBERSECURITY PROFESSIONALS.—Civilian personnel engaged in or directly supporting planning, commanding and controlling, training, developing, acquiring, modifying, and operating systems and capabilities, and military units and intelligence organizations (other than those funded by the National Intelligence Program) that are directly engaged in or used for offensive and defensive cyber and information warfare or intelligence activities in support thereof.

“(B) CIVILIAN LEGAL PROFESSIONALS.—Civilian personnel occupying legal or similar positions, as determined by the Secretary of Defense for purposes of the pilot program, that require eligibility to practice law in a State or territory

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of the United States, the District of Colombia, or the Commonwealth of Puerto Rico.

"(2) INAPPLICABILITY TO SES POSITIONS.—The pilot program does not apply to positions within the Senior Executive Service under subchapter VIII of chapter 53 of title 5.

“(c) APPOINTMENT ON A DIRECT-HIRE BASIS.—An appointment of an individual as a cybersecurity or legal professional under the program under this section shall be made as provided in section 1590 of this title.

“(d) TERM APPOINTMENTS.—

“(1) RENEWABLE TERM APPOINTMENTS.—Each individual shall serve with the Department of Defense as a cybersecurity or legal professional under the pilot program pursuant to an initial appointment to service with the Department for a term of not less than two years nor more than eight years. Any term of appointment under the pilot program may be renewed for one or more additional terms of not less than two years nor more than eight years as provided in subsection (f).

"(2) LENGTH OF TERMS.—The length of the term of appointment to a position under the pilot program shall be prescribed by the Secretary of Defense taking into account the national security, mission, and other applicable requirements of the position. Positions having identical or similar requirements or terms may be grouped into categories for purposes of the pilot program. The authority of the Secretary under this paragraph may not be delegated to an officer or employee in the Department who is not appointed by the President or in the Senior Executive Service or to a commissioned

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officer of the armed forces in a grade below the grade of brigadier general or rear admiral (lower half).

“(j) REGULATIONS.—The Secretary of Defense shall administer the pilot program under regulations prescribed by the Secretary. The regulations shall ensure flexibility and expedited appointment of cybersecurity and legal professionals in the Department of Defense under the pilot program.

“(k) TERMINATION.—The provisions of subsections (e), (g), (h), and (i) of this section do not apply with respect to an individual appointed after December 31, 2029, as a cybersecurity or legal professional as provided in section 1590 of this title.

“(l) REPORTS.—

“(1) REPORTS REQUIRED.—Not later than January 30 of each of 2022, 2025, and 2028, the Secretary of Defense shall submit to the appropriate committees of Congress a report on the carrying out of the pilot program. Each report shall include the following:

“(A) A description and assessment of the carrying out of the pilot program during the period since the commencement of the pilot program or the previous submittal of a report under this subsection, as applicable.

“(B) A description and assessment of the successes in and impediments to carrying out the pilot program system during such period.

“(C) Such recommendations as the Secretary considers appropriate for legislative action to improve the pilot program and to otherwise improve civilian personnel management of cybersecurity and legal professionals by the Department of Defense.

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"(D) In the case of the report submitted in 2028, an assessment and recommendations by the Secretary on whether to make the pilot program permanent.

“(2) APPROPRIATE COMMITTEES OF CONGRESS DEFINED.—In this subsection, the term 'appropriate committees of Congress' means—

“(A) the Committee on Armed Services and the Committee on Homeland Security and Governmental Affairs of the Senate; and

“(B) the Committee on Armed Services and the Committee on Oversight and Government Reform of the House of Representatives.”.

(2) TRANSFER OF PROVISIONS.—Subsections (g), (h), (f), (i), and (j) of section 1110 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1580 note prec.) are transferred to section 1590a of title 10, United States Code, as added by paragraph (1), inserted (in that order) after subsection (d), and redesignated as subsections (e), (f), (g), (h), and (i), respectively.

(3) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 81 of such title is amended by inserting after the item relating to section 1589 the following new items:

“1590. Direct hiring authorities.

“1590a. Enhanced personnel management system for cybersecurity and legal professionals: pilot program.”.

(b) CONFORMING REPEALS.—The following provisions of law are repealed:

(1) Section 1113 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 10 U.S.C. 1701 note).

(2) Section 1110 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1580 note prec.).

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(3) Section 1106 of the National Defense Authorization Act for Fiscal Year 2017
(Public Law 114-328; 10 U.S.C. 1580 note prec.).

(4) Section 1125 of the National Defense Authorization Act for Fiscal Year 2017
(Public Law 114-328; 10 U.S.C. 1580 note prec.).

(5) Section 1101 of the National Defense Authorization Act for Fiscal Year 2018
(Public Law 115-91; 10 U.S.C. 1580 note prec.).

(6) Section 1110 of the National Defense Authorization Act for Fiscal Year 2018
(Public Law 115-91; 10 U.S.C. 1580 note prec.).

SEC. 1002. EMPLOYMENT BY DEPARTMENT OF DEFENSE OF SPECIALLY QUALIFIED SCIENTIFIC AND PROFESSIONAL PERSONNEL.

(a) DEPARTMENT OF DEFENSE TITLE 10 AUTHORITY.—

(1) IN GENERAL.—Chapter 81 of title 10, United States Code, is amended by
adding at the end of subchapter V the following new section:

“§1599i. Employment of specially qualified scientific and professional personnel

“(a) AUTHORITY.—(1) The Secretary of Defense may establish, and from time to time
revise, the maximum number of covered scientific or professional positions which may be
established in the Department of Defense outside of the General Schedule. Such number may not
exceed the number of positions in effect under section 3104(a) of title 5 with respect to the
Department of Defense as of the date of the enactment of this section.

“(2) Paragraph (1) does not apply to a Senior Executive Service position (as defined in
section 3132(a) of title 5).

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“(3) In this subsection, the term ‘covered scientific or professional positions’ means scientific or professional positions for carrying out research and development functions of the Department of Defense which require the services of specially qualified personnel.

“(b) APPOINTMENTS.—(1) Positions established under subsection (a) are in the competitive service. However, appointments to those positions are made without competitive examination on approval of the qualifications of the proposed appointee by the Secretary of Defense on the basis of standards developed by the Secretary.

“(c) PRIOR APPOINTMENTS.—Any individual serving in the Department of Defense on the day before the date of the enactment of this section in a position established under section 3104 of title 5 shall be considered as of the date of the enactment of this section to have been appointed to a position established under this section.”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:
“1599i. Employment of specially qualified scientific and professional personnel.”.

(b) REMOVAL OF DEPARTMENT OF DEFENSE FROM TITLE 5 AUTHORITY.—Section 3104(b) of title 5, United States Code, is amended by inserting “or to any position in the Department of Defense” before the period at the end.

SEC. 1003. EXPEDITED HIRING AUTHORITY FOR CERTAIN ACQUISITION WORKFORCE POSITIONS.

(a) POSITIONS FOR WHICH THERE IS A CRITICAL SKILLS DEFICIENCY.—

(1) IN GENERAL.—Chapter 87 of title 10, United States Code, is amended by adding at the end of subchapter V the following new section:

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1 **“§1765. Expedited hiring authority: positions for which there is a shortage of candidates, a**
2 **critical hiring need, or a critical skills deficiency**

3 “(a) **AUTHORITY.**—(1) The Secretary of Defense may use the authorities in sections 3304,
4 5333, and 5753 of title 5 to recruit and appoint qualified persons directly to positions in a
5 category of positions designated by the Secretary under paragraph (2).

6 “(2) The Secretary of Defense may designate for purposes of paragraph (1) any category
7 of positions in the acquisition workforce as positions for which there is —

8 “(A) a shortage of candidates;

9 “(B) a critical hiring need; or

10 “(C) a critical skills deficiency.

11 “(b) **CRITICAL SKILLS DEFICIENCY DESIGNATIONS.**—(1) The Secretary of Defense shall
12 designate critical skills for which there is a deficiency in the acquisition workforce. Such
13 designations shall be made separately for each of the military departments and for the elements
14 of the Department of Defense outside the military departments. For each fiscal year, there may
15 be in effect—

16 “(A) no more than 10 such designations for each military department; and

17 “(B) no more than 10 such designations for the elements of the Department of
18 Defense outside the military departments.

19 “(2) If a designation under paragraph (1) in effect for a fiscal year is terminated before
20 the end of that fiscal year, the applicable number of designations that may be in effect for the
21 remainder of the fiscal year is reduced by one.

22 “(3) For each skill which the Secretary identifies as a critical skill for which there is a
23 deficiency in the acquisition workforce, the Secretary—

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“(A) shall establish criteria related to such critical skill (such as educational credentials or professional experience) in order to evaluate whether an applicant has the critical skill; and

“(B) shall apply the designation across different occupational series, position categories, and career fields in which the critical skill is lacking.

“(4) The Secretary shall periodically evaluate the number of designations of critical skill deficiencies under this subsection to determine whether an increase in the number would benefit the acquisition workforce.”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by adding at the end the following new item:

“1765. Expedited hiring authority: positions for which there is a shortage of candidates, a critical hiring need, or a critical skills deficiency.”.

(b) CONFORMING AMENDMENT.—Section 1705 of title 10, United States Code, is amended by striking subsection (f).

SEC. 1004. PERSONNEL SYSTEM FOR CIVILIAN ACQUISITION WORKFORCE.

(a) REPLACEMENT FOR ACQUISITION DEMONSTRATION PROJECT.—Chapter 87 of title 10, United States Code, is amended by inserting after section 1762 the following new section:

“§ 1763. Personnel system for civilian acquisition workforce

“(a) PERSONNEL SYSTEM FOR CIVILIAN ACQUISITION WORKFORCE.—The Secretary of Defense shall manage the employees in the civilian acquisition workforce of the Department of Defense in accordance with the personnel system established pursuant to this section.

“(b) AUTHORITY.—

“(1) AUTHORITIES.—The Secretary shall establish a personnel system for purposes of this section. In establishing and carrying out such system, the Secretary may exercise

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1 any of the authorities under section 4703 of title 5 that the Secretary was authorized to
2 exercise with respect to the demonstration project under section 1762 of this title as of the
3 day before the effective date of this section.

4 “(2) LIMITATIONS.—The provisions of subsection (c) of section 4703 of title 5
5 shall apply to the personnel system under this section in the same manner as such
6 provisions applied to the demonstration project under section 1762 of this title as of the
7 day before the effective date of this section.

8 “(c) IMPLEMENTATION.—

9 “(1) INITIAL IMPLEMENTATION.— The system established under the demonstration
10 project authority under section 1762 of title 10, United States Code, as in effect on the
11 day before the effective date of this section, shall be considered to be established under
12 this section and shall apply as of that effective date to any employee in the civilian
13 acquisition workforce who on the day before that date was covered by the demonstration
14 project under section 1762 of this title.

15 “(2) DEADLINE FOR FULL IMPLEMENTATION.—The Secretary shall carry out the
16 implementation of the personnel system established under this section so that all
17 employees in the civilian acquisition workforce are covered by that system not later than
18 the end of the five-year period beginning on the effective date of this section.

19 “(d) COLLECTIVE BARGAINING AGREEMENTS.—

20 “(1) Nothing in this section, or the personnel system established under this
21 section, may be construed to impair the continued effectiveness of a collective bargaining
22 agreement in effect on the day before the effective date of this section, except that any

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1 extension, or exercise of an option, under such an agreement after such date is subject to
2 paragraph (2).

3 “(2) Any collective bargaining agreement entered into after the date of the
4 enactment of this section that covers employees in the civilian acquisition workforce is
5 subject to the provisions of the personnel system established under this section with
6 respect to those employees.

7 “(3) In this subsection, the term ‘collective bargaining agreement’ has the
8 meaning given that term in section 7103(a)(8) of title 5.

9 “(e) REGULATIONS.—

10 “(1) IN GENERAL.—The Secretary of Defense shall prescribe regulations to carry
11 out the personnel system established under this section.

12 “(2) TRANSITION.—Until revised by the Secretary under paragraph (1), the
13 regulations of the Secretary of Defense prescribed under section 1762 of this title, as in
14 effect on the day before the effective date of this section, shall be considered to be
15 prescribed by the Secretary of Defense under this subsection and to be applicable to the
16 personnel system established under this section.

17 “(f) CIVILIAN ACQUISITION WORKFORCE.— In this section, the term ‘civilian acquisition
18 workforce’ means the following:

19 “(1) Employees of the Department of Defense in positions designated under
20 section 1721 of this title as acquisition positions for purposes of this chapter.

21 “(2) Other employees of the Department of Defense who are designated as
22 members of the acquisition workforce—

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“(A) in the case of positions not in one of the military departments, by the
Under Secretary of Defense for Acquisition and Sustainment; and

“(B) in the case of positions in one of the military departments, by the
senior acquisition executive of that military department.”.

(b) REPEAL OF ACQDEMO STATUTE.—Section 1762 of such title is repealed.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter V of
such chapter is amended by striking the item relating to section 1762 and inserting the following:
“1763. Personnel system for civilian acquisition workforce.”.

(d) EFFECTIVE DATE.—This section and the amendments made by this section shall take
effect on the first day of the first month after the date of the enactment of this Act.

SEC. 1005. DEPARTMENT OF DEFENSE ACQUISITION WORKFORCE DEVELOPMENT FUND.

(a) FUND MANAGEMENT.—Subsection (c) of section 1705 of title 10, United States Code,
is amended by adding at the end the following new sentence: “In addition, the designated senior
official, or the principal deputy of that official, shall have both qualifications in financial
management and an extensive background in financial management.”.

(b) REPLACEMENT OF REMITTANCES FUNDING WITH FUNDING FROM UNOBLIGATED
BALANCES.—

(1) IN GENERAL.—Subsection (d) of such section is amended to read as follows:

“(d) SOURCE OF FUNDS.—

“(1) ELEMENTS OF THE FUND.—The Fund shall consist of amounts as follows:

“(A) Amounts transferred to the Fund pursuant to paragraph (2).

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“(B) Any other amounts appropriated to, credited to, or deposited into the Fund by law.

“(2) TRANSFER OF CERTAIN UNOBLIGATED BALANCES.—(A) The Secretary of Defense shall transfer to the Fund each fiscal year from unobligated balances of appropriations described in subparagraph (B) a total amount of not less than \$450,000,000.

“(B) Subparagraph (A) applies to unobligated balances of appropriations made to the Department of Defense for which the period of availability for obligation expired at the end of one of the three fiscal years preceding the fiscal year during which the transfer under subparagraph (A) is made, but only in the case of an appropriation made to the Department of Defense—

“(i) for procurement;

“(ii) for research, development, test, and evaluation; or

“(iii) for operation and maintenance,

“(C) Any amount transferred to the Fund pursuant to subparagraph (A) shall be credited to the Fund.”.

(2) CONFORMING AMENDMENT.—Subsection (e)(6) of such section is amended by striking “Amounts credited” and all that follows through “subsection (d)(3),” and inserting “Amounts transferred to the Fund pursuant to subsection (d)(2),”.

(c) REFERENCES TO UNDER SECRETARY FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS.—Such section is further amended by striking “Under Secretary of Defense for Acquisition, Technology, and Logistics” in subsections (c), (e)(3), and (g)(2)(B) and inserting “Secretary of Defense”.

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SEC. 1006. CODIFICATION OF CERTAIN ACQUISITION WORKFORCE-RELATED PROVISIONS OF LAW.

(a) POST-EMPLOYMENT REQUIREMENTS.—

(1) IN GENERAL.—Subchapter I of chapter 87 of title 10, United States Code, is amended by adding at the end a new section 1708 consisting of—

(A) a heading as follows:

“§1708. Certain senior Department of Defense officials and former officials seeking employment with defense contractors: requirements”; and

(B) a text consisting of the text of section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 10 U.S.C. 1701 note).

(2) AMENDMENTS IN CONNECTION WITH CODIFICATION.—Section 1708 of title 10, United States Code, as added by paragraph (1), is amended—

(A) by striking “, United States Code” each place it appears; and

(B) by striking the second sentence of subsection (b)(2).

(3) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by adding at the end the following new item:

“1708. Certain senior Department of Defense officials and former officials seeking employment with defense contractors: requirements.”.

(4) CONFORMING REPEAL.—Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 10 U.S.C. 1701 note) is repealed.

(b) AWARD PROGRAM.—

(1) IN GENERAL.—Subchapter I of chapter 87 of title 10, United States Code, is amended by inserting after section 1701a a new section 1701b consisting of—

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(A) a heading as follows:

“§1701b. Award program: programs and professionals making best use of authorized flexibility in contracting”; and

(B) a text consisting of the text of section 834 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1701a note).

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 1701a the following new item:

“1701b. Award program: programs and professionals making best use of authorized flexibility in contracting.”.

(3) CONFORMING REPEAL.—Section 834 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1701a note) is repealed.

(c) QUICK-REACTION SPECIAL PROJECTS ACQUISITION TEAM.—

(1) IN GENERAL.—Subchapter I of chapter 87 of title 10, United States Code, is amended by inserting after section 1702 a new section 1703 consisting of—

(A) a heading as follows:

“§1703. Quick-reaction special projects acquisition team”; and

(B) a text consisting of the text of section 807 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314; 10 U.S.C. 1702 note).

(2) UPDATE TO REFERENCE.—Subsection (a) of section 1703 of title 10, United States Code, as added by paragraph (1), is amended by striking “Under Secretary of

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1 Defense for Acquisition, Technology, and Logistics” and inserting “Under Secretary of
2 Defense for Acquisition and Sustainment”.

3 (3) CLERICAL AMENDMENT.—The table of sections at the beginning of such
4 subchapter is amended by inserting after the item relating to section 1702 the following
5 new item:

“1703. Quick-reaction special projects acquisition team.”.

6 (4) CONFORMING REPEAL.—Section 807 of the Bob Stump National Defense
7 Authorization Act for Fiscal Year 2003 (Public Law 107-314; 10 U.S.C. 1702 note) is
8 repealed.

9 (d) DEVELOPMENT PROGRAM FOR CIVILIAN PROGRAM MANAGERS.—

10 (1) IN GENERAL.—Subchapter II of chapter 87 of title 10, United States Code, is
11 amended by inserting after section 1722b the following new section:

12 **“§1722c. Civilian program managers: development program**

13 “(a) PROGRAM REQUIRED.—

14 “(1) IN GENERAL.—The Secretary of Defense, in consultation with the Secretaries
15 of the military departments, shall implement a program manager development program to
16 provide for the professional development of high-potential, experienced civilian
17 personnel.

18 “(2) SELECTION OF PERSONNEL.—Personnel shall be competitively selected for the
19 program based on their potential to become a program manager of a major defense
20 acquisition program, as defined in section 2430 of this title.

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“(3) ADMINISTRATION, ETC.—The program shall be administered and overseen by the Secretary of each military department, acting through the service acquisition executive for the military department concerned.

“(b) COMPREHENSIVE IMPLEMENTATION PLAN.—

“(1) REQUIREMENT.—The program under subsection (a) shall be carried out in accordance with a comprehensive plan developed by the Secretary of Defense. In developing the plan, the Secretary shall seek the input of relevant external parties, including professional associations, other government entities, and industry.

“(2) ELEMENTS OF COMPREHENSIVE PLAN.—The plan shall include the following elements:”.

(2) ELEMENTS OF COMPREHENSIVE PLAN.—Subparagraphs (A) through (K) of paragraph (2) of section 841(a) of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1722b note) are transferred to section 1722c of title 10, United States Code, as added by paragraph (1), and inserted at the end of paragraph (2) of subsection (b).

(3) USE OF DEFENSE ACQUISITION WORKFORCE DEVELOPMENT FUND.—Paragraph (3) of section 841(a) of such Act is transferred to the end of section 1722c of title 10, United States Code, as added by paragraph (1) and amended by paragraph (2), redesignated as subsection (c), and amended—

(A) by capitalizing the first letter of each word in the subsection heading other than the second;

(B) by striking “title 10, United States Code” and inserting “this title”; and

(C) by striking “paragraph (1)” and inserting “subsection (a)”.

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1 (4) IMPLEMENTATION.—The program required to be established under section
2 1722c of title 10, United States Code, as added by paragraph (1), shall be implemented
3 not later than September 30, 2019. The comprehensive implementation plan required by
4 subsection (b) of that section shall be submitted by the Secretary of Defense to the
5 Committees on Armed Services of the Senate and House of Representatives not later than
6 December 12, 2018.

7 (5) CLERICAL AMENDMENT.—The table of sections at the beginning of such
8 subchapter is amended by inserting after the item relating to section 1722b the following
9 new item:

“1722c. Civilian program managers: development program.”.

10 (6) CONFORMING REPEAL.—Section 841(a) of the National Defense
11 Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1722b note) is
12 repealed.

13 (e) INFORMATION TECHNOLOGY ACQUISITION WORKFORCE.—

14 (1) IN GENERAL.—Subchapter II of chapter 87 of title 10, United States Code, is
15 amended by inserting after section 1723 the following new section:

16 “§1723a. Information technology acquisition workforce

17 “(a) PLAN REQUIRED.—The Secretary of Defense shall carry out a plan to strengthen the
18 part of the acquisition workforce that specializes in information technology. The plan shall
19 include the following:

20 “(1) Defined targets for billets devoted to information technology acquisition.

21 “(2) Specific certification requirements for individuals in the acquisition
22 workforce who specialize in information technology acquisition.

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“(3) Defined career paths for individuals in the acquisition workforce who specialize in information technology acquisitions.

“(b) DEFINITIONS.—In this section:

“(1) The term ‘information technology’ has the meaning provided that term in section 11101 of title 40 and includes information technology incorporated into a major weapon system.

“(2) The term ‘major weapon system’ has the meaning provided that term in section 2379(f) of this title.”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 1723 the following new item:

“1723a. Information technology acquisition workforce.”.

(3) CONFORMING REPEAL.—Section 875 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011(Public Law 111-383; 10 U.S.C. 1723 note) is repealed.

(f) CREDIT FOR EXPERIENCE IN CERTAIN POSITIONS.—

(1) IN GENERAL.—Subchapter II of chapter 87 of title 10, United States Code, is amended by inserting after section 1724 the following new section:

“§1724a. Credit for experience in certain positions

“For purposes of meeting any requirement under this chapter for a period of experience (such as requirements for experience in acquisition positions or in critical acquisition positions) and for purposes of coverage under the exceptions established by section 1724(c)(1) and section 1732(c)(1) of this title, any period of time spent serving in a position later designated as an

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acquisition position or a critical acquisition position under this chapter may be counted as experience in such a position for such purposes.”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 1724 the following new item:

“1724a. Credit for experience in certain positions.”.

(3) CONFORMING REPEAL.—Section 1209(i) of the Defense Acquisition Workforce Improvement Act (title XII of Public Law 101-510; 10 U.S.C. 1724 note) is repealed.

(g) GUIDANCE REGARDING TRAINING AND DEVELOPMENT OF THE ACQUISITION WORKFORCE.—

(1) IN GENERAL.—Subchapter IV of chapter 87 of title 10, United States Code, is amended by inserting after section 1742 the following new section:

“§1743. Guidance regarding training and development of the acquisition workforce

“(a) IN GENERAL.—The Secretary of Defense shall issue guidance addressing the training and development of the Department of Defense workforce engaged in the procurement of services, including those personnel not designated as members of the acquisition workforce.

“(b) IDENTIFICATION OF TRAINING AND PROFESSIONAL DEVELOPMENT OPPORTUNITIES AND ALTERNATIVES.—The guidance required under subsection (a) shall identify training and professional development opportunities and alternatives, not limited to existing Department of Defense institutions, that focus on and provide relevant training and professional development in commercial business models and contracting.

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“(c) TREATMENT OF TRAINING AND PROFESSIONAL DEVELOPMENT.—Any training and professional development provided pursuant to this section outside Department of Defense institutions shall be deemed to be equivalent to similar training certified or provided by the Defense Acquisition University.”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 1742 the following new item:

“1743. Guidance regarding training and development of the acquisition workforce.”.

(3) CONFORMING REPEAL.—Section 803(b) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1741 note) is repealed.

(h) TRAINING IN COMMERCIAL ITEMS PROCUREMENT.—

(1) IN GENERAL.—Subchapter IV of chapter 87 of title 10, United States Code, is amended by adding at the end a new section 1749 consisting of—

(A) a heading as follows:

“§1749. Training in commercial items procurement”; and

(B) a text consisting of the text of section 850 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1746 note).

(2) AMENDMENTS IN CONNECTION WITH CODIFICATION.—Section 1749 of title 10, United States Code, as added by paragraph (1), is amended—

(A) in subsection (a), by striking “Not later than” and all that follows through “the President” and inserting “The President”; and

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(B) in subsection (d), by striking “title 10, United States Code,” and inserting “this title”.

(3) IMPLEMENTATION.—The comprehensive training program required by section 1749 of title 10, United States Code, as added by paragraph (1), shall be established not later than December 12, 2018.

(4) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by adding at the end the following new item:
“1749. Training in commercial items procurement.”.

(5) CONFORMING REPEAL.—Section 850 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1746 note) is repealed.

(i) TRAINING ON AGILE OR ITERATIVE DEVELOPMENT METHODS.—

(1) IN GENERAL.—Subchapter IV of chapter 87 of title 10, United States Code, is amended by adding after section 1749, as added by subsection (h), a new section 1750 consisting of—

(A) a heading as follows:

“§1750. Training on agile or iterative development methods”; and

(B) a text consisting of the text of section 891 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1746 note).

(2) AMENDMENTS IN CONNECTION WITH CODIFICATION.—Section 1750 of title 10, United States Code, as added by paragraph (1), is amended—

(A) in subsection (a)—

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(i) by striking “Not later than” and all that follows through “the Secretary” and inserting “(1) The Secretary”; and

(ii) by adding at the end the following new paragraph:

“(2) In this section, the term ‘specified pilot programs’ means—

“(A) the pilot program required by section 873 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 2223a note), relating to use of agile or iterative development methods to tailor major software-intensive warfighting systems and defense business systems; and

“(B) the pilot program required by section 874 of such Act (Public Law 115-91; 10 U.S.C. 2302 note), relating to software development using agile best practices.”; and

(B) by striking “the pilot programs required by sections 873 and 874 of this Act” each place it appears and inserting “the specified pilot programs”.

(3) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by adding after the item relating to section 1749, as added by subsection (h), the following new item:

“1750. Training on agile or iterative development methods.”.

(4) CONFORMING REPEAL.—Section 891 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1746 note) is repealed.

(j) CONTRACTOR INCENTIVES TO ACHIEVE SAVINGS AND IMPROVE MISSION PERFORMANCE.—

(1) IN GENERAL.—Subchapter IV of chapter 87 of title 10, United States Code, is amended by adding after section 1750, as added by subsection (i), a new section 1751 consisting of—

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(A) a heading as follows:

“§1751. Contractor incentives to achieve savings and improve mission performance”; and

(B) a text consisting of the text of section 832 of the National Defense

Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1746

note).

(2) AMENDMENT IN CONNECTION WITH CODIFICATION.—Section 1751 of title 10,

United States Code, as added by paragraph (1), is amended by striking “Not later than”

and all that follows through “and implement” and inserting “The President of the

Defense Acquisition University shall implement”.

(3) CLERICAL AMENDMENT.—The table of sections at the beginning of such

subchapter is amended by adding after the item relating to section 1750, as added by

subsection (i), the following new item:

“1751. Contractor incentives to achieve savings and improve mission performance.”.

(4) CONFORMING REPEAL.—Section 832 of the National Defense Authorization

Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1746 note) is repealed.

SECTIONS AFFECTED BY THE PROPOSAL

[Provisions of current law would be affected by the amendments in the legislative text above as follows: matter proposed to be deleted is shown in ~~stricken through~~ text; matter to be inserted is shown in *bold italic*.]

National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 10 U.S.C. 1701 note)

~~SEC. 1113. DIRECT HIRE AUTHORITY FOR TECHNICAL EXPERTS INTO THE
DEFENSE ACQUISITION WORKFORCE.~~

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~~(a) AUTHORITY. Each Secretary of a military department may appoint qualified candidates possessing a scientific or engineering degree to positions described in subsection (b) for that military department without regard to the provisions of subchapter I of chapter 33 of title 5, United States Code.~~

~~(b) APPLICABILITY. Positions described in this subsection are scientific and engineering positions within the defense acquisition workforce.~~

~~(c) LIMITATION. Authority under this section may not, in any calendar year and with respect to any military department, be exercised with respect to a number of candidates greater than the number equal to 5 percent of the total number of scientific and engineering positions within the acquisition workforce of that military department that are filled as of the close of the fiscal year last ending before the start of such calendar year.~~

~~(d) NATURE OF APPOINTMENT. Any appointment under this section shall be treated as an appointment on a full-time equivalent basis, unless such appointment is made on a term or temporary basis.~~

~~(e) EMPLOYEE DEFINED. In this section, the term “employee” has the meaning given that term in section 2105 of title 5, United States Code.~~

~~(f) TERMINATION. The authority to make appointments under this section shall not be available after December 31, 2020.~~

National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1580 note prec.)

~~SEC. 1110. DIRECT HIRE AUTHORITY FOR FINANCIAL MANAGEMENT EXPERTS IN THE DEPARTMENT OF DEFENSE WORKFORCE.~~

~~(a) AUTHORITY. — Each Secretary concerned may appoint qualified candidates possessing a finance, accounting, management, or actuarial science degree, or a related degree or equivalent experience, to positions specified in subsection (c) for a Department of Defense component without regard to the provisions of subchapter I of chapter 33 of title 5, United States Code.~~

~~(b) SECRETARY CONCERNED. — For purposes of this section, the Secretary concerned is as follows:~~

~~(1) The Secretary of Defense with respect to each Department of Defense component listed in subsection (f) other than the Department of the Army, the Department of the Navy, and the Department of the Air Force.~~

~~(2) The Secretary of a military department with respect to such military department.~~

~~(c) POSITIONS. — The positions specified in this subsection are the positions within the Department of Defense workforce as follows:~~

~~(1) Financial management positions.~~

~~(2) Accounting positions.~~

~~(3) Auditing positions.~~

~~(4) Actuarial positions.~~

~~(5) Cost estimation positions.~~

~~(6) Operational research positions.~~

~~(7) Business and business administration positions.~~

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~~(d) LIMITATION.— Authority under this section may not, in any calendar year and with respect to any Department of Defense component, be exercised with respect to a number of candidates greater than the number equal to 10 percent of the total number of the financial management, accounting, auditing, and actuarial positions within the financial management workforce of such Department of Defense component that are filled as of the close of the fiscal year last ending before the start of such calendar year.~~

~~(e) NATURE OF APPOINTMENT.— Any appointment under this section shall be treated as an appointment on a full-time equivalent basis, unless such appointment is made on a term or temporary basis.~~

~~(f) DEPARTMENT OF DEFENSE COMPONENT DEFINED.— In this section, the term “Department of Defense component” means the following:~~

- ~~(1) A Defense Agency.~~
- ~~(2) The Office of the Chairman of the Joint Chiefs of Staff.~~
- ~~(3) The Joint Staff.~~
- ~~(4) A combatant command.~~
- ~~(5) The Office of the Inspector General of the Department of Defense.~~
- ~~(6) A Field Activity of the Department of Defense.~~
- ~~(7) The Department of the Army.~~
- ~~(8) The Department of the Navy.~~
- ~~(9) The Department of the Air Force.~~

~~(g) TERMINATION.— The authority to make appointments under this section shall not be available after December 31, 2022.~~

National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1580 note prec.)

~~SEC. 1106. DIRECT HIRE AUTHORITY FOR THE DEPARTMENT OF DEFENSE FOR POST-SECONDARY STUDENTS AND RECENT GRADUATES.~~

~~(a) HIRING AUTHORITY.— Without regard to sections 3309 through 3318, 3327, and 3330 of title 5, United States Code, the Secretary of Defense may recruit and appoint qualified recent graduates and current post-secondary students to competitive service positions in professional and administrative occupations within the Department of Defense.~~

~~(b) LIMITATION ON APPOINTMENTS.— Subject to subsection (c)(2), the total number of employees appointed by the Secretary under subsection (a) during a fiscal year may not exceed the number equal to 15 percent of the number of hires made into professional and administrative occupations of the Department at the GS-11 level and below (or equivalent) under competitive examining procedures during the previous fiscal year.~~

~~(c) REGULATIONS.—~~

~~(1) IN GENERAL.— The Secretary shall administer this section in accordance with regulations prescribed by the Secretary for purposes of this section.~~

~~(2) LOWER LIMIT ON APPOINTMENTS.— The regulations may establish a lower limit on the number of individuals appointable under subsection (a) during a fiscal year than is otherwise provided for under subsection (b), based on such factors as the Secretary considers appropriate.~~

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~~(3) PUBLIC NOTICE AND ADVERTISING.—To the extent practical, as determined by the Secretary, the Secretary shall publicly advertise positions available under this section. In carrying out the preceding sentence, the Secretary shall —~~

~~(A) take into account merit system principles, mission requirements, costs, and organizational benefits of any advertising of positions; and~~

~~(B) advertise such positions in the manner the Secretary determines is most likely to provide diverse and qualified candidates and ensure potential applicants have appropriate information relevant to the positions available.~~

~~(d) SUNSET.—The authority provided under this section shall terminate on September 30, 2021.~~

~~(e) DEFINITIONS.—In this section:~~

~~(1) The term “current post-secondary student” means a person who —~~

~~(A) is currently enrolled in, and in good academic standing at, a full-time program at an institution of higher education;~~

~~(B) is making satisfactory progress toward receipt of a baccalaureate or graduate degree; and~~

~~(C) has completed at least one year of the program.~~

~~(2) The term ‘institution of higher education’ has the meaning given the term in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001).~~

~~(3) The term ‘recent graduate’, with respect to appointment of a person under this section, means a person who was awarded a degree by an institution of higher education not more than two years before the date of the appointment of such person, except that in the case of a person who has completed a period of obligated service in a uniformed service of more than four years, such term means a person who was awarded a degree by an institution of higher education not more than four years before the date of the appointment of such person.~~

National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1580 note prec.)

~~SEC. 1125. TEMPORARY DIRECT HIRE AUTHORITY FOR DOMESTIC DEFENSE INDUSTRIAL BASE FACILITIES, THE MAJOR RANGE AND TEST FACILITIES BASE, AND THE OFFICE OF THE DIRECTOR OF OPERATIONAL TEST AND EVALUATION.~~

~~(a) DEFENSE INDUSTRIAL BASE FACILITY AND MRTFB.—During each of fiscal years 2017 through 2021, the Secretary of Defense may appoint, without regard to the provisions of subchapter I of chapter 33 of title 5, United States Code, other than sections 3303 and 3328 of such title, qualified candidates to positions in the competitive service at any defense industrial base facility or the Major Range and Test Facilities Base.~~

~~(b) OFFICE OF THE DIRECTOR OF OPERATIONAL TEST AND EVALUATION.—During fiscal years 2017 through 2021, the Secretary of Defense may, acting through the Director of Operational Test and Evaluation, appoint qualified candidates possessing an advanced degree to scientific and engineering positions within the Office of the Director of Operational Test and Evaluation~~

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without regard to the provisions of subchapter I of chapter 33 of title 5, United States Code, other than sections 3303 and 3328 of such title.

~~(e) DEFINITION OF DEFENSE INDUSTRIAL BASE FACILITY. — In this section, the term “defense industrial base facility” means any Department of Defense depot, arsenal, or shipyard located within the United States.~~

National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1580 note prec.)

~~SEC. 1101. DIRECT HIRE AUTHORITY FOR THE DEPARTMENT OF DEFENSE FOR PERSONNEL TO ASSIST IN BUSINESS TRANSFORMATION AND MANAGEMENT INNOVATION.~~

~~(a) AUTHORITY. — The Secretary of Defense may appoint in the Department of Defense individuals described in subsection (b) without regard to the provisions of subchapter I of chapter 33 of title 5, United States Code, for the purpose of assisting and facilitating the efforts of the Department in business transformation and management innovation.~~

~~(b) COVERED INDIVIDUALS. — The individuals described in this subsection are individuals who have all of the following:~~

- ~~(1) A management or business background.~~
- ~~(2) Experience working with large or complex organizations.~~
- ~~(3) Expertise in management and organizational change, data analytics, or business process design.~~

~~(c) LIMITATION ON NUMBER. — The number of individuals appointed pursuant to this section at any one time may not exceed 10 individuals.~~

~~(d) NATURE OF APPOINTMENT. — Any appointment under this section shall be on a term basis, and shall be subject to the term appointment regulations in part 316 of title 5, Code of Federal Regulations (other than requirements in such regulations relating to competitive hiring). The term of any such appointment shall be specified by the Secretary at the time of the appointment.~~

~~(e) BRIEFINGS. —~~

~~(1) IN GENERAL. — Not later than September 30, 2019, and September 30, 2021, the Secretary shall brief the appropriate committees of Congress on the exercise of the authority in this section.~~

~~(2) ELEMENTS. — Each briefing under this subsection shall include the following:~~

~~(A) A description and assessment of the results of the use of such authority as of the date of such briefing.~~

~~(B) Such recommendations as the Secretary considers appropriate for extension or modification of such authority.~~

~~(3) APPROPRIATE COMMITTEES OF CONGRESS DEFINED. — In this subsection, the term “appropriate committees of Congress” means —~~

~~(A) the Committee on Armed Services and the Committee on Homeland Security and Governmental Affairs of the Senate; and~~

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- ~~(B) the Committee on Armed Services and the Committee on Government Oversight and Reform of the House of Representatives.~~
- ~~(f) Sunset.—~~
- ~~(1) IN GENERAL.—The authority to appoint individuals in this section shall expire on September 30, 2021.~~
- ~~(2) CONSTRUCTION WITH EXISTING APPOINTMENTS.—The expiration in paragraph (1) of the authority in this section shall not be construed to terminate any appointment made under this section before the date of expiration that continues according to its term as of the date of expiration.~~

National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1580 note prec.)

~~SEC. 1110 PILOT PROGRAM ON ENHANCED PERSONNEL MANAGEMENT SYSTEM FOR CYBERSECURITY AND LEGAL PROFESSIONALS IN THE DEPARTMENT OF DEFENSE.~~

~~(a) PILOT PROGRAM REQUIRED.—The Secretary of Defense shall carry out within the Department of Defense a pilot program to assess the feasibility and advisability of an enhanced personnel management system in accordance with this section for cybersecurity and legal professionals in the Department described in subsection (b) who enter civilian service with the Department on or after January 1, 2020.~~

~~(b) CYBERSECURITY AND LEGAL PROFESSIONALS.—~~

~~(1) IN GENERAL.—The cybersecurity and legal professionals described in this subsection are the following:~~

~~(A) Civilian cybersecurity professionals in the Department of Defense consisting of civilian personnel engaged in or directly supporting planning, commanding and controlling, training, developing, acquiring, modifying, and operating systems and capabilities, and military units and intelligence organizations (other than those funded by the National Intelligence Program) that are directly engaged in or used for offensive and defensive cyber and information warfare or intelligence activities in support thereof.~~

~~(B) Civilian legal professionals in the Department occupying legal or similar positions, as determined by the Secretary of Defense for purposes of the pilot program, that require eligibility to practice law in a State or territory of the United States.~~

~~(2) INAPPLICABILITY TO SES POSITIONS.—The pilot program shall not apply to positions within the Senior Executive Service under subchapter VIII of chapter 53 of title 5, United States Code.~~

~~(c) DIRECT APPOINTMENT AUTHORITY.—~~

~~(1) Inapplicability of GENERAL CIVIL SERVICE APPOINTMENT AUTHORITIES TO APPOINTMENTS.—Under the pilot program, the Secretary of Defense, with respect to the Defense Agencies, and the Secretary of the military department concerned, with respect to the military departments, may appoint qualified candidates as cybersecurity and legal~~

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professionals without regard to the provisions of subchapter I of chapter 33 of title 5, United States Code.

~~(2) APPOINTMENT ON DIRECT HIRE BASIS.—~~ Appointments under the pilot program shall be made on a direct hire basis.

~~(d) TERM APPOINTMENTS.—~~

~~(1) RENEWABLE TERM APPOINTMENTS.—~~ Each individual shall serve with the Department of Defense as a cybersecurity or legal professional under the pilot program pursuant to an initial appointment to service with the Department for a term of not less than 2 years nor more than 8 years. Any term of appointment under the pilot program may be renewed for one or more additional terms of not less than 2 years nor more than 8 years as provided in subsection (h).

~~(2) LENGTH OF TERMS.—~~ The length of the term of appointment to a position under the pilot program shall be prescribed by the Secretary of Defense taking into account the national security, mission, and other applicable requirements of the position. Positions having identical or similar requirements or terms may be grouped into categories for purposes of the pilot program. The Secretary may delegate any authority in this paragraph to a commissioned officer of the Armed Forces in pay grade O-7 or above or an employee in the Department in the Senior Executive Service.

~~(e) NATURE OF SERVICE UNDER APPOINTMENTS.—~~

~~(1) TREATMENT OF PERSONNEL APPOINTED AS EMPLOYEES.—~~ Except as otherwise provided by this section, individuals serving with the Department of Defense as cybersecurity or legal professionals under the pilot program pursuant to appointments under this section shall be considered employees (as specified in section 2105 of title 5, United States Code) for purposes of the provisions of title 5, United States Code, and other applicable provisions of law, including, in particular, for purposes as follows:

~~(A) Eligibility for participation in the Federal Employees' Retirement System under chapter 84 of title 5, United States Code, subject to the provisions of section 8402 of such title and the regulations prescribed pursuant to such section.~~

~~(B) Eligibility for enrollment in a health benefits plan under chapter 89 of title 5, United States Code (commonly referred as the 'Federal Employees Health Benefits Program').~~

~~(C) Eligibility for and subject to the employment protections of subpart F of part III of title 5, United States Code, relating to merit principles and protections.~~

~~(D) Eligibility for the protections of chapter 81, of title 5, United States Code, relating to workers compensation.~~

~~(2) SCOPE OF RIGHTS AND BENEFITS.—~~ In administering the pilot program, the Secretary of Defense shall specify, and from time to time update, a comprehensive description of the rights and benefits of individuals serving with the Department under the pilot program pursuant to this subsection and of the provisions of law under which such rights and benefits arise.

~~(f) (g) COMPENSATION.—~~

~~(1) BASIC PAY.—~~ Individuals serving with the Department of Defense as cybersecurity or legal professionals under the pilot program shall be paid basic pay for

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such service in accordance with a schedule of pay prescribed by the Secretary of Defense for purposes of the pilot program.

(2) **TREATMENT AS BASIC PAY.**—Basic pay payable under the pilot program shall be treated for all purposes as basic pay paid under the provisions of title 5, United States Code.

(3) **PERFORMANCE AWARDS.**—Individuals serving with the Department as cybersecurity or legal professionals under the pilot program may be awarded such performance awards for outstanding performance as the Secretary shall prescribe for purposes of the pilot program. The performance awards may include a monetary bonus, time off with pay, or such other awards as the Secretary considers appropriate for purposes of the pilot program. The award of performance awards under the pilot program shall be based in accordance with such policies and requirements as the Secretary shall prescribe for purposes of the pilot program.

(4) **ADDITIONAL COMPENSATION.**—Individuals serving with the Department as cybersecurity or legal professionals under the pilot program may be awarded such additional compensation above basic pay as the Secretary (or the designees of the Secretary) consider appropriate in order to promote the recruitment and retention of highly skilled and productive cybersecurity and legal professionals to and with the Department.

~~(g)~~ **(e) PROBATIONARY PERIOD.**—The following terms of appointment shall be treated as a probationary period under the pilot program:

(1) The first term of appointment of an individual to service with the Department of Defense as a cybersecurity or legal professional, regardless of length.

(2) The first term of appointment of an individual to a supervisory position in the Department as a cybersecurity or legal professional, regardless of length and regardless of whether or not such term of appointment to a supervisory position is the first term of appointment of the individual concerned to service with the Department as a cybersecurity or legal professional.

~~(h)~~ **(f) RENEWAL OF APPOINTMENTS.**—

(1) **IN GENERAL.**—The Secretary of Defense shall prescribe the conditions for the renewal of appointments under the pilot program. The conditions may apply to one or more categories of positions, positions on a case-by-case basis, or both.

(2) **PARTICULAR CONDITIONS.**—In prescribing conditions for the renewal of appointments under the pilot program, the Secretary shall take into account the following (in the order specified):

(A) The necessity for the continuation of the position concerned based on mission requirements and other applicable justifications for the position.

(B) The service performance of the individual serving in the position concerned, with individuals with satisfactory or better performance afforded preference in renewal.

(C) Input from employees on conditions for renewal.

(D) Applicable private and public sector labor market conditions.

(3) **SERVICE PERFORMANCE.**—The assessment of the service performance of an individual under the pilot program for purposes of paragraph (2)(B) shall consist of an assessment of the ability of the individual to effectively accomplish mission goals for the

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position concerned as determined by the supervisor or manager of the individual based on the individual's performance evaluations and the knowledge of and review by such supervisor or manager (developed in consultation with the individual) of the individual's performance in the position. An individual's tenure of service in a position or the Department of Defense may not be the primary element of the assessment.

(+) **(h) PROFESSIONAL DEVELOPMENT.**—The pilot program shall provide for the professional development of individuals serving with the Department of Defense as cybersecurity and legal professionals under the pilot program in a manner that—

(1) creates opportunities for education, training, and career-broadening experiences, and for experimental opportunities in other organizations within and outside the Federal Government; and

(2) reflects the differentiated needs of personnel at different stages of their careers.

(+) **(i) SABBATICALS.**—

(1) **IN GENERAL.**—The pilot program shall provide for an individual who is in a successive term after the first 8 years with the Department of Defense as a cybersecurity or legal professional under the pilot program to take, at the election of the individual, a paid or unpaid sabbatical from service with the Department for professional development or education purposes. The length of a sabbatical shall be any length not less than 6 months nor more than 1 year (unless a different period is approved by the Secretary of the military department or head of the organization or element of the Department concerned for purposes of this subsection). The purpose of any sabbatical shall be subject to advance approval by the organization or element in the Department in which the individual is currently performing service. The taking of a sabbatical shall be contingent on the written agreement of the individual concerned to serve with the Department for an appropriate length of time at the conclusion of the term of appointment in which the sabbatical commences, with the period of such service to be in addition to the period of such term of appointment.

(2) **NUMBER OF SABBATICALS.**—An individual may take more than one sabbatical under this subsection.

(3) **REPAYMENT.**—Except as provided in paragraph (4), an individual who fails to satisfy a written agreement executed under paragraph (1) with respect to a sabbatical shall repay the Department an amount equal to any pay, allowances, and other benefits received by the individual from the Department during the period of the sabbatical.

(4) **WAIVER OF REPAYMENT.**—An agreement under paragraph (1) may include such conditions for the waiver of repayment otherwise required under paragraph (3) for failure to satisfy such agreement as the Secretary specifies in such agreement.

~~(k) **REGULATIONS.**—The Secretary of Defense shall administer the pilot program under regulations prescribed by the Secretary for purposes of the pilot program.~~

~~(l) **TERMINATION.**—~~

~~(1) **IN GENERAL.**—The authority of the Secretary of Defense to appoint individuals for service with the Department of Defense as cybersecurity or legal professionals under the pilot program shall expire on December 31, 2029.~~

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~~(2) EFFECT ON EXISTING APPOINTMENTS.—The termination of authority in paragraph (1) shall not be construed to terminate or otherwise affect any appointment made under this section before December 31, 2029, that remains valid as of that date.~~

~~(m) IMPLEMENTATION.—~~

~~(1) INTERIM FINAL RULE.—Not later than one year after the date of the enactment of this Act [Dec. 12, 2017], the Secretary of Defense shall prescribe an interim final rule to implement the pilot program.~~

~~(2) FINAL RULE.—Not later than 180 days after prescribing the interim final rule under paragraph (1) and considering public comments with respect to such interim final rule, the Secretary shall prescribe a final rule to implement the pilot program.~~

~~(3) OBJECTIVES.—The regulations prescribed under paragraphs (1) and (2) shall accomplish the objectives set forth in subsections (a) through (j) and otherwise ensure flexibility and expedited appointment of cybersecurity and legal professionals in the Department of Defense under the pilot program.~~

~~(n) REPORTS.—~~

~~(1) REPORTS REQUIRED.—Not later than January 30 of each of 2022, 2025, and 2028, the Secretary of Defense shall submit to the appropriate committees of Congress a report on the carrying out of the pilot program. Each report shall include the following:~~

~~(A) A description and assessment of the carrying out of the pilot program during the period since the commencement of the pilot program or the previous submittal of a report under this subsection, as applicable.~~

~~(B) A description and assessment of the successes in and impediments to carrying out the pilot program system during such period.~~

~~(C) Such recommendations as the Secretary considers appropriate for legislative action to improve the pilot program and to otherwise improve civilian personnel management of cybersecurity and legal professionals by the Department of Defense.~~

~~(D) In the case of the report submitted in 2028, an assessment and recommendations by the Secretary on whether to make the pilot program permanent.~~

~~(2) APPROPRIATE COMMITTEES OF CONGRESS DEFINED.—In this subsection, the term 'appropriate committees of Congress' means—~~

~~(A) the Committee on Armed Services and the Committee on Homeland Security and Governmental Affairs of the Senate; and~~

~~(B) the Committee on Armed Services and the Committee on Oversight and Government Reform of the House of Representatives.~~

TITLE 5, UNITED STATES CODE

§3104. Employment of specially qualified scientific and professional personnel

(a) The Director of the Office of Personnel Management may establish, and from time to time revise, the maximum number of scientific or professional positions for carrying out research

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and development functions which require the services of specially qualified personnel which may be established outside of the General Schedule. Any such position may be established by action of the Director or, under such standards and procedures as the Office prescribes and publishes in such form as the Director may determine (including procedures under which the prior approval of the Director may be required), by agency action.

(b) The provisions of subsection (a) of this section shall not apply to any Senior Executive Service position (as defined in section 3132(a) of this title) *or to any position in the Department of Defense.*

(c) In addition to the number of positions authorized by subsection (a) of this section, the Librarian of Congress may establish, without regard to the second sentence of subsection (a) of this section, not more than 8 scientific or professional positions to carry out the research and development functions of the Library of Congress which require the services of specially qualified personnel.

TITLE 10, UNITED STATES CODE

§1705. Defense Acquisition Workforce Development Fund

(a) ESTABLISHMENT.—The Secretary of Defense shall establish a fund to be known as the "Department of Defense Acquisition Workforce Development Fund" (in this section referred to as the "Fund") to provide funds, in addition to other funds that may be available, for the recruitment, training, and retention of acquisition personnel of the Department of Defense.

(b) PURPOSE.—The purpose of the Fund is to ensure that the Department of Defense acquisition workforce has the capacity, in both personnel and skills, needed to properly perform its mission, provide appropriate oversight of contractor performance, and ensure that the Department receives the best value for the expenditure of public resources.

(c) MANAGEMENT.—The Fund shall be managed by a senior official of the Department of Defense designated by the Under Secretary of Defense for Acquisition, Technology, and Logistics for that purpose, from among persons with an extensive background in management relating to acquisition and personnel. *In addition, the designated senior official, or the principal deputy of that official, shall have both qualifications in financial management and an extensive background in financial management.*

(d) ~~ELEMENTS~~ *SOURCE OF FUNDS.*—

(1) ~~IN GENERAL~~ *ELEMENTS OF THE FUND.*—The Fund shall consist of amounts as follows:

~~(A) Amounts credited to the Fund under paragraph (2).~~

~~(B) (A)~~ Amounts transferred to the Fund pursuant to paragraph (3) ~~(2)~~.

~~(C) (B)~~ Any other amounts appropriated to, credited to, or deposited into the Fund by law.

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~~(2) CREDITS TO THE FUND.—(A) There shall be credited to the Fund an amount equal to the applicable percentage for a fiscal year of all amounts expended by the Department of Defense in such fiscal year for contract services from amounts available for contract services for operation and maintenance.~~

~~(B) Subject to paragraph (4), not later than 30 days after the end of the first quarter of each fiscal year, the head of each military department and Defense Agency shall remit to the Secretary of Defense, from amounts available to such military department or Defense Agency, as the case may be, for contract services for operation and maintenance, an amount equal to the applicable percentage for such fiscal year of the amount expended by such military department or Defense Agency, as the case may be, during such fiscal year for services covered by subparagraph (A). Any amount so remitted shall be credited to the Fund under subparagraph (A).~~

~~(C) For purposes of this paragraph, the applicable percentage for a fiscal year is the percentage that results in the credit to the Fund of \$500,000,000 in such fiscal year.~~

~~(D) The Secretary of Defense may adjust the amount specified in subparagraph (C) for a fiscal year if the Secretary determines that the amount is greater or less than reasonably needed for purposes of the Fund for such fiscal year. The Secretary may not adjust the amount for a fiscal year to an amount that is more than \$600,000,000 or less than \$400,000,000.~~

~~(3) TRANSFER OF CERTAIN UNOBLIGATED BALANCES.—To the extent provided in appropriations Acts, the Secretary of Defense may, during the 36-month period following the expiration of availability for obligation of any appropriations made to the Department of Defense for procurement, research, development, test, and evaluation, or operation and maintenance, transfer to the Fund any unobligated balance of such appropriations.~~

(2) TRANSFER OF CERTAIN UNOBLIGATED BALANCES.—(A) The Secretary of Defense shall transfer to the Fund each fiscal year from unobligated balances of appropriations described in subparagraph (B) a total amount of not less than \$400,500,000.

(B) Subparagraph (A) applies to unobligated balances of appropriations made to the Department of Defense for which the period of availability for obligation expired at the end of one of the three fiscal years preceding the fiscal year during which the transfer under subparagraph (A) is made, but only in the case of an appropriation made to the Department of Defense —

(i) for procurement;

(ii) for research, development, test, and evaluation; or

(iii) for operation and maintenance.

(C) Any amount so transferred to the Fund pursuant to subparagraph (A) shall be credited to the Fund.

~~(4) ADDITIONAL REQUIREMENTS AND LIMITATIONS ON REMITTANCES.—(A) In the event amounts are transferred to the Fund during a fiscal year pursuant to paragraph (1)(B) or appropriated to the Fund for a fiscal year pursuant to paragraph (1)(C), the aggregate amount otherwise required to be remitted to the Fund for that fiscal year pursuant to paragraph (2)(B) shall be reduced by the amount equal to the amounts so transferred or appropriated to the Fund during or for that fiscal year. Any reduction in the~~

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~~aggregate amount required to be remitted to the Fund for a fiscal year under this subparagraph shall be allocated as provided in applicable provisions of appropriations Acts or, absent such provisions, on a pro rata basis among the military departments and Defense Agencies required to make remittances to the Fund for that fiscal year under paragraph (2)(B), subject to any exclusions the Secretary of Defense determines to be necessary in the best interests of the Department of Defense.~~

~~(B) Any remittance of amounts to the Fund for a fiscal year under paragraph (2) shall be subject to the availability of appropriations for that purpose.~~

(e) AVAILABILITY OF FUNDS.—

(1) IN GENERAL.—(A) Subject to the provisions of this subsection, amounts in the Fund shall be available to the Secretary of Defense for expenditure, or for transfer to a military department or Defense Agency, for the recruitment, training, and retention of acquisition personnel of the Department of Defense for the purpose of the Fund, including for the provision of training and retention incentives to the acquisition workforce of the Department and to develop acquisition tools and methodologies, and undertake research and development activities, leading to acquisition policies and practices that will improve the efficiency and effectiveness of defense acquisition efforts. In the case of temporary members of the acquisition workforce designated pursuant to subsection (g)(2), such funds shall be available only for the limited purpose of providing training in the performance of acquisition-related functions and duties.

(B) Amounts in the Fund also may be used to pay salaries of personnel at the Office of the Secretary of Defense, military departments, and Defense Agencies to manage the Fund.

(2) PROHIBITION.—Amounts in the Fund may not be obligated for any purpose other than purposes described in paragraph (1) or otherwise in accordance with this subsection.

(3) GUIDANCE.—~~The Under Secretary of Defense for Acquisition, Technology, and Logistics,~~ acting through the senior official designated to manage the Fund, shall issue guidance for the administration of the Fund. Such guidance shall include provisions—

(A) identifying areas of need in the acquisition workforce for which amounts in the Fund may be used, including—

(i) changes to the types of skills needed in the acquisition workforce;

(ii) incentives to retain in the acquisition workforce qualified, experienced acquisition workforce personnel; and

(iii) incentives for attracting new, high-quality personnel to the acquisition workforce;

(B) describing the manner and timing for applications for amounts in the Fund to be submitted;

(C) describing the evaluation criteria to be used for approving or prioritizing applications for amounts in the Fund in any fiscal year;

(D) describing measurable objectives of performance for determining whether amounts in the Fund are being used in compliance with this section; and

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(E) describing the amount from the Fund that may be used to pay salaries of personnel at the Office of the Secretary of Defense, military departments, and Defense Agencies to manage the Fund and the circumstances under which such amounts may be used for such purpose.

(4) LIMITATION ON PAYMENTS TO OR FOR CONTRACTORS.—Amounts in the Fund shall not be available for payments to contractors or contractor employees, other than for the purposes of—

(A) providing advanced training to Department of Defense employees;

(B) developing acquisition tools and methodologies and performing research on acquisition policies and best practices that will improve the efficiency and effectiveness of defense acquisition efforts; and

(C) supporting human capital and talent management of the acquisition workforce, including benchmarking studies, assessments, and requirements planning.

(5) PROHIBITION ON PAYMENT OF BASE SALARY OF CURRENT EMPLOYEES.—

Amounts in the Fund may not be used to pay the base salary of any person who was an employee of the Department serving in a position in the acquisition workforce as of January 28, 2008, and who has continued in the employment of the Department since such time without a break in such employment of more than a year.

(6) DURATION OF AVAILABILITY.—Amounts ~~credited to the Fund in accordance with subsection (d)(2)~~, transferred to the Fund pursuant to subsection (d)(3)(2), appropriated to the Fund, or deposited to the Fund shall remain available for obligation in the fiscal year for which ~~credited~~, transferred, appropriated, or deposited and the two succeeding fiscal years.

~~(f) EXPEDITED HIRING AUTHORITY.—For purposes of sections 3304, 5333, and 5753 of title 5, the Secretary of Defense may—~~

~~(1) designate any category of positions in the acquisition workforce as positions for which there exists a shortage of candidates or there is a critical hiring need; and~~

~~(2) utilize the authorities in such sections to recruit and appoint qualified persons directly to positions so designated.~~

(g) ACQUISITION WORKFORCE DEFINED.—In this section, the term "acquisition workforce" means the following:

(1) Personnel in positions designated under section 1721 of this title as acquisition positions for purposes of this chapter.

(2) Other military personnel or civilian employees of the Department of Defense who—

(A)(i) contribute significantly to the acquisition process by virtue of their assigned duties; or

(ii) contribute significantly to the acquisition or development of systems relating to cybersecurity; and

(B) are designated as temporary members of the acquisition workforce by the Under Secretary of Defense for Acquisition, Technology, and Logistics, or by the senior acquisition executive of a military department, for the limited purpose

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of receiving training for the performance of acquisition-related functions and duties.

~~§1762. Demonstration project relating to certain acquisition personnel management policies and procedures~~

~~(a) COMMENCEMENT.—The Secretary of Defense is authorized to carry out a demonstration project, the purpose of which is to determine the feasibility or desirability of one or more proposals for improving the personnel management policies or procedures that apply with respect to the acquisition workforce of the Department of Defense and supporting personnel assigned to work directly with the acquisition workforce.~~

~~(b) TERMS AND CONDITIONS.—(1) Except as otherwise provided in this subsection, any demonstration project described in subsection (a) shall be subject to [section 4703 of title 5](#) and all other provisions of such title that apply with respect to any demonstration project under such section.~~

~~(2) Subject to paragraph (3), in applying [section 4703 of title 5](#) with respect to a demonstration project described in subsection (a) —~~

~~(A) "180 days" in subsection (b)(4) of such section shall be deemed to read "120 days";~~

~~(B) "90 days" in subsection (b)(6) of such section shall be deemed to read "30 days"; and~~

~~(C) subsection (d)(1) of such section shall be disregarded.~~

~~(3) Paragraph (2) shall not apply with respect to a demonstration project unless —~~

~~(A) for each organization or team participating in the demonstration project —~~

~~(i) at least one third of the workforce participating in the demonstration project consists of members of the acquisition workforce; and~~

~~(ii) at least two thirds of the workforce participating in the demonstration project consists of members of the acquisition workforce and supporting personnel assigned to work directly with the acquisition workforce; and~~

~~(B) the demonstration project commences before October 1, 2007.~~

~~(4) The Secretary of Defense shall exercise the authorities granted to the Office of Personnel Management under [section 4703 of title 5](#) for purposes of the demonstration project authorized under this section.~~

~~(c) LIMITATION ON NUMBER OF PARTICIPANTS.—The total number of persons who may participate in at any one time the demonstration project under this section may not exceed 130,000.~~

~~(d) EFFECT OF REORGANIZATIONS.—The applicability of paragraph (2) of subsection (b) to an organization or team shall not terminate by reason that the organization or team, after having satisfied the conditions in paragraph (3) of such subsection when it began to participate in a demonstration project under this section, ceases to meet one or both of the conditions set forth in subparagraph (A) of such paragraph (3) as a result of a reorganization, restructuring, realignment, consolidation, or other organizational change.~~

~~(e) ASSESSMENTS.—(1) The Secretary of Defense shall designate an independent organization to conduct two assessments of the acquisition workforce demonstration project described in subsection (a).~~

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~~(2) Each such assessment shall include the following:~~

~~(A) A description of the workforce included in the project.~~

~~(B) An explanation of the flexibilities used in the project to appoint individuals to the acquisition workforce and whether those appointments are based on competitive procedures and recognize veteran's preferences.~~

~~(C) An explanation of the flexibilities used in the project to develop a performance appraisal system that recognizes excellence in performance and offers opportunities for improvement.~~

~~(D) The steps taken to ensure that such system is fair and transparent for all employees in the project.~~

~~(E) How the project allows the organization to better meet mission needs.~~

~~(F) An analysis of how the flexibilities in subparagraphs (B) and (C) are used, and what barriers have been encountered that inhibit their use.~~

~~(G) Whether there is a process for—~~

~~(i) ensuring ongoing performance feedback and dialogue among supervisors, managers, and employees throughout the performance appraisal period; and~~

~~(ii) setting timetables for performance appraisals.~~

~~(H) The project's impact on career progression.~~

~~(I) The project's appropriateness or inappropriateness in light of the complexities of the workforce affected.~~

~~(J) The project's sufficiency in terms of providing protections for diversity in promotion and retention of personnel.~~

~~(K) The adequacy of the training, policy guidelines, and other preparations afforded in connection with using the project.~~

~~(L) Whether there is a process for ensuring employee involvement in the development and improvement of the project.~~

~~(3) The first assessment under this subsection shall be completed not later than September 30, 2012. The second and final assessment shall be completed not later than September 30, 2016. The Secretary shall submit to the covered congressional committees a copy of each assessment within 30 days after receipt by the Secretary of the assessment.~~

~~(f) COVERED CONGRESSIONAL COMMITTEES.—In this section, the term "covered congressional committees" means—~~

~~(1) the Committees on Armed Services of the Senate and the House of Representatives;~~

~~(2) the Committee on Homeland Security and Governmental Affairs of the Senate; and~~

~~(3) the Committee on Oversight and Government Reform of the House of Representatives.~~

~~(g) TERMINATION OF AUTHORITY.—The authority to conduct a demonstration project under this section shall terminate on December 31, 2023.~~

~~(h) CONVERSION.—Within 6 months after the authority to conduct a demonstration project under this section is terminated as provided in subsection (g), employees in the project shall convert to the civilian personnel system created pursuant to [section 9902 of title 5](#).~~

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Below are the sections of law that would be repealed by the codification provisions in section 1006

[The letter designators at the beginning of each citation below
correspond to the subsection designations in section 1006]

A. National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 10 U.S.C. 1701 note)

SEC. 847. REQUIREMENTS FOR SENIOR DEPARTMENT OF DEFENSE OFFICIALS SEEKING EMPLOYMENT WITH DEFENSE CONTRACTORS.

(a) REQUIREMENT TO SEEK AND OBTAIN WRITTEN OPINION.—

(1) REQUEST.—An official or former official of the Department of Defense described in subsection (c) who, within two years after leaving service in the Department of Defense, expects to receive compensation from a Department of Defense contractor, shall, prior to accepting such compensation, request a written opinion regarding the applicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor.

(2) SUBMISSION OF REQUEST.—A request for a written opinion under paragraph (1) shall be submitted in writing to an ethics official of the Department of Defense having responsibility for the organization in which the official or former official serves or served and shall set forth all information relevant to the request, including information relating to government positions held and major duties in those positions, actions taken concerning future employment, positions sought, and future job descriptions, if applicable.

(3) WRITTEN OPINION.—Not later than 30 days after receiving a request by an official or former official of the Department of Defense described in subsection (c), the appropriate ethics counselor shall provide such official or former official a written opinion regarding the applicability or inapplicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor.

(4) CONTRACTOR REQUIREMENT.—A Department of Defense contractor may not knowingly provide compensation to a former Department of Defense official described in subsection (c) within two years after such former official leaves service in the Department of Defense, without first determining that the former official has sought and received (or has not received after 30 days of seeking) a written opinion from the appropriate ethics counselor regarding the applicability of post-employment restrictions to the activities that the former official is expected to undertake on behalf of the contractor.

(5) ADMINISTRATIVE ACTIONS.—In the event that an official or former official of the Department of Defense described in subsection (c), or a Department of Defense contractor, knowingly fails to comply with the requirements of this subsection, the Secretary of Defense may take any of the administrative actions set forth in section 2105

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of title 41, United States Code[,], that the Secretary of Defense determines to be appropriate.

(b) RECORDKEEPING REQUIREMENT.—

(1) DATABASE.—Each request for a written opinion made pursuant to this section, and each written opinion provided pursuant to such a request, shall be retained by the Department of Defense in a central database or repository maintained by the General Counsel of the Department for not less than five years beginning on the date on which the written opinion was provided.

(2) INSPECTOR GENERAL REVIEW.—The Inspector General of the Department of Defense shall conduct periodic reviews to ensure that written opinions are being provided and retained in accordance with the requirements of this section. The first such review shall be conducted no later than two years after the date of the enactment of this Act [Jan. 28, 2008].

(c) COVERED DEPARTMENT OF DEFENSE OFFICIALS.—An official or former official of the Department of Defense is covered by the requirements of this section if such official or former official—

(1) participated personally and substantially in an acquisition as defined in section 131 of title 41, United States Code[,], with a value in excess of \$10,000,000 and serves or served—

(A) in an Executive Schedule position under subchapter II of chapter 53 of title 5, United States Code;

(B) in a position in the Senior Executive Service under subchapter VIII of chapter 53 of title 5, United States Code; or

(C) in a general or flag officer position compensated at a rate of pay for grade O–7 or above under section 201 of title 37, United States Code; or

(2) serves or served as a program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of \$10,000,000.

(d) DEFINITION.—In this section, the term “post-employment restrictions” includes—

(1) chapter 21 of title 41, United States Code;

(2) section 207 of title 18, United States Code; and

(3) any other statute or regulation restricting the employment or activities of individuals who leave government service in the Department of Defense.

B. National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1701a note)

SEC. 834. FLEXIBILITY IN CONTRACTING AWARD PROGRAM.

(a) ESTABLISHMENT OF AWARD PROGRAM.—The Secretary of Defense shall create an award to recognize those acquisition programs and professionals that make the best use of the flexibilities and authorities granted by the Federal Acquisition Regulation and Department of Defense Instruction 5000.02 (Operation of the Defense Acquisition System).

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(b) **PURPOSE OF AWARD.**—The award established under subsection (a) shall recognize outstanding performers whose approach to program management emphasizes innovation and local adaptation, including the use of—

- (1) simplified acquisition procedures;
- (2) inherent flexibilities within the Federal Acquisition Regulation;
- (3) commercial contracting approaches;
- (4) public-private partnership agreements and practices;
- (5) cost-sharing arrangements;
- (6) innovative contractor incentive practices; and
- (7) other innovative implementations of acquisition flexibilities.

C. Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314; 10 U.S.C. 1702 note)

SEC. 807. QUICK-REACTION SPECIAL PROJECTS ACQUISITION TEAM.

(a) **ESTABLISHMENT.**—The Under Secretary of Defense for Acquisition, Technology, and Logistics shall establish a team of highly qualified acquisition professionals who shall be available to advise the Under Secretary on actions that can be taken to expedite the acquisition of urgently needed systems.

(b) **DUTIES.**—The issues on which the team may provide advice shall include the following:

- (1) Industrial base issues, including the limited availability of suppliers.
- (2) Technology development and technology transition issues.
- (3) Issues of acquisition policy, including the length of the acquisition cycle.
- (4) Issues of testing policy and ensuring that weapon systems perform properly in combat situations.
- (5) Issues of procurement policy, including the impact of socio-economic requirements.
- (6) Issues relating to compliance with environmental requirements.

D. National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1722b note)

SEC. 841. ENHANCEMENTS TO THE CIVILIAN PROGRAM MANAGEMENT WORKFORCE.

(a) **ESTABLISHMENT OF PROGRAM MANAGER DEVELOPMENT PROGRAM.**—

(1) **IN GENERAL.**—The Secretary of Defense, in consultation with the Secretaries of the military departments, shall implement a program manager development program to provide for the professional development of high-potential, experienced civilian personnel. Personnel shall be competitively selected for the program based on their potential to become a program manager of a major defense acquisition program, as

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defined in section 2430 of title 10, United States Code. The program shall be administered and overseen by the Secretary of each military department, acting through the service acquisition executive for the department concerned.

(2) **PLAN REQUIRED.**—Not later than one year after the date of the enactment of this Act [Dec. 12, 2017], the Secretary of Defense shall provide to the Committees on Armed Services of the Senate and the House of Representatives a comprehensive plan to implement the program established under paragraph (1). In developing the plan, the Secretary of Defense shall seek the input of relevant external parties, including professional associations, other government entities, and industry. The plan shall include the following elements:

(A) An assessment of the minimum level of subject matter experience, education, years of experience, certifications, and other qualifications required to be selected into the program, set forth separately for current Department of Defense employees and for personnel hired into the program from outside the Department of Defense.

(B) A description of hiring flexibilities to be used to recruit qualified personnel from outside the Department of Defense.

(C) A description of the extent to which mobility agreements will be required to be signed by personnel selected for the program during their participation in the program and after their completion of the program. The use of mobility agreements shall be applied to help maximize the flexibility of the Department of Defense in assigning personnel, while not inhibiting the participation of the most capable candidates.

(D) A description of the tenure obligation required of personnel selected for the program.

(E) A plan for training during the course of the program, including training in leadership, program management, engineering, finance and budgeting, market research, business acumen, contracting, supplier management, requirement setting and tradeoffs, intellectual property matters, and software.

(F) A description of career paths to be followed by personnel in the program in order to ensure that personnel in the program gain expertise in the program management functional career field competencies identified by the Department in existing guidance and the topics listed in subparagraph (E), including—

(i) a determination of the types of advanced educational degrees that enhance program management skills and the mechanisms available to the Department of Defense to facilitate the attainment of those degrees by personnel in the program;

(ii) a determination of required assignments to positions within acquisition programs, including position type and acquisition category of the program office;

(iii) a determination of required or encouraged rotations to career broadening positions outside of acquisition programs; and

(iv) a determination of how the program will ensure the opportunity for a required rotation to industry of at least six months to

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develop an understanding of industry motivation and business acumen, such as by developing an industry exchange program for civilian program managers, similar to the Corporate Fellows Program of the Secretary of Defense.

(G) A general description of the number of personnel anticipated to be selected into the program, how frequently selections will occur, how long personnel selected into the program will participate in the program, and how personnel will be placed into an assignment at the completion of the program.

(H) A description of benefits that will be offered under the program using existing human capital flexibilities to retain qualified employees, such as student loan repayments, bonuses, or pay banding.

(I) An assessment of personnel flexibilities needed to allow the military departments and the Defense Agencies to reassign or remove program managers that do not perform effectively.

(J) A description of how the program will be administered and overseen by the Secretaries of each military department, acting through the service acquisition executive for the department concerned.

(K) A description of how the program will be integrated with existing program manager development efforts at each military department.

(3) **USE OF DEFENSE ACQUISITION WORKFORCE DEVELOPMENT FUND.**—Amounts in the Department of Defense Acquisition Workforce Development Fund (established under section 1705 of title 10, United States Code) may be used to pay the base salary of personnel in the program established under paragraph (1) during the period of time such personnel are temporarily assigned to a developmental rotation or training program anticipated to last at least six months.

(4) **IMPLEMENTATION.**—The program established under paragraph (1) shall be implemented not later than September 30, 2019.

(b) **INDEPENDENT STUDY OF INCENTIVES FOR PROGRAM MANAGERS.**—***

E. Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383; 10 U.S.C. 1723 note)

SEC. 875. INFORMATION TECHNOLOGY ACQUISITION WORKFORCE.

(a) **PLAN REQUIRED.**—The Secretary of Defense shall develop and carry out a plan to strengthen the part of the acquisition workforce that specializes in information technology. The plan shall include the following:

(1) Defined targets for billets devoted to information technology acquisition.

(2) Specific certification requirements for individuals in the acquisition workforce who specialize in information technology acquisition.

(3) Defined career paths for individuals in the acquisition workforce who specialize in information technology acquisitions.

(b) **DEFINITIONS.**—In this section:

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(1) The term “information technology” has the meaning provided such term in section 11101 of title 40, United States Code, and includes information technology incorporated into a major weapon system.

(2) The term “major weapon system” has the meaning provided such term in section 2379(f) of title 10, United States Code.

(c) DEADLINE.—The Secretary of Defense shall develop the plan required under this section not later than 270 days after the date of the enactment of this Act [Jan. 7, 2011].

F. Defense Acquisition Workforce Improvement Act (title XII of Public Law 101-510; 10 U.S.C. 1724 note)

SEC. 1209. TRANSITION PROVISIONS.

(a) ***

(i) CREDIT FOR EXPERIENCE FOR CERTAIN POSITIONS.—For purposes of meeting any requirement under chapter 87 of title 10, United States Code (as added by section 1202), for a period of experience (such as requirements for experience in acquisition positions or in critical acquisition positions) and for purposes of coverage under the exceptions established by section 1724(c)(1) and section 1732(c)(1) of such title, any period of time spent serving in a position later designated as an acquisition position or a critical acquisition position under such chapter may be counted as experience in such a position for such purposes.

G. National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1741 note)

SEC. 803. MODERNIZATION OF SERVICES ACQUISITION.

(a) ***

(b) GUIDANCE REGARDING TRAINING AND DEVELOPMENT OF THE ACQUISITION WORKFORCE.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act [Dec. 23, 2016], the Secretary of Defense shall issue guidance addressing the training and development of the Department of Defense workforce engaged in the procurement of services, including those personnel not designated as members of the acquisition workforce.

(2) IDENTIFICATION OF TRAINING AND PROFESSIONAL DEVELOPMENT OPPORTUNITIES AND ALTERNATIVES.—The guidance required under paragraph (1) shall identify training and professional development opportunities and alternatives, not limited to existing Department of Defense institutions, that focus on and provide relevant training and professional development in commercial business models and contracting.

(3) TREATMENT OF TRAINING AND PROFESSIONAL DEVELOPMENT.—Any training and professional development provided pursuant to this subsection outside Department of

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Defense institutions shall be deemed to be equivalent to similar training certified or provided by the Defense Acquisition University.

H. National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1746 note)

SEC. 850. TRAINING IN COMMERCIAL ITEMS PROCUREMENT.

(a) TRAINING.—Not later than one year after the date of the enactment of this Act [Dec. 12, 2017], the President of the Defense Acquisition University shall establish a comprehensive training program on part 12 of the Federal Acquisition Regulation. The training shall cover, at a minimum, the following topics:

(1) The origin of part 12 and the congressional mandate to prefer commercial procurements.

(2) The definition of a commercial item, with a particular focus on the “of a type” concept.

(3) Price analysis and negotiations.

(4) Market research and analysis.

(5) Independent cost estimates.

(6) Parametric estimating methods.

(7) Value analysis.

(8) Best practices in pricing from commercial sector organizations, foreign government organizations, and other Federal, State, and local public sectors organizations.

(9) Other topics on commercial procurements necessary to ensure a well-educated acquisition workforce.

(b) ENROLLMENTS GOALS.—The President of the Defense Acquisition University shall set goals for student enrollment for the comprehensive training program established under subsection (a).

(c) SUPPORTING ACTIVITIES.—The Secretary of Defense shall, in support of the achievement of the goals of this section—

(1) engage academic experts on research topics of interest to improve commercial item identification and pricing methodologies; and

(2) facilitate exchange and interface opportunities between government personnel to increase awareness of best practices and challenges in commercial item identification and pricing.

(d) FUNDING.—The Secretary of Defense shall use amounts available in the Department of Defense Acquisition Workforce Development Fund established under section 1705 of title 10, United States Code, to fund the comprehensive training program established under subsection (a).

I. National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 1746 note)

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SEC. 891. TRAINING ON AGILE OR ITERATIVE DEVELOPMENT METHODS.

(a) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act [Dec. 12, 2017], the Secretary of Defense, in consultation with the President of the Defense Acquisition University, shall establish a training course at the Defense Acquisition University on agile or iterative development methods to provide training for personnel implementing and supporting the pilot programs required by sections 873 and 874 of this Act [10 U.S.C. 2223a note, 10 U.S.C. 2302 note].

(b) COURSE ELEMENTS.—

(1) IN GENERAL.—The course shall be taught in residence at the Defense Acquisition University and shall include the following elements:

(A) Training designed to instill a common understanding of all functional roles and dependencies involved in developing and producing a capability using agile or iterative development methods.

(B) An exercise involving teams composed of personnel from pertinent functions and functional organizations engaged in developing an integrated agile or iterative development method for a specific program.

(C) Instructors and content from non-governmental entities, as appropriate, to highlight commercial best practices in using an agile or iterative development method.

(2) COURSE UPDATES.—The Secretary shall ensure that the course is updated as needed, including through incorporating lessons learned from the implementation of the pilot programs required by sections 873 and 874 of this Act in subsequent versions of the course.

(c) COURSE ATTENDANCE.—The course shall be—

(1) available for certified acquisition personnel working on programs or projects using agile or iterative development methods; and

(2) mandatory for personnel participating in the pilot programs required by sections 873 and 874 of this Act from the relevant organizations in each of the military departments and Defense Agencies, including organizations responsible for engineering, budgeting, contracting, test and evaluation, requirements validation, and certification and accreditation.

(d) AGILE ACQUISITION SUPPORT.—The Secretary and the senior acquisition executives in each of the military departments and Defense Agencies, in coordination with the Director of the Defense Digital Service, shall assign to offices supporting systems selected for participation in the pilot programs required by sections 873 and 874 of this Act a subject matter expert with knowledge of commercial agile acquisition methods and Department of Defense acquisition processes to provide assistance and to advise appropriate acquisition authorities of the expert's observations.

(e) AGILE RESEARCH PROGRAM.—The President of the Defense Acquisition University shall establish a research program to conduct research on and development of agile acquisition practices and tools best tailored to meet the mission needs of the Department of Defense.

(f) AGILE OR ITERATIVE DEVELOPMENT DEFINED.—The term “agile or iterative development”, with respect to software—

ACQUISITION WORKFORCE — LEGISLATIVE PROVISIONS

(1) means acquisition pursuant to a method for delivering multiple, rapid, incremental capabilities to the user for operational use, evaluation, and feedback not exclusively linked to any single, proprietary method or process; and

(2) involves—

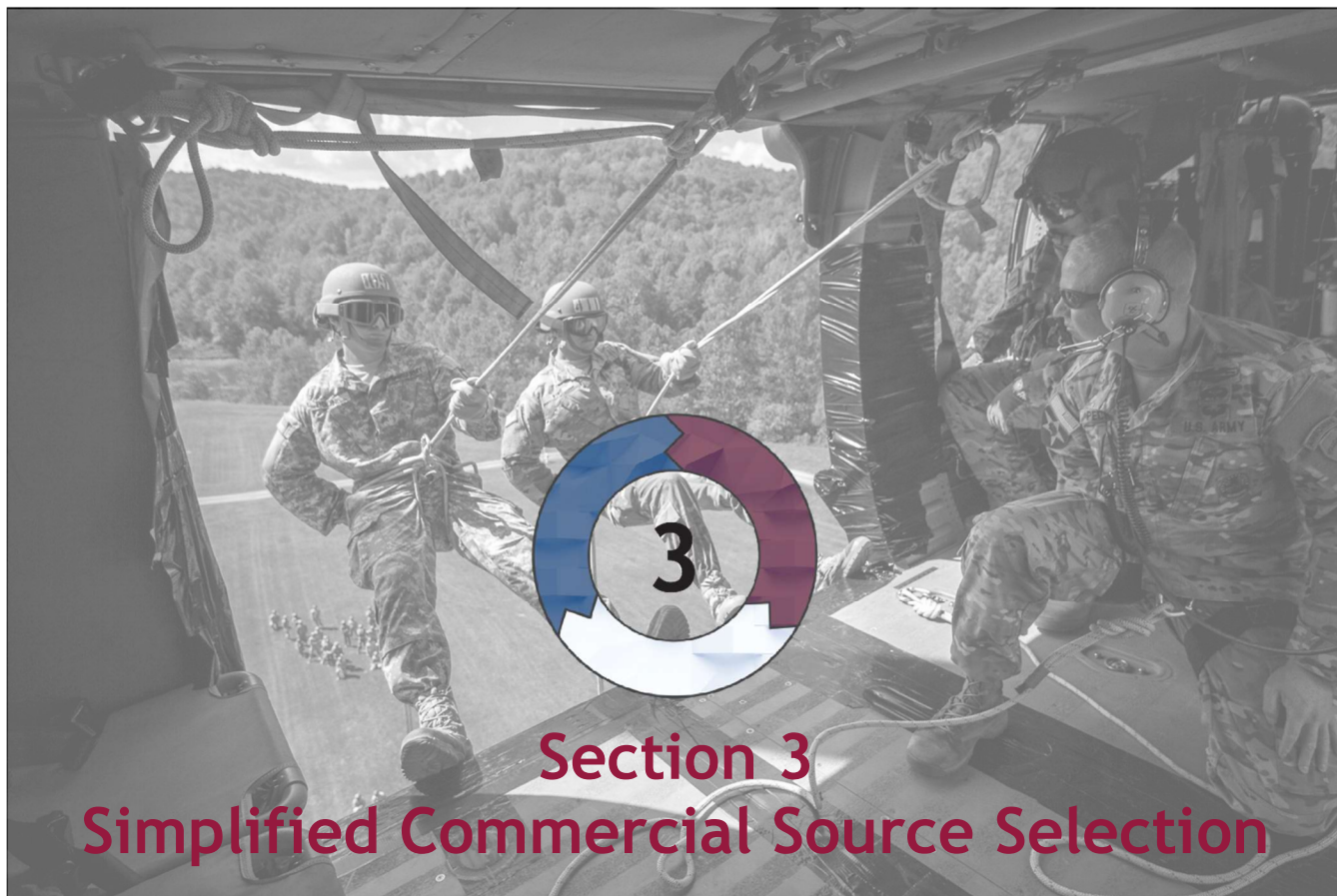
(A) the incremental development and fielding of capabilities, commonly called “spirals”, “spins”, or “sprints”, which can be measured in a few weeks or months; and

(B) continuous participation and collaboration by users, testers, and requirements authorities.

J. National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 1746 note)

SEC. 832. CONTRACTOR INCENTIVES TO ACHIEVE SAVINGS AND IMPROVE MISSION PERFORMANCE.

Not later than 180 days after the date of the enactment of this Act [Dec. 23, 2016], the Defense Acquisition University shall develop and implement a training program for Department of Defense acquisition personnel on fixed-priced incentive fee contracts, public-private partnerships, performance-based contracting, and other authorities in law and regulation designed to give incentives to contractors to achieve long-term savings and improve administrative practices and mission performance.



Much of the authority needed to further simplify procurements of commercial products and services is already in place but appears not to have been widely used.

RECOMMENDATION

Rec. 28: Simplify the selection of sources for commercial products and services.

INTRODUCTION

Despite numerous revisions to statutes and regulations, selecting sources for commercial products and services continues to take too long and involve unnecessarily complex procedures for buyers and sellers. Statutory changes aimed at expanding the applicability of the special streamlined acquisition procedures and updating the requirement to publish notices to reflect current technology would simplify selection of sources for commercial products and services. Improving guidance in the FAR, emphasizing the use of simplified acquisition procedures, revising the FAR to make it easier to locate procedures for using simplified acquisition procedures for commercial products and services, and defining streamlining-related terms in the FAR would also simplify commercial selection.

RECOMMENDATION

Recommendation 28: Simplify the selection of sources for commercial products and services.

Problem

Despite numerous revisions to statutes and regulations, selecting sources for commercial products and services continues to take too long and involve unnecessarily complex procedures for both government buyers and private-sector sellers.

Background

The Federal Acquisition Streamlining Act of 1994 (FASA) made notable changes to acquisition, including modifications to commercial buying (FAR Part 12) and simplified acquisition (FAR Part 13) procedures. FAR Part 12 established streamlined policies and procedures for acquiring *commercial items* (products and services) with no dollar limit. Part 13 established streamlined policies and procedures for buying any product or service (commercial or noncommercial) up to the simplified acquisition threshold (currently \$250,000). This applicability overlap has caused confusion since implementation of the two FAR parts in 1995.

Adding to the confusion, guidance in FAR 12.102, Applicability, instructs contracting officers to use Part 12 in conjunction with parts 13, 14, and 15 when selecting sources for commercial products and services.¹ FASA provided authority to publicize a synopsis for less than the standard 30 days, but offered little additional flexibility for selecting commercial products and services. As a consequence, when acquiring commercial products and services, contracting officers used a mixture of Part 13 simplified acquisition procedures below the simplified acquisition threshold (SAT), and the more formal Part 15 source selection procedures both below and above the SAT.

Section 4202 of the Federal Acquisition Reform Act of 1996 (FARA), Application of Simplified Procedures to Certain Commercial Items, offered the possibility of substantially simplifying the acquisition of commercial products and services.² This statute amended 41 U.S.C. § 1901(a) and 10 U.S.C. § 2304(g), authorizing use of special simplified procedures for commercial item acquisition at

¹ Applicability, FAR 12.102.

² FY 1996 NDAA, Pub. L. No. 104-106 (1996).

amounts greater than the simplified acquisition threshold but not greater than \$5 million when the contracting officer reasonably expects, based on the nature of the commercial items sought and on market research, that offers will include only commercial items. This authority was initially set to expire on January 1, 2000.

The proposed implementation of Section 4202 was published in the Federal Register dated September 6, 1996.³ The proposed rule established FAR 13.5, Test Program for Certain Commercial Items, and explained that the purpose of the proposed rule was “to vest contracting officers with additional procedural discretion and flexibility, so that commercial items acquisitions in this dollar range [\$100,000 – \$5,000,000] may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and industry.”⁴

The Federal Register notice further explained:

It is clear that the drafters of this legislation intended for commercial items to be purchased in as simplified a manner as possible. A report by the House Committee of Government Reform and Oversight (No. 104-222) on H.R. 1670 noted that ‘The purchase of a commercial item logically lends itself to simplified procedures because there exists a yardstick in the commercial marketplace against which to measure price and product quality and to serve a surrogate for Government-unique procedures.’

The intent of this proposed rule is to ensure the benefits of this new authority can be fully realized by giving contracting officers a clear understanding of the procedural discretion and flexibility they have, so that acquisitions of commercial items conducted under these regulations may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and its suppliers.⁵

The final rule implementing the test program was published in the Federal Register in January 1997, and amended several times in subsequent years to raise the threshold to \$7 million and extend the end date of the test program.⁶

Section 815 of the FY 2015 NDAA made the test program permanent for commercial item purchases greater than the SAT, but not exceeding \$7 million (\$13 million for certain emergency-related acquisitions).⁷

Discussion

Selecting sources can be one of the most important, time-consuming, and skill intensive responsibilities of a contracting officer. On occasion, it can result in an unsuccessful or disappointed offerors filing a protest. It is important contracting officers use the most appropriate and streamlined selection

³ 61 Fed. Reg. 47384 (Sep. 6, 1996).

⁴ Ibid.

⁵ Ibid.

⁶ 62 Fed. Reg. 262 (Jan. 2, 1997).

⁷ 80 Fed. Reg. 38311 (Jul. 2, 2015).

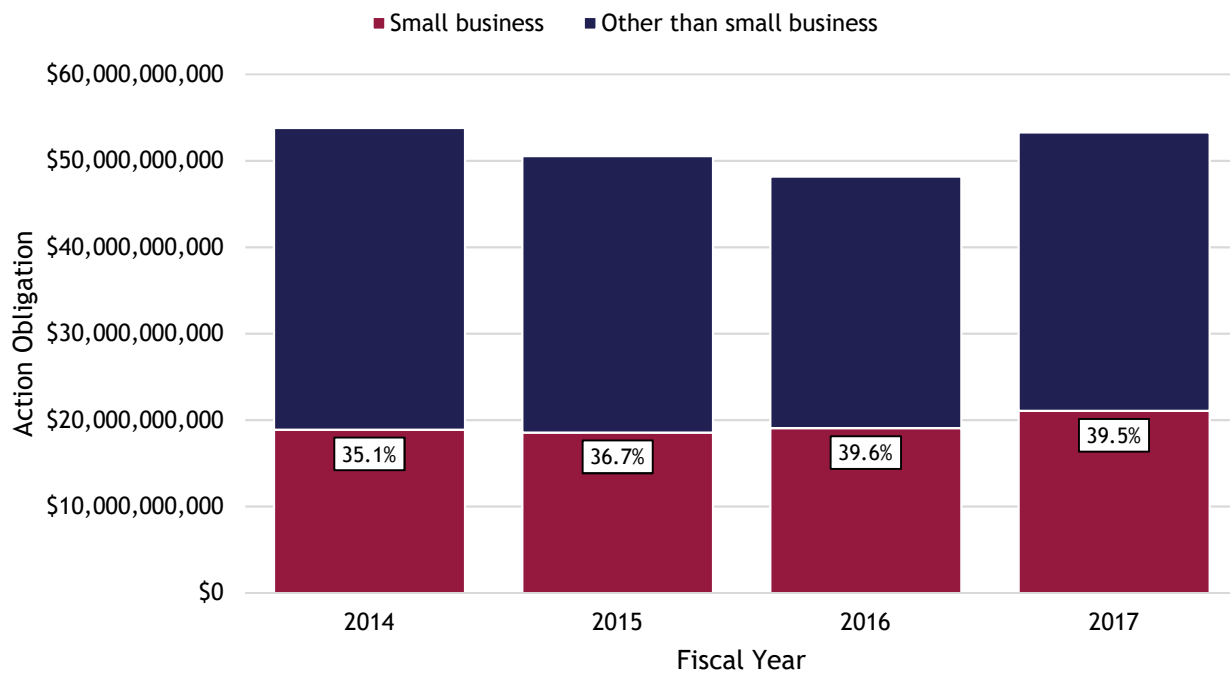
technique, taking into consideration factors such as the product or service being acquired, the expected value, technical complexity, and government-unique requirements.

The policies and procedures in Part 13 provide contracting officers with considerable discretion and flexibility. The Government Accountability Office (GAO) has recognized and supported this discretion and flexibility in numerous decisions.⁸ Extending the authority to use these simplified procedures for acquisition of commercial products and services up to \$7 million has the potential to substantially simplify and speed those acquisitions.

Streamlining the processes for acquiring commercial products and services is also likely to benefit small business. Small businesses are among the most affected by the heavy administrative burdens imposed by government contracts. Small businesses typically lack the overhead staff to establish and maintain business systems compliant with government-unique requirements.

FPDS data indicates that in recent years between 35 percent and 39 percent of DoD's commercial buys have been from small business (see Figure 3-1).⁹ The federal government's commercial buys from small business for that time period are in the same range.

Figure 3-1. FPDS-Reported DoD-Contracted Obligations Using Commercial Item Procedures



The Section 809 Panel reviewed 2017 FPDS data that indicated a majority of contract obligations for commercial products or services were under the \$7 million threshold for using simplified acquisition

⁸ See, for example, *American Artisan Products*, B-293801.2, June 7 2004, 2004 CPD ¶ 127 at 3; and *United Marine International, LLC*, B-281512, 99 CPD ¶ 44.

⁹ Data from FPDS, extracted March 22, 2018.

procedures to procure commercial products and services (see Figure 3-1).¹⁰ Although the data set cannot be used to identify which of these obligations already used the streamlined procedures, it does support the notion that DoD could garner benefits from clarifying and simplifying use of Part 13 simplified acquisition procedures for commercial products and services up to \$7 million (see Table 3-1).

Table 3-1. DoD Actions by Dollar Threshold, FY 2017

DoD Actions by Dollar Threshold, FY 2017 (Thresholds defined by base and all options value of contract action for modification-zero)			
	Commercial	Noncommercial	% Commercial
\$3,500 to \$150K	382,641	402,367	49%
\$150K to \$1M	43,960	45,007	49%
\$1M to \$7M	11,953	17,415	41%
\$7M and greater	2,112	7,654	22%
<i>Data do not include USTRANSCOM</i>			

A 2001 GAO evaluation of the simplified acquisition test program showed that although federal agencies argued there were positive benefits to the authority provided in the test program, there was little empirical data to support the program.¹¹ The Section 809 Panel’s review of more recent FPDS data regarding use of the test program suggests the test program is not being widely used, but the data reporting is also likely to be inaccurate due to confusion over the test program’s reporting process. Anecdotal information supports the assertion that streamlined procedures for acquiring commercial products and services up to the \$7 million threshold are underused.

Contracting officers are not taking full advantage of the simplification in selecting sources offered by the simplified acquisition procedures. If contracting officers took greater advantage of the simplified acquisition procedures, they would substantially streamline acquisition of commercial products and services.

One well respected professional publication addressed this issue, stating the following:¹²

One of the most remarkable and disappointing phenomena of Government contracting is the unwillingness or inability of many contracting officers to take advantage of the streamlining and labor-saving contract formation procedures that became available during the acquisition reform era of the 1990’s. COs needlessly resort to Federal Acquisition Regulation Part 15 solicitation, offer, and award procedures when making simplified acquisitions, when competing task orders under multiple award service contracts, and even when placing orders under General Services Administration schedules.

¹⁰ Data from FPDS, extracted March 22, 2018. Dollar categories are based on the number of modification-zero actions with reported “base and all options value” falling within the dollar amounts listed. USTRANSCOM (agency ID 9776), which makes up a majority of DoD contract actions, is omitted from this dataset.

¹¹ GAO, *Benefits of Simplified Test Procedures Not Clearly Demonstrated, April 2001, GAO-01-517*, accessed June 4, 2018, <https://www.gao.gov/new.items/d01517.pdf>.

¹² 21 NO. 7 Nash & Cibinic Report ¶ 31, July 2007.

The article cites a GAO decision in which a DoD buying activity used the more complex Part 15-type procurement procedures to select a contractor to provide room and board for military recruits.¹³ The article cites another GAO decision in which a civilian agency used Part 13 simplified procedures but with the more complex Part 15-type solicitation, offer, evaluation, and selection procedures to select from among numerous providers of a commercial product that was sold in the millions in the commercial marketplace all around the world.¹⁴

The author concludes by observing the following:

Based on my personal observations, several factors contribute to this problem. First, many of the buyers doing simplified acquisitions lack confidence in their own know-how, so procedural formality makes them feel safe, while creative simplicity seems dangerous. Second, those buyers lack a sound conceptual grounding in procurement and contract formation, which makes it hard for them to improvise simple procedures that are suitable for the acquisition at hand. Third, FAR Part 13 is poorly organized and sometimes confusing.

Conclusions

There are abundant opportunities for more streamlining of commercial products and services procurement. Much of the authority needed to further simplify these procurements is already in place but appears not to have been widely used. Several statutory and regulatory obstacles to greater use of simplified acquisition procedures for commercial products and services exist.

Unnecessarily Narrow Applicability of the Special Streamlined Acquisition Procedures

Perhaps one possible reason for the apparent underuse of the simplified acquisition procedures for commercial procurements can be found in statute. In establishing the authority to use simplified acquisition procedures to acquired commercial products and services up to \$7 million, Section 4202 of the FY 1996 NDAA (implemented at 41 U.S.C. § 1901) included an unnecessarily narrow restriction by authorizing the use of these procedures if the contracting officer expects “offers will include only commercial items.”

§1901. Simplified acquisition procedures

(a) WHEN PROCEDURES ARE TO BE USED. — To promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts —

(1) not greater than the simplified acquisition threshold; and

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

¹³ Finlen Complex, Inc., Comp. Gen. Dec. B-288280, 2001 CPD ¶ 167.

¹⁴ Bio-Rad Laboratories, Inc., Comp. Gen. B-297653, 2007 CPD ¶ 58, 49 GC ¶ 198.

This restriction is unnecessary, and conflicts with statute expressing the general preference for acquiring commercial items at 41 U.S.C. § 3307(b)(3) that requires offerors of commercial items and nondevelopmental items be provided the opportunity to fill the government's requirements.

(b) PREFERENCE — The head of each executive agency shall ensure that, to the maximum extent practicable —

(1) requirements of the executive agency with respect to a procurement of supplies or services are stated in terms of—

(A) functions to be performed;

(B) performance required; or

(C) essential physical characteristics;

(2) those requirements are defined so that commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items may be procured to fulfill those requirements; and

(3) offerors of commercial items and nondevelopmental items other than commercial items are provided an opportunity to compete in any procurement to fill those requirements.

This preference is implemented, in part, in FAR 10.002 (d)(1), which states that if the government's need may be met by a type of item or service customarily available in the marketplace. It specifically states, "the contracting officer shall solicit and award and resultant contract using the policies and procedures in Part 12." As long as the need may be met by the commercial marketplace, there is no restriction that *only* commercial items may be offered to meet the government's need.

Outdated Requirement to Publish Notices of Contract Actions

41 U.S.C. § 1708(a) and 15 U.S.C. § 637(e) require publication of notices, subject to certain thresholds, in three circumstances—notice of an intent to issue a solicitation, the posting in a public place at the contracting office of that notice, and the publication of a notice announcing the award. These statutes also require public solicitations be used for all procurements for which the contract value is expected to exceed \$25,000. These publication requirements are vestiges of the commerce era when paper notices, mailing of documents, and paper solicitations were common place.

Both statutes recognize the effect of modern electronic media (such as FedBizOpps, FPDS, USASpending) has had on the need for and method of making such publications. 41 U.S.C. § 1708(b)(1) provides an exception to these requirements if the following criteria are met:

(A) the proposed procurement is for an amount not greater than the simplified acquisition threshold and is to be conducted by —

(1) using widespread electronic public notice of the solicitation in a form that allows convenient and universal user access through a single, Government-wide point of entry; and

(2) permitting the public to respond to the solicitation electronically

15 U.S.C. § 637(g) provides a similar exception. These exceptions are limited, however, to procurements not greater than the *simplified acquisition threshold*, so the effect on streamlining commercial buying using the special simplified procedures in FAR 13.5 is limited to acquisitions under the SAT (\$250,000) and does not apply to procurements of commercial products and services between the SAT and the \$7 million special simplified acquisition procedures threshold. The language at 15 U.S.C. § 637(g) leaves in place the outdated procurement notice process for electronic procurements and creates an unnecessary restriction that limits the streamlining Congress is trying to achieve.

Solicitation posting requirements have not changed since 1984; therefore, they do not reflect the extent to which the commercial marketplace has evolved during the last 30 years.¹⁵ According to FAR 5.002, the purpose for publicizing contract actions is to “increase competition, broaden industry participation in meeting government requirements, assist [the various different types of] small businesses concerns...in obtaining contracts and subcontracts.”¹⁶ In today’s marketplace, using publicly posted solicitations for all commercial buying above \$25,000 has the potential to incentivize limited competition and can add unnecessary time to the process. It can result in what Assistant Secretary of the Navy for Research, Development, and Acquisition James F. Guerts described as “choosing between two bad decisions”¹⁷ when better solutions, readily available to other buyers in the marketplace, are not even considered because the vendor does not access FedBizOpps.

Congress has recognized the changing landscape of buying commercial products through e-commerce in Section 846 of the FY 2018 NDAA and the proposed expansion of micropurchase procedures for procurement through the Section 846 e-commerce portal.¹⁸ These changes will streamline purchasing up to the \$25,000 threshold, but contracting officers will still be unable to use processes that already exist in the FAR for purchases above the threshold. FAR 13.103 authorizes individuals to use standing price quotations as part of the simplified acquisition procedures, and 13.106-1(c) directs contracting officers to use oral solicitations to the maximum extent practicable when they are more efficient. Both of these procedures, however, have very limited application for purchases above \$25,000 because of the requirements in 41 U.S.C. § 1708, 15 U.S.C. § 637, and FAR 5. The existing process leaves the federal government with access to a very small segment of the commercial marketplace when the value of the procurement exceeds \$25,000.

Increasing a threshold that has not been increased in more than 30 years will enable contracting officers to leverage market research, standing price quotations as properly defined below, and oral and direct electronic solicitations to efficiently find the best products and services from the most capable suppliers

¹⁵ See Pub. L. No. 98-369, 98 STAT. 1196, Sec. 2732 (1985), codified at 41 U.S.C. § 1708. The simplified acquisition threshold has increased from \$100,000 to \$250,000, with simplified acquisition procedures authorized for commercial purchases over \$7 million, over that same period of time. The micro-purchase threshold has also been increased from \$2,500 to \$10,000. See Ron Smith, *Keep it Simple (Sometimes): Acquisition Thresholds are Changing (or Not)*, centrelawgroup.com, August 19, 2015, accessed May 17, 2018, <http://dev.centrelawgroup.com/keeping-it-simple-sometimes-acquisition-thresholds-are-changing-or-not/> and FY 2018 NDAA, Pub. L. No. 115-91, Section 805 and 806.

¹⁶ Publicizing Contract Actions: Policy, FAR 5.002.

¹⁷ Testimony to House Armed Services Committee Hearing, Assessing Military Service Acquisition Reform, March 7, 2018, <https://armedservices.house.gov/legislation/hearings/assessing-military-service-acquisition-reform>.

¹⁸ H.R. 5515, Section 843, Fiscal Year 2019 National Defense Authorization Bill, Chairman’s Mark, https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/FY19%20NDAA%20Chairman%27s%20Mark%20Final.pdf.

that provide the best value to the government. Currently, FAR Part 5 is confusing and complicated with multiple different thresholds requiring different publicizing requirements. In addition to the \$25,000 threshold, 41 U.S.C. § 1708, 15 U.S.C. § 637 still requires public posting on a bulletin board in the contracting office of all proposed contract actions expected to exceed \$15,000 but not exceed \$25,000. If contracting offices still perform this function, it is even further out of touch with the pervasive use of e-commerce and electronic communication in business today.¹⁹

Setting a single publication threshold that is consistent with obligations under U.S. trade agreements for all acquisition will help alleviate confusion created by the requirements in FAR Part 5 that are in tension with the simplified procedures in FAR Parts 12 and 13.²⁰ A threshold of \$75,000 is consistent with the increased simplified acquisition and micro-purchase thresholds and is only slightly more than \$60,000, which is what the \$25,000 threshold established in 1984 would be in inflation-adjusted dollars.²¹

Insufficient and Confusing Guidance is Provided for the Use of Commercial Policies and Procedures

The FAR direction to contracting officers regarding which procedures to use when acquiring commercial products and services can be confusing and does not drive contracting officers to use the simplest procedures available. For example, FAR 12.102, Applicability, requires that the contracting officer do the following when acquiring commercial items, regardless of dollar value:

[U]se the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; and Part 15, Contracting by Negotiation, as appropriate for the particular acquisition.

FAR 13.000, Scope of Part, states that when making an acquisition between the micro-purchase threshold (MPT) and the SAT, the contracting officer must use Part 13 which “prescribes policies and procedures for the acquisition of supplies and services, including...commercial items.” With this vague direction, it is understandable that contracting officers do not more widely use the streamlined acquisition procedures for procuring commercial products and services.

FAR Guidance for Streamlined Authority for Commercial Buying is Misplaced

The authority to use Part 13 simplified acquisition procedures for acquiring certain commercial products and services was implemented in Subpart 13.5, Test Program for Certain Commercial Items. Placing the policy and procedures in Part 13 makes some organizational sense, but it would be more appropriately placed in Part 12.6 where buyers would be looking when preparing to make a commercial buy, especially true if a contracting officer were preparing to make a commercial buy with an expected value greater than the SAT.

¹⁹ In fact, for DoD, most contracting activities are on military installations that the public does not have access to. Only those contractors that already have access to the installation would be able to see notices posted to bulletin boards.

²⁰ See FAR 24.5.

²¹ See Bureau of Labor Statistics Consumer Price Index Inflation Calculator at <https://data.bls.gov/cgi-bin/cpicalc.pl>. October 1984 and May 2018 were the dates used to calculate the inflation adjusted threshold.

Use of Simplified Acquisition Procedures is not Sufficiently Emphasized

FAR 13.500, Simplified Procedures for Certain Commercial Items, does not require use of the simplified procedures, but merely gives contracting officers the *authority* to use simplified acquisition procedures, and provides that they *may* use any simplified procedure. As noted above, contracting officers may be uncomfortable with the flexibility it provides or may simply find greater comfort with the more structured procedures on Parts 14 and 15. If DoD is going to take greater advantage of the commercial marketplace, it must take a more aggressive approach to using streamlined acquisition procedures when acquiring commercial products and services. Commercial sellers are demanding more simplicity; Congress has provided more simplicity in statute, and contracting officers have indicated they want more simplicity for acquiring commercial products and services.²²

Existing Procedures for Using Simplified Acquisition Procedures are Disjointed

There is no shortage of references to use of simplified acquisition procedures for acquiring commercial products and services. Simply stating contracting officers should use simplified acquisition procedures when acquiring commercial products and services is not enough. As noted above, Part 13 is poorly organized and confusing. For example, in researching the *simplified procedures* available under the authority in FAR 13.5, it was necessary to review policies and procedures in FAR Parts 2, 5, 6, 10, 11, 12, 13, 18, and 19. As the Section 809 Panel was told in sensing sessions with contracting officers, “simplified procedures need to be simple.”

Important Streamlining-Related Terms are Not Defined

One of the simplified procedures available in Part 13 is the use of *standing price quotations* (13.103), which allows the use of available pricing without obtaining individual quotations, yet this term is not defined. Similarly, contracting officers are authorized in Part 11.103 to require offerors to demonstrate that items offered have achieved *commercial market acceptance*, yet that term is also not defined.

Implementation

Legislative Branch

- Revise 15 U.S.C. § 637(g) and 41 U.S.C. § 1708(b) to extend the exemption to the requirement to publish notices of contract actions to procurements using *simplified acquisition procedures*. The current exemption has an upper limit of the Simplified Acquisition Threshold. By revising the statute’s threshold from the *simplified acquisition threshold* to the use of *simplified acquisition procedures*, procurements under the special simplified acquisition procedures under 41 U.S.C. § 1901 and 10 U.S.C. § 2304(g) will be included.
- Revise 15 U.S.C. § 637(e) and 41 U.S.C. § 1708(a) to eliminate the requirement to post solicitation documents in a public place and to increase the threshold for the requirement to publish notice of a proposed contract action on the GPE from \$25,000 to \$75,000. This revision eliminates the obsolete posting requirement and raises the 30 old synopsis threshold.

²² Contracting officers, interviews with Section 809 Panel.

- Revise 41 U.S.C. § 1901(a), 41 U.S.C. § 3305 (a), and 10 U.S.C. § 2304(g) to remove the word *only*. This change will make the authority provided by these statutes consistent with the preference for commercial products and services in 41 U.S.C. § 3307(b) and 10 U.S.C. § 2377.

Executive Branch

- Revise FAR 2.101 and 11.103 to define the term *market acceptance*; revise FAR 2.101 and 13.103 to define the term *standing price quotation*. These terms are already contained in the FAR but are undefined. Both terms represent techniques that may offer contracting officers the opportunity to streamline the procurement of commercial products and services.
- Revise FAR 5.202(b)(13) and 5.301(b)(6) to conform to the statutory changes at 15 U.S.C. § 637 and 41 U.S.C. § 1708.
- Revise 12.102 and 13.000 to clarify the relationship between Part 12 and Part 13. Contracting officers are required to use Part 12 when acquiring commercial products and services with an expected value greater than the MPT; Part 13 would focus on all purchases below the MPT, and purchases of noncommercial products and services between the MPT and SAT.
- Revise the FAR to move the authority to use simplified acquisition procedures for commercial products and services in FAR 13.5, Simplified Procedures for Certain Commercial Items, to FAR 12.6, Selection of Sources for Commercial Products and Services. This change makes the simplified procedures for procuring commercial products and services available in the logical part of the FAR that primarily focuses on procurements of commercial products and services.
- Revise FAR 12.203 and 12.6, Streamlined Procedures for Evaluation and Solicitation for Commercial Items, to focus more broadly on the *selection of sources for commercial products and services*. The existing language implies a more complex process for selecting sources. With the clarification of the relationship between Parts 12 and 13, and the incorporation in 12.6 of special streamlined procedures for acquiring commercial products and services, the revised Subpart 12.6 would focus on using simplified procedures for selecting sources first, and using more complex procedures only when procuring products and services over the SAT.
- Revise FAR 12.602 (d) to require contracting officers to use simplified acquisition procedures when acquiring commercial products and services with an expected value between the MPT and the thresholds provided by 41 U.S.C. §§ 1901 and 1903 implemented in FAR 12.602(c). Require contracting officers to obtain approval to use the complex policies and procedures in Part 14 or Part 15 to acquire commercial products or services below the threshold in FAR 12.602(c).
- Revise FAR 12.6 to organize in one location the simplified acquisition procedures available to contracting officers under the authority of 41 U.S.C. §§ 1901 and 1903. This change gives contracting officers more clarity, direction, and confidence in using simplified procedures rather than more familiar, but possibly inappropriate, complex procedures for procuring commercial products and services.

- Revise FAR 12.604, Combined Synopsis/Solicitation, to reflect the statutory revisions at 15 U.S.C. § 637 and 41 U.S.C. § 1708 that would limit the need to a synopsis to paper solicitations.

Note: Explanatory report language, draft legislative text, and regulatory revisions can be found in the Implementation Details subsection at the end of Section 3.

Implications for Other Agencies

- The recommended changes to statute and the FAR would apply to DoD and the civilian agencies that use the FAR. Both DoD and the civilian agencies will benefit from these recommendations.

Section 3
Simplified Commercial Source Selection
Implementation Details

Recommendation 28

RECOMMENDED REPORT LANGUAGE

SEC. 304. Revision to Source Selection Requirements for Acquisition of Commercial Products and Services.

This section would amend section 1708(a), title 41, United States Code, and section 637(e), title 15, United States Code, to increase the threshold for requiring procurement notices to be published from \$25,000 to \$75,000, and expand the use of combined synopsis and solicitations to all commercial product and service procurements made using simplified acquisition procedures. This section would also remove the requirement to post procurement opportunities valued above the micro-purchase threshold, but below \$25,000, from being posted in a public place in the contracting office, and remove the limitation on the use of simplified acquisition procedures for commercial products and services to procurements made up of only commercial products and services.

The committee notes that while the threshold for using simplified acquisition procedures is currently \$7 million (\$13 million for products or services procured in support of a contingency or recovery from a nuclear, chemical, or biological attack), the simplified procedure for using a combined synopsis and solicitation has remained limited to only those procurements below the simplified acquisition threshold. The committee is aware that this threshold has not been increased in over 30 years despite the micro-purchase and simplified acquisition thresholds being raised multiple times. The committee expects these amendments would advance efforts to further simplify the simplified acquisition procedures for the purpose of increasing agencies' ability to access commercially viable technologies and solutions from innovative and non-traditional sources.

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COMMERCIAL ITEMS #2

[NOTE: The draft legislative text below is followed by a “Sections Affected” display, showing the text of each provision of law affected by the draft legislative text.]

SEC. 304. REVISION TO SOURCE SELECTION REQUIREMENTS FOR
ACQUISITION OF COMMERCIAL PRODUCTS AND SERVICES.

(a) THRESHOLD FOR REQUIRED PUBLICATION OF NOTICE.—

(1) SMALL BUSINESS ACT.—Section 8 of the Small Business Act (15 U.S.C. 637) is amended—

(A) in subsection (e)(1)—

(i) by striking “\$25,000” in clauses (i) and (ii) of subparagraph (A)

and inserting “\$75,000”;

(ii) by inserting “and” at the end of subparagraph (A);

(iii) by striking subparagraph (B); and

(iv) by redesignating subparagraph (C) as subparagraph (B); and

(B) in subsection (g)(1)(A)—

(i) by striking “for an amount not greater than the simplified acquisition threshold and is” in the matter preceding clause (i);

(ii) by redesignating clauses (i) and (ii) as clauses (ii) and (iii), respectively;

(iii) by inserting before clause (ii), as so redesignated, the following new clause (i):

“(i) using simplified acquisition procedures;”; and

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COMMERCIAL ITEMS #2

(iv) by striking the period at the end of clause (iii), as so

redesignated, and inserting a semicolon.

(2) TITLE 41, UNITED STATES CODE.—Section 1708 of title 41, United States Code,

is amended—

(A) in subsection (a)—

(i) by striking paragraph (1);

(ii) by redesignating paragraphs (2) and (3) as paragraphs (1) and

(2), respectively;

(iii) by striking “\$25,000” in subparagraphs (A) and (B) of

paragraph (1), as so redesignated, and inserting “\$75,000”; and

(iv) by striking “\$25,000” both places it appears in paragraph (2),

as so redesignated, and inserting “\$75,000”; and

(B) in subsection (b)(1)(A)—

(i) by striking “for an amount not greater than the simplified

acquisition threshold and is” in the matter preceding clause (i);

(ii) by redesignating clauses (i) and (ii) as clauses (ii) and (iii),

respectively; and

(iii) by inserting before clause (ii), as so redesignated, the

following new clause (i):

“(i) using simplified acquisition procedures;”.

(b) AVAILABILITY OF SIMPLIFIED ACQUISITION PROCEDURES FOR CERTAIN ABOVE-

THRESHOLD PURCHASES WHEN OFFERS ARE EXPECTED TO INCLUDE COMMERCIAL PRODUCTS OR

SERVICES.—

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COMMERCIAL ITEMS #2

(1) TITLE 41, UNITED STATES CODE.—Sections 1901(a)(2) and 3305(a)(2) of title 41, United States Code, are amended by striking “only”.

(2) TITLE 10, UNITED STATES CODE.—Section 2304(g)(1)(B) of title 10, United States Code, is amended by striking “only”.

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*.]

Section 8 of the Small Business Act (15 U.S.C. 637)

SEC. 8. (a) ***

(e)(1) Except as provided in subsection (g)—

(A) an executive agency intending to—

(i) solicit bids or proposals for a contract for property or services for a price expected to exceed ~~\$25,000~~ ***\$75,000***; or

(ii) place an order, expected to exceed ~~\$25,000~~ ***\$75,000***, under a basic agreement, basis ordering agreement, or similar arrangement, shall publish a notice described in subsection (f); ***and***

~~(B) an executive agency intending to solicit bids or proposals for a contract for property or services shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection (f)—~~

~~(i) in the case of an executive agency other than the Department of Defense, if the contract is for a price expected to exceed \$10,000, but not to exceed \$25,000; and~~

~~(ii) in the case of the Department of Defense, if the contract is for a price expected to exceed \$5,000, but not to exceed \$25,000; and~~

~~(C)~~ ***(B)*** an executive agency awarding a contract for property or services for a price exceeding \$100,000, or placing an order referred to in clause (A)(ii) exceeding \$100,000, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order.

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COMMERCIAL ITEMS #2

(2)(A) A notice of solicitation required to be published under paragraph (1) may be published—

(i) by electronic means that meet the accessibility requirements under section 18(a)(7) of the Office of Federal Procurement Policy Act (41 U.S.C. 416(a)(7)); or

(ii) by the Secretary of Commerce in the Commerce Business Daily.

(B) The Secretary of Commerce shall promptly publish in the Commerce Business Daily each notice or announcement received under this subsection for publication by that means.

(3) Whenever an executive agency is required by paragraph (1)(A) to publish a notice of solicitation, such executive agency may not—

(A) issue the solicitation earlier than 15 days after the date on which the notice is published; or

(B) in the case of a contract or order estimated to be greater than the simplified acquisition threshold, establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that—

(i) in the case of an order under a basic agreement, basic ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

(ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or

(iii) in any other case, is earlier than the date 30 days after the date the solicitation is issued.

(f) ***

* * * * *

(g)(1) A notice is not required under subsection (e)(1) if—

(A) the proposed procurement is ~~for an amount not greater than the simplified acquisition threshold and is to be conducted by—~~

(i) using simplified acquisition procedures;

~~(i)~~ **(ii)** using widespread electronic public notice of the solicitation in a form that allows convenient and universal user access through a single, Government-wide point of entry; and

~~(ii)~~ **(iii)** permitting the public to respond to the solicitation notice electronically;

(B) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

(C) the proposed procurement would result from acceptance of—

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal; or

(ii) a proposal submitted under section 9 of this Act;

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COMMERCIAL ITEMS #2

- (D) the procurement is made against an order placed under a requirements contract;
- (E) the procurement is made for perishable subsistence supplies;
- (F) the procurement is for utility services, other than telecommunication services, and only one source is available; or
- (G) the procurement is for the services of an expert for use in any litigation or dispute (including preparation for any foreseeable litigation or dispute) that involves or could involve the Federal Government in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify.

TITLE 41, UNITED STATES CODE

§1708. Procurement notice

- (a) NOTICE REQUIREMENT.—Except as provided in subsection (b)—
 - ~~(1) an executive agency intending to solicit bids or proposals for a contract for property or services for a price expected to exceed \$10,000, but not to exceed \$25,000, shall post, for not less than 10 days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection (c);~~
 - ~~(2)~~ **(1)** an executive agency shall publish a notice of solicitation described in subsection (c) if the agency intends to—
 - (A) solicit bids or proposals for a contract for property or services for a price expected to exceed ~~\$25,000~~ **\$75,000**; or
 - (B) place an order, expected to exceed ~~\$25,000~~ **\$75,000**, under a basic agreement, basic ordering agreement, or similar arrangement; and
 - ~~(3)~~ **(2)** an executive agency awarding a contract for property or services for a price exceeding ~~\$25,000~~ **\$75,000**, or placing an order exceeding ~~\$25,000~~ **\$75,000** under a basic agreement, basic ordering agreement, or similar arrangement, shall furnish for publication a notice announcing the award or order if there is likely to be a subcontract under the contract or order.
- (b) EXEMPTIONS.—
 - (1) IN GENERAL.—A notice is not required under subsection (a) if—
 - (A) the proposed procurement is ~~for an amount not greater than the simplified acquisition threshold and is~~ to be conducted by—
 - ~~(i)~~ **(i) using simplified acquisition procedures;**
 - ~~(ii)~~ **(ii) using widespread electronic public notice of the solicitation in a form that allows convenient and universal user access through a single, Government-wide point of entry; and**
 - ~~(iii)~~ **(iii) permitting the public to respond to the solicitation electronically;**
 - (B) ***

* * * * *

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COMMERCIAL ITEMS #2

§1901. Simplified acquisition procedures

(a) **WHEN PROCEDURES ARE TO BE USED.**—To promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts—

(1) not greater than the simplified acquisition threshold; and

(2) greater than the simplified acquisition threshold but not greater than \$5,000,000 for which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include **only** commercial items.

* * * * *

§3305. Simplified procedures for small purchases

(a) **AUTHORIZATION.**—To promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts—

(1) not greater than the simplified acquisition threshold; and

(2) greater than the simplified acquisition threshold but not greater than \$5,000,000 for which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include **only** commercial items.

* * * * *

TITLE 10, UNITED STATES CODE

§2304 Contracts: competition requirements

(a) ***

* * * * *

(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 services sought and on market research, that offers will include **only** commercial items.

Section 809

Commercial Buying Committee

Draft and Regulatory Revisions

Selecting Sources for Commercial Products and Services

FAR Subpart 2.101 - Definitions

Market Acceptance means that a product has an established record of performance in the commercial market place for a sufficiently large consumer base that warrants the product's continued production and availability in the market place.

Standing price quotation means an offer from a potential supplier to the general public to provide goods and/or services at prearranged prices under established terms and conditions. A standing price quotation is not a contract. The Government has no obligation to acquisition under the standing price quotation. No contract exists until the government issues an order against the standing price quotation. Commercial products and services offered to the public in widely available catalogs or the internet are examples of standing price quotations.

5.101 Methods of disseminating information.

(a) As required by the Small Business Act (15 U.S.C. 637(e)) and the Office of Federal Procurement Policy Act (41 U.S.C. 1708), contracting officers must disseminate information on proposed contract actions as follows:

(1) For proposed contract actions expected to exceed \$2575,000, by synopsisizing in the GPE (see 5.201).

~~(2) For proposed contract actions expected to exceed \$15,000, but not expected to exceed \$25,000, by displaying in a public place, or by any appropriate electronic means, an unclassified notice of the solicitation or a copy of the solicitation satisfying the requirements of 5.207(c). The notice must include a statement that all responsible sources may submit a response which, if timely received, must be considered by the agency. The information must be posted not later than the date the solicitation is issued, and must remain posted for at least 10 days or until after quotations have been opened, whichever is later.~~

FAR Subpart 5.2 -- Synopses of Proposed Contract Actions

5.201 -- General.

(a) As required by the Small Business Act (15 U.S.C. 637(e)) and 41 U.S.C. 1708, agencies must make notices of proposed contract actions available as specified in paragraph (b) of this section.

(b) (1) For acquisitions of supplies and services, other than those covered by the exceptions in [5.202](#), and the special situations in [5.205](#), the contracting officer must transmit a notice to the GPE, for each proposed --

5.202 -- Exceptions.

The contracting officer need not submit the notice required by [5.201](#) when --

(a) The contracting officer determines that --

(13) The proposed contract action--

(i) ~~Is for an amount not expected to exceed the simplified acquisition threshold to~~ be conducted by using simplified acquisition procedures;

(ii) ~~Will be made through a means that provides access to the notice of proposed contract action through the GPE~~ Using widespread electronic public notice of the solicitation in a form that allows convenient and universal user access through a single, Government-wide point of entry (GPE); and

(iii) Permits the public to respond to the solicitation electronically;

5.203 – Publicizing and response time.

Whenever agencies are required to publicize notice of proposed contract actions under [5.201](#), they must proceed as follows:

(a) An agency must transmit a notice of proposed contract action to the GPE (see 5.201). All publicizing and response times are calculated based on the date of publication. The publication date is the date the notice appears on the GPE. The notice must be published at least 15 days before issuance of a solicitation, or a proposed contract action the Government intends to solicit and negotiate with only one source under the authority of 6.302, except that, for acquisitions of commercial items, the contracting officer may --

(1) Establish a shorter period for issuance of the solicitation; or

(2) Use the combined synopsis and solicitation procedure (see 12.603).

(b) The contracting officer must establish a solicitation response time that will afford potential offerors a reasonable opportunity to respond to each proposed contract action, (including actions where the notice of proposed contract action and solicitation information is accessible through the GPE), in an amount estimated to be greater than \$7525,000, but not greater than the simplified acquisition threshold; or each contract action for the acquisition of commercial items in an amount estimated to be greater than \$7525,000. The contracting officer should consider the circumstances of the individual acquisition, such as the complexity, commerciality, availability, and urgency, when establishing the solicitation response time.

5.205 Special situations.

(d) Architect-engineering services. Contracting officers must publish notices of intent to contract for architect-engineering services as follows:

(1) Except when exempted by 5.202, contracting officers must transmit to the GPE a synopsis of each proposed contract action for which the total fee (including phases and options) is expected to exceed \$2575,000.

~~(2) When the total fee is expected to exceed \$15,000 but not exceed \$25,000, the contracting officer must comply with 5.101(a)(2). When the proposed contract action is not required to be synopsized under paragraph (d)(1) of this section, the contracting officer must display a notice of the solicitation or a copy of the solicitation in a public place at the contracting office. Other optional publicizing methods are authorized in accordance with 5.101(b). —~~

Subpart 5.3 -- Synopses of Contract Awards

5.301 -- General.

(a) Except for contract actions described in paragraph (b) of this section and as provided in [5.003](#), contracting officers must synopsize through the GPE the following:

(b) A notice is not required under paragraph (a)(1) of this section if –

(6) The contract action –

(i) ~~Is~~ Was conducted using simplified acquisition procedures ~~for an amount not greater than the simplified acquisition threshold;~~

(ii) Using widespread electronic public notice of the solicitation in a form that allows convenient and universal user access through a single, Government-wide

point of entry (GPE); ~~Was made through a means where access to the notice of proposed contract action was provided through the GPE;~~ and

(iii) Permitted the public to respond to the solicitation electronically; or

FAR Part 11 – Describing Agency Needs

11.103 -- Market Acceptance.

(a) 41 U.S.C. 3307(e) provides that, in accordance with agency procedures, the head of an agency may, under appropriate circumstances, require offerors to demonstrate that the items offered --

(1) Have either --

(i) Achieved commercial market acceptance as defined in 2.101; or

(ii) Been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and

(2) Otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation.

(b) Appropriate circumstances may, for example, include situations where the agency's minimum need is for an item that has a demonstrated reliability, performance or product support record in a specified environment. Use of market acceptance is inappropriate when new or evolving items may meet the agency's needs.

(c) In developing criteria for demonstrating that an item has achieved commercial market acceptance, the contracting officer shall ensure the criteria in the solicitation --

(1) Reflect the minimum need of the agency and are reasonably related to the demonstration of an item's acceptability to meet the agency's minimum need;

(2) Relate to an item's performance and intended use, not an offeror's capability;

(3) Are supported by market research;

(4) Include consideration of items supplied satisfactorily under recent or current Government contracts, for the same or similar items; and

(5) Consider the entire relevant commercial market, including small business concerns.

(d) Commercial market acceptance shall not be used as a sole criterion to evaluate whether an item meets the Government's requirements.

(e) When commercial market acceptance is used, the contracting officer shall document the file to --

(1) Describe the circumstances justifying the use of commercial market acceptance criteria; and

(2) Support the specific criteria being used.

FAR Part 12 – Acquisition of Commercial Items Products and Services

Subpart 12.1 – Acquisition of Commercial Items Products and Services -- General

12.102 -- Applicability.

(a) This part shall be used for the acquisition of supplies products or services that meet the definition of commercial items products and commercial services at [2.101](#).

(b) ~~Contracting officers shall use the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition.~~

(c) Contracts for the acquisition of commercial items are subject to the policies in other parts of the FAR. When a policy in another part of the FAR is inconsistent with a policy in this part, this part 12 shall take precedence for the acquisition of commercial items.

Subpart 12.2 – Special Requirements for the Acquisition of Commercial Items Products and Services

12.203 – Procedures for Solicitation, Evaluation, and Award Selection of Sources for Commercial Products and Services.

Contracting officers shall use the policies unique to for the acquisition of commercial items products and services prescribed in subpart 12.6. ~~this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition. The contracting officer may use the streamlined procedure for soliciting offers for commercial items prescribed in [12.603](#). For acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding \$7 million (\$13 million for~~

acquisitions as described in [13.500\(c\)](#)), including options, contracting activities may use any of the simplified procedures authorized by [Subpart 13.5](#).

Subpart 12.6 -- Streamlined Procedures for Evaluation and Solicitation Selection of Sources for Commercial Items Products and Services

12.601 -- General.

This subpart provides optional procedures for

- (a) streamlined evaluation of offers for commercial items; and
- (b) streamlined solicitation of offers for commercial items for use where appropriate. These procedures are intended to simplify the process of preparing and issuing solicitations, and evaluating offers for commercial items consistent with customary commercial practices.

This subpart provides streamlined procedures for selecting sources for commercial products or services.

- (a) Part 12 shall be used for acquiring commercial products or services where the contract action is expected to exceed the micro-purchase threshold.
- (b) The policies and procedures in this subpart include the authority provided by Section 4202, P.L. 104-106 for acquiring certain commercial products or services exceeding the simplified acquisition threshold using the simplified acquisition procedures contained in Part 13.

12.602 -- Streamlined Evaluation of Offers.

(a) When evaluation factors are used, the contracting officer may insert a provision substantially the same as the provision at [52.212-2](#), Evaluation Commercial Items, in solicitations for commercial items or comply with the procedures in [13.106](#) if the acquisition is being made using simplified acquisition procedures. When the provision at [52.212-2](#) is used, paragraph (a) of the provision shall be tailored to the specific acquisition to describe the evaluation factors and relative importance of those factors. However, when using the simplified acquisition procedures in Part 13, contracting officers are not required to describe the relative importance of evaluation factors.

(b) Offers shall be evaluated in accordance with the criteria contained in the solicitation. For many commercial items, the criteria need not be more detailed than technical (capability of the item offered to meet the agency need), price and past performance. Technical capability may be

~~evaluated by how well the proposed products meet the Government requirement instead of predetermined subfactors. Solicitations for commercial items do not have to contain subfactors for technical capability when the solicitation adequately describes the item's intended use. A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features and warranty provisions. Past performance shall be evaluated in accordance with the procedures in [13.106](#) or [Subpart 15.3](#), as applicable. The contracting officer shall ensure the instructions provided in the provision at [52.212-1](#), Instructions to Offerors—Commercial Items, and the evaluation criteria provided in the provision at [52.212-2](#), Evaluation—Commercial Items, are in agreement.~~

~~(c) Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered.~~

12.602 – Taking advantage of the commercial marketplace.

(a) By definition, commercial products and commercial services are available or will be available in time to satisfy the government's requirement. As a result, ample information should be readily available with regard to product specifications and features, service plans, capabilities, past performance and other information relevant to the seller's conduct of business in the commercial marketplace.

(b) If, after conducting appropriate market research, the contracting officer determines the government's requirement can be satisfied by a commercial product or commercial service, the contracting officer should proceed to identify and select a source(s) using the simplest, most efficient and expeditious methods.

(c) To simplify purchases and avoid unnecessary costs and administrative burdens for agencies and contractors, contracting officer shall use the procedures in this subpart to acquire commercial products or services. This subpart includes the authority to use simplified acquisition procedures (Part 13) when –

- 1) acquiring commercial products or services with a value not greater than \$7,000,000 (including options) for which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include commercial items (See 10 U.S.C §2304(g); 41 U.S.C. §1901 and §3305); and
- 2) acquiring commercial products or services with a value not greater than \$13,000,000 (including options) that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack, international disaster assistance, or an emergency or major disaster. (See 41 U.S.C. 1903)

(d) Contracting Officers may use the more complex selection techniques, such as those in Part 14 or Part 15, if the value of the acquisition exceeds or is expected to exceed the thresholds in

12.602 (c). The justification for use of procedures in Part 14 or Part 15 to select a source for a commercial product or commercial service with an expected value below the thresholds in 12.602(c) shall be approved by a level above the contracting officer.

12.603 Selecting sources for commercial products and services below the threshold in 12.602(c)

(a) The GPC is the preferred method for acquiring commercial products and services below the micro purchase threshold.

(b) For acquisitions of commercial products or services above the micro purchase threshold, the use of the simplified acquisition procedures for acquiring commercial products or services gives contracting officers significant flexibility to adapt selection procedures specifically to the commercial product or service being acquired. The contracting officer is also given considerable discretion in the conduct of the solicitation, evaluation and award consistent with the nature of the products or services and their availability in the commercial marketplace.

(c) The key flexibilities available when acquiring commercial products or commercial services (including construction) below the thresholds in 12.602 are summarized below –

(1) Market research. Information regarding commercial products or services should be readily available from a variety of public sources. Contracting officers should conduct market research for products or services acquired under this subpart to an extent consistent with the relative complexity and value of the proposed acquisition, and the intent of the simplified acquisition procedures. (See Subpart 10.002.)

(2) Competition. Acquisitions under this subpart are exempt from the requirements of Part 6. (See 41 USC §1901(c); FAR 6.001(a)) The contracting officer shall solicit from a reasonable number of sources to promote competition to the maximum extent practicable.

(3) Soliciting from only one source.

(i) For acquisitions not exceeding the simplified acquisition threshold, the contracting officers may solicit from only one source (including brand name) if the contracting officer determines that the circumstances of the acquisition deem only one source is reasonably available. (See 13.106-1(b))

(ii) For acquisitions exceeding the simplified acquisition threshold but not exceeding the threshold in 12.602, Contracting officers shall –

(A) Prepare and obtain approval of a justifications for a sole source (including brand name) acquisition or portions of an acquisition requiring brand name using the format at [6.303-2](#), modified to reflect that the procedures in FAR subpart 12.6 were used in accordance with the authority of 41 U.S.C. §1901 or 41 U.S.C §1903;

(B) For acquisitions exceeding the simplified acquisition threshold, but not exceeding \$700,000, the contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(C) For acquisitions exceeding \$700,000, but not exceeding the threshold in 12.602, the advocate for competition for the procuring activity must approve the justification and approval. This authority may not be redelegated.

(iii) Make brand name justifications publicly available with the solicitation. (See 5.102 (a)(6) and 6.302-1 (c)); and

(iv) Make justifications (other than brand name) publicly available within 14 days after contract award, or in the case of unusual and compelling urgency, within 30 days after contract award.

(4) Small business set-asides. Small Business set-asides remain applicable at the threshold in 19.502-2(a).

(5) Synopsis of proposed contract actions

(i) Oral solicitations do not need to be synopsisized and may be used up to the WTO GPA threshold (see Subpart 25.4).

(ii) Electronic solicitations do not need to be synopsisized if the solicitation will be available through the GPE at FedBizOpps and it permits the public to respond to the solicitation electronically. (See 5.202 (a)(13)).

(iii) Written (paper) solicitations shall be synopsisize when the proposed contract action is expected to exceed \$75,000. Synopsis may be published less than 15 days prior to issuance of the solicitation (See 5.203(a)), or a combined synopsis and solicitation may be used. (See 12.604)

(6) Terms and conditions. Contracting officers shall use the terms and conditions prescribed in 12.3 when acquiring commercial products or services under this subpart. Indicate in Block 27 of the DD 1449 if additional terms beyond 52.212-4, Contract Terms and Conditions - Commercial Products and Services, are included.

(7) Solicitation method

(i) Contracting officers may solicit quotations using an oral solicitation, a request for quotation (RFQ), or proposals using a request for proposal (RFP), as appropriate for the particular circumstance.

(ii) The contracting officer shall solicit quotations orally to the maximum extent practicable for acquisitions under \$75,000, or if covered by an exception in 5.202. (See 13.106-

1(c)) When using oral solicitation, the contracting officer should consider soliciting at least three sources. (See 13.104(b))

(iii) When an oral solicitation is not practicable, the preferred method of soliciting commercial products or services is an electronic solicitation available through the GPE at FedBizOpps permitting the public to respond to the solicitation electronically. Solicitations may also be distributed electronically directly to potential offerors in addition to posting them to the GPE.

(iv) A written (paper) solicitation should be used only if obtaining electronic or oral quotations is deemed to be uneconomical or impracticable and the acquisition will exceed \$25,000. (See 13.106-1(d))

(v) Solicitations for construction exceeding \$2000 (where Wage Rate Requirements apply) and solicitations for services exceeding \$2500 (where the Service Contract Labor Standards apply) shall be electronic or written (paper).

(vi) The solicitation shall include a statement that all responsible sources may submit a proposal or quotation (as appropriate) that the agency shall consider. (See 41 USC §1708 (c)(4))

(vii) Standing price quotations, as defined in 2.101, may be used (See 13.103).

(8) Offeror response time: The contracting officer must establish a solicitation response time for each acquisition in an amount expected to be greater than \$25,000. When acquiring commercial products or services, the contracting officer has the flexibility to establish response times that consider the circumstances of the acquisition such as complexity, commerciality, availability, and urgency when establishing the response time. (See 5.203(b)).

(9) Basis of award: The contracting office has broad discretion in fashioning suitable evaluation procedures under this subpart.

(i) The solicitation should make it clear to potential offerors that the selection process is being conducted under this subpart and not Part 14 or Part 15. Conduct of the selection process must be consistent with that statement.

(ii) Use of best value is encouraged.

(iii) Submission of detailed technical and management plans, the use of formal evaluation plans, use of a competitive range, conducting discussions or exchanges to make an offer acceptable, scoring quotations and offers, and final price revisions are not required and are generally discouraged as inconsistent with the objective of simplification under the subpart. (see 41 USC §3306 and 10 U.S.C. §2305(a)(2))

(iv) Contracting officers shall state the evaluation factor(s) to be used as the basis for award. Use of sub factors is not required. Solicitations under this subpart are not required to establish the relative importance of each evaluation factor or sub factor (thereby making them of equal importance). For many commercial products or services, for example, the evaluation factors need not be more detailed than price and past performance, or technical (e.g., how well the propose product meets the agency need, technical features, warranty provisions), price and past performance.

(v) If market research indicates the government's need can be met by commercial products with demonstrated performance in the market place, the contracting officer may

require offerors to demonstrate the commercial market's acceptance of their product, as defined in 2.101, as one criterion in a selecting source. (See 11.103)

(vi) When evaluating past performance, use of a formal data base is not required. The evaluation may be based on the contracting officer's knowledge and prior experience with acquiring the commercial product or commercial service, customer surveys, PPIRS, or any reasonable basis. (See 13.106-2) There is no obligation to discuss adverse past performance.

(vii) The contracting officer must make an affirmative determination of responsibility for the selected offeror. Simplified procedures could include determining that the offeror has adequate financial resources to do the job, can comply with the delivery or performance schedule, has a satisfactory performance record, and is not listed in the EPLS. (See 9.104)

(10) Award: Quotations or offers shall be evaluated on the basis of award established in the solicitation. For acquisitions that permit offerors to provide an electronic response to the solicitation, the contracting officer may –

(i) After preliminary consideration of all quotations or offers, select one that will satisfy the government's requirement, and then screen all other lower price offers on readily discernable value indicators. When evaluation is based only on price and past performance, make an award based on whether the lowest price quotation or offer with the highest past performance represents the best value. (See 13.106-2 (b))

(iii) The contracting officer must determine that the proposed price is fair and reasonable based on competition, or if only one response is received, a statement that the price is reasonable. (See 13.106-3 (a))

(iv) The contracting officer shall consider offers or proposals received from any responsible source. (See 41 USC§1901(e); 41 USC§1708 (c)(4))

(11) Forms for solicitation and award. For acquisitions above the micro-purchase threshold, contracting officers shall use the Standard Form 1449, Solicitation/Contract/Order for Commercial Products or Services, for awards under this subpart.

(12) Debrief and Notification:

(i) Debriefings of unsuccessful offerors shall be provided, if requested. If the award was based on price alone, no further explanation should be necessary. If the award was based on factors other than price alone, provide a brief explanation of the basis for the contract award.

(ii) Notification of contract award is not required where access to the notice of proposed contract action and solicitation was made available through the GPE at FedBizOpps and the notice permitted the public to respond to the solicitation electronically. (See 5.301(b)(6)).

(14) File documentation. Consistent with the objective of this subpart, file documentation should be kept to a minimum with due consideration for the size and complexity of the award. (See 13.106-3(b))

(i) Oral solicitation – keep records to reflect clearly the propriety of placing the order at the price paid with the supplier concerned.

(ii) Electronic and written (paper) solicitations – Limit records of solicitations or offers to notes or abstracts to show the number of suppliers contacted, offers received, prices, references to printed price lists used, delivery, the fact that the procedures in FAR 12.6 were used, and other pertinent data.

(A) For acquisitions not exceeding the simplified acquisition threshold, if only one source was solicited (including brand name), explain the absence of competition.

(B) For acquisitions exceeding the simplified acquisition threshold but not exceeding the threshold in 12.602, if only one source was solicited or it is a brand name acquisition, include the approved justification and approval.

(iii) Include a brief description of the procedures used to make the award and support for the award decision if other than price-related factors were considered.

(iv) Include the contracting officer's determination of price reasonableness (See 13.106-3) and affirmative determination of responsibility (See 9.104)

12.6034 -- Streamlined Solicitation for Commercial Items Combined Synopsis/Solicitation

(a) 5.202 provides an exception to the 5.201 requirement to synopses proposed contract actions if the proposed contract action is for an amount not expected to exceed the simplified acquisition threshold, it will be available through the GPE at FedBizOpps, and it permits the public to respond to the solicitation electronically. When a written (paper) solicitation will be issued and a synopsis is required, the contracting officer may use the following procedure to reduce the time required to solicit and award contracts for the acquisition of commercial items. This procedure combines the synopsis required by [5.203](#) and the issuance of the solicitation into a single document.

(b) When using the combined synopsis/solicitation procedure, the SF 1449 is not used for issuing the solicitation.

(c) To use these procedures, the contracting officer shall --

(1) Prepare the synopsis as described at [5.207](#).

(2) In the, Description, include the following additional information:

(i) The following statement:

This is a combined synopsis/solicitation for commercial items prepared in accordance with the format in [Subpart 12.6](#), as supplemented with additional information included in this notice. This announcement constitutes the only solicitation; proposals are being requested and a written solicitation will not be issued.

- (ii) The solicitation number and a statement that the solicitation is issued as an invitation to bid (IFB), request for quotation (RFQ) or request for proposal (RFP).
- (iii) A statement that the solicitation document and incorporated provisions and clauses are those in effect through Federal Acquisition Circular ____.
- (iv) A notice regarding any set-aside and the associated NAICS code and small business size standard.
- (v) A list of line item number(s) and items, quantities, and units of measure, (including option(s), if applicable).
- (vi) Description of requirements for the items to be acquired.
- (vii) Date(s) and place(s) of delivery and acceptance and FOB point.
- (viii) A statement that the provision at [52.212-1](#), Instructions to Offerors -- Commercial, applies to this acquisition and a statement regarding any addenda to the provision.
- (ix) A statement regarding the applicability of the provision at [52.212-2](#), Evaluation -- Commercial Items, if used, and the specific evaluation criteria to be included in paragraph (a) of that provision. If this provision is not used, describe the evaluation procedures to be used.
- (x) A statement advising offerors to include a completed copy of the provision at [52.212-3](#), Offeror Representations and Certifications -- Commercial Items, with its offer.
- (xi) A statement that the clause at [52.212-4](#), Contract Terms and Conditions -- Commercial Items, applies to this acquisition and a statement regarding any addenda to the clause.
- (xii) A statement that the clause at [52.212-5](#), Contract Terms and Conditions Required To Implement Statutes Or Executive Orders -- Commercial Items, applies to this acquisition and a statement regarding which, if any, of the additional FAR clauses cited in the clause are applicable to the acquisition.
- (xiii) A statement regarding any additional contract requirement(s) or terms and conditions (such as contract financing arrangements or warranty requirements) determined by the contracting officer to be necessary for this acquisition and consistent with customary commercial practices.

(xiv) A statement regarding the Defense Priorities and Allocations System (DPAS) and assigned rating, if applicable.

(xv) The date, time and place offers are due.

(xvi) The name and telephone number of the individual to contact for information regarding the solicitation.

(3) Allow response time for receipt of offers as follows:

(i) Because the synopsis and solicitation are contained in a single document, it is not necessary to publicize a separate synopsis 15 days before the issuance of the solicitation.

(ii) When using the combined synopsis and solicitation, contracting officers must establish a response time in accordance with [5.203](#)(b) (but see [5.203](#)(h)).

(4) Publicize amendments to solicitations in the same manner as the initial synopsis and solicitation.

FAR Part 13 – Simplified Acquisition Procedures

13.000 -- Scope of Part.

This part prescribes policies and procedures for the acquisition of –

- (i) Products and services below the micro purchase threshold;
- (ii) Products ~~supplies~~ and services, including construction and research and development, ~~and commercial items~~, the aggregate amount of which does not exceed the simplified acquisition threshold (see [2.101](#)). ~~Subpart 13.5 provides special authority for acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding \$7 million (\$13 million for acquisitions as described in [13.500](#)(c)), including options.~~

Use Part 12 for policies applicable to the streamlined acquisition of commercial products or services, including construction, exceeding the micro-purchase threshold.

See [36.602-5](#) for simplified procedures to be used when acquiring architect-engineer services.

13.103 -- Use of Standing Price Quotations.

Authorized individuals do not have to obtain individual quotations for each purchase. Standing price quotations, as defined in 2.101, may be used if --

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

Subpart 13.5—Simplified Procedures for Certain Commercial Items

13.500 -- General.

~~(a) This subpart authorizes the use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding \$7 million (\$13 million for acquisitions as described in 13.500(c)), including options, if the contracting officer reasonably expects, based on the nature of the supplies or services sought, and on market research, that offers will include only commercial items. Contracting officers may use any simplified acquisition procedure in this part, subject to any specific dollar limitation applicable to the particular procedure. The purpose of these simplified procedures is to vest contracting officers with additional procedural discretion and flexibility, so that commercial item acquisitions in this dollar range may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and industry (10 U.S.C. 2304(g) and 2305 and 41 U.S.C. 3305, 3306, and chapter 37, Awarding of Contracts).~~

~~(b) When acquiring commercial items using the procedures in this part, the requirements of part 12 apply subject to the order of precedence provided at [12.102\(c\)](#). This includes use of the provisions and clauses in [Subpart 12.3](#).~~

~~(c) Under 41 U.S.C. 1903, the simplified acquisition procedures authorized in this subpart may be used for acquisitions that do not exceed \$13 million when—~~

- ~~(1) The acquisition is for commercial items that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack; or;~~
- ~~(2) The acquisition will be treated as an acquisition of commercial items in accordance with 12.102(f)(1).~~

13.501 -- Special Documentation Requirements.

~~(a) Sole source (including brand name) acquisitions.~~

~~(1) Acquisitions conducted under simplified acquisition procedures are exempt from the requirements in [Part 6](#). However, contracting officers must —~~

~~(i) Conduct sole source acquisitions, as defined in [2.101](#), (including brand name) under this subpart only if the need to do so is justified in writing and approved at the levels specified in paragraph (a)(2) of this section;~~

~~(ii) Prepare sole source (including brand name) justifications using the format at [6.303-2](#), modified to reflect that the procedures in FAR subpart 13.5 were used in accordance with 41 U.S.C. 1901 or the authority of 41 U.S.C. 1903.~~

~~(iii) Make publicly available the justifications (excluding brand name) required by [6.305](#)(a) within 14 days after contract award or in the case of unusual and compelling urgency within 30 days after contract award, in accordance with [6.305](#) procedures at paragraphs (b), (d), (e), and (f); and~~

~~(iv) Make publicly available brand name justifications with the solicitation, in accordance with [5.102](#)(a)(6).~~

~~(2) Justifications and approvals are required under this subpart only for sole source (including brand name) acquisitions or portions of an acquisition requiring a brand name. If the justification is to cover only the portion of the acquisition which is brand name, then it should so state; the approval level requirements will then only apply to that portion.~~

~~(i) For a proposed contract exceeding \$150,000, but not exceeding \$700,000, the contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.~~

~~(ii) For a proposed contract exceeding \$700,000, but not exceeding \$13.5 million, the advocate for competition for the procuring activity, designated pursuant to [6.501](#); or an official described in [6.304](#)(a)(3) or (a)(4) must approve the justification and approval. This authority is not delegable.~~

~~(iii) For a proposed contract exceeding \$13.5 million but not exceeding \$68 million, or for DoD, NASA, and the Coast Guard, not exceeding \$93 million, the head of the procuring activity or the official described in [6.304](#)(a)(3) or (a)(4) must approve the justification and approval. This authority is not delegable.~~

(iv) For a proposed contract exceeding \$68 million, or, for DoD, NASA, and the Coast Guard, \$93 million, the official described in [6.304\(a\)\(4\)](#) must approve the justification and approval. This authority is not delegable except as provided in [6.304\(a\)\(4\)](#).

~~(b) *Contract file documentation.* The contract file must include—~~

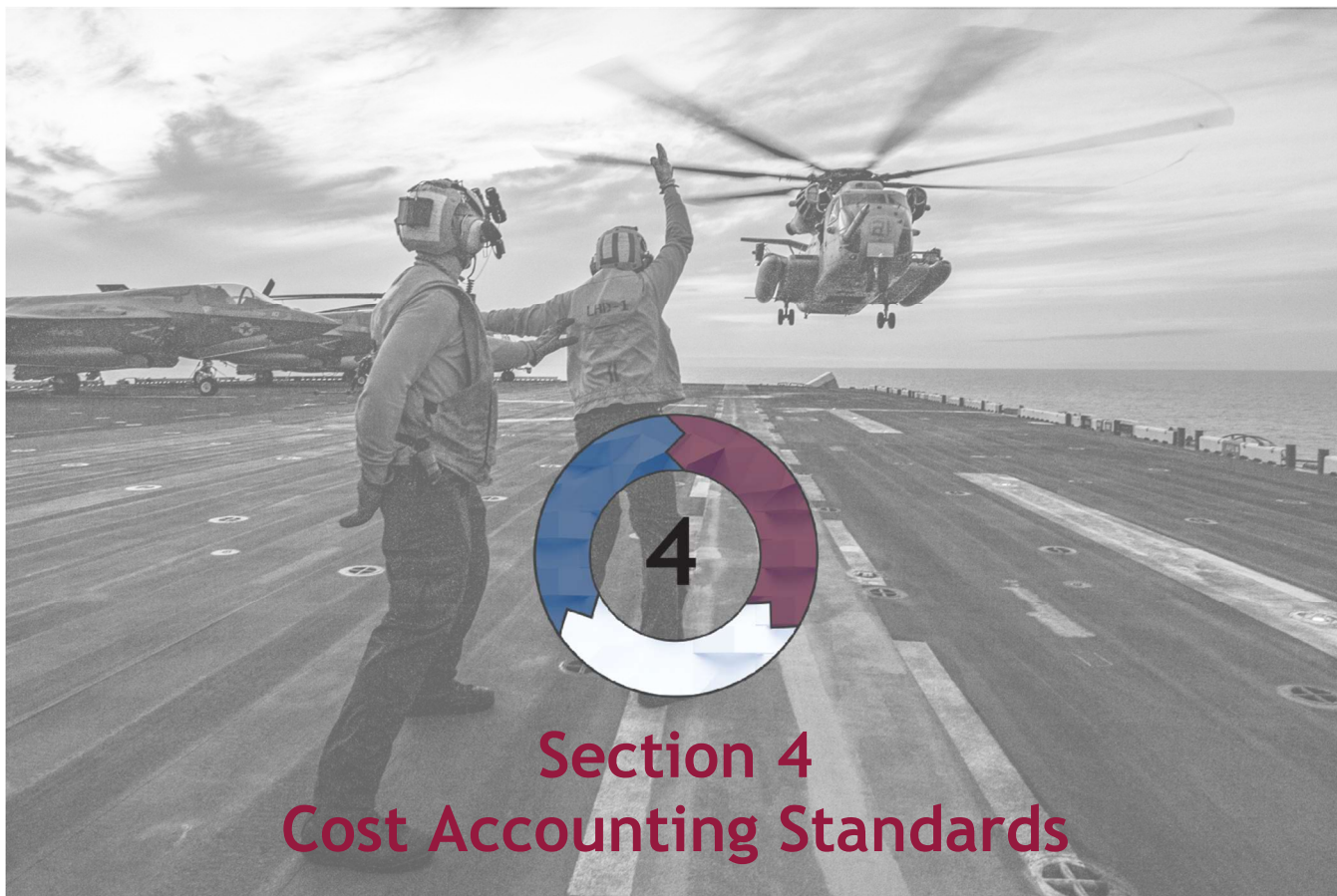
~~(1) A brief written description of the procedures used in awarding the contract, including the fact that the procedures in FAR [Subpart 13.5](#) were used;~~

~~(2) The number of offers received;~~

~~(3) An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and~~

~~(4) Any justification approved under paragraph (a) of this section.~~

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Reinvigorating the Cost Accounting Standards Board and updating Cost Accounting Standards would ease compliance burden, yet retain appropriate oversight for cost accounting.

RECOMMENDATIONS

Rec. 29: Revise 41 U.S.C. §§ 1501-1506 to designate the Cost Accounting Standards Board as an independent federal organization within the executive branch.

Rec. 30: Reshape CAS program requirements to function better in a changed acquisition environment.

INTRODUCTION

In 1970, Congress created the five-member Cost Accounting Standards Board (CASB) to promulgate cost accounting standards (CAS) that produce more uniform and consistent cost accounting practices on national defense contracts and subcontracts. The original board created 19 standards over the course of 10 years. In 1980, the board's appropriation was not renewed, and the board ceased to operate until Congress created a new CASB in 1988. The post-1988 CASB has periodically issued updates to existing regulations, but is often slow to act and less effective than its predecessor. The board and regulations both need to be restructured to provide necessary guidance and minimize the burden for government and contractors.

CAS was designed to provide oversight for cost-based contracts, but CAS originally applied only to negotiated contracts exceeding \$100,000, with a limited set of exceptions. Except for monetary threshold increases, CAS has remained unchanged, yet DoD acquisition policies, procedures, and practices have evolved, and improvements in technology, business practices, and pricing policies have lessened the government's contract cost accounting risks. CAS program requirements are not only incompatible with how business is conducted in today's marketplace, but they are incompatible with the way the government conducts its own business. Independent studies have consistently shown that CAS is a barrier to the government's access to important technologies; the standards impose additional performance and financial risk through burdensome accounting requirements and certifications not present in commercial business sectors.

The CAS Board and program requirements must be reshaped for the future. The recommendations in this section take two steps to modernize CAS. Recommendation 29 reinvigorates the CASB by extracting the Board from the Office of Federal Procurement Policy (OFPP), designating it as an independent organization within the executive branch, appointing a new chair, and other structural changes to ensure the board meets regularly and is provided with the resources needed to address its responsibilities. Recommendation 30 updates CAS program requirements, including raising the thresholds for full CAS coverage and the disclosure statement and adding guidance for CAS applicability to hybrid contracts and indefinite delivery contract vehicles. Together, these recommendations would ease the burden of CAS compliance, while retaining appropriate oversight for cost accounting on large DoD contracts.

RECOMMENDATIONS

Recommendation 29: Revise 41 U.S.C. § 1501-1506 to designate the Cost Accounting Standards Board as an independent federal organization within the executive branch.

Problem

The CASB's current configuration within OFPP is ineffective at providing oversight for application of CAS to federal government contracts. CASB has only rarely met in recent years, and member positions often go unfilled for long periods. Meanwhile, changes to government contracting require ongoing updates to the standards and resolution of questions about CAS applicability. Because CASB has not been responsive to these changes, contractors are overly burdened by the need for added layers of

compliance to many rules that have not kept pace with new business models. CASB needs to be reinvigorated as an independent organization and removed from OFPP.

Background

In 1970, Congress created the five-member CASB with authority to promulgate cost accounting standards designed to achieve more uniform and consistent cost accounting practices on national defense contracts and subcontracts.¹ The original CASB was part of what was then the General Accounting Office (GAO), and it was chaired by the Comptroller General. CASB met regularly and employed a staff of professional accountants who were responsible for conducting research and making recommendations to the board. Over the course of its existence, CASB promulgated 19 standards as well as detailed rules and regulations about the application of the statutory requirements to contracts and subcontracts.

The original CASB ceased to function at the end of FY 1981 when its funding expired and was not renewed. CAS and related regulations remained in effect, but in the absence of an active Board, there was no authority to make changes to CAS or regulations. It became clear that a functioning CASB was needed, and Congress created a new CASB in 1988 with the OFPP administrator as the board's chair.

For a variety of reasons, the new CASB did not begin to function until 1991.² The long delay in getting the new CASB functioning within OFPP has turned out to be prophetic. In recent years, dissatisfaction and frustration with the performance of CASB has grown. Notably, the Senate Armed Services Committee admitted in 2016 that it "is disappointed that the Federal Cost Accounting Standards Board does not currently have a quorum of members and has not met in over three years. Due to this situation, it is doubtful that any credible reform will emanate out of this board in the future."³ The board's inactivity is due to frequent changes in the identity of the OFPP Administrator and long periods during which that position was vacant, as well as other prolonged vacancies among board members.

CASB has responsibilities that have been neglected. The board has "exclusive authority to prescribe, amend, and rescind cost accounting standards, and interpretations of the standards" that govern "measurement, assignment, and allocation of costs to contracts with the [f]ederal [g]overnment."⁴ As the sole organization with this authority, CASB must meet regularly and address issues promptly as they arise.

¹ Defense Production Act, Pub. L. No. 91-379, 84 Stat. 796, on August 15, 1970; codified at 50 U.S.C. App. 2179.

² The new Board's work was delayed for more than a year because there was a question about whether anyone currently employed by a government contractor or with other financial connections to the industry could serve as a private sector member of the Board without violating the Ethics in Government Act (18 U.S.C. § 208). The original sponsor of the OFPP legislation, Representative Jack Brooks, eventually informed the Administrator that Congress intended to create an exception to the Ethics Act. Based on advice from the Office of Government Ethics, the Administrator concluded that private sector representatives who were employees or consultants to contractor could serve on the Board as long as they recused themselves from the Board's consideration of matters such as waivers that were specifically and uniquely applicable to their employer or client.

³ FY 2017 NDAA, S. Rpt. No. 114-255 § 811 (2016).

⁴ Cost Accounting Standards, 41 U.S.C. § 1502.

Discussion

For the past 30 years, CASB has failed to address urgent issues in a timely way. For example, Congress has twice changed pension funding requirements in a way that made those requirements inconsistent with CAS funding requirements—once in the Omnibus Budget Reconciliation Act of 1987, and the second time in the Pension Protection Act of 2006.⁵ CASB did not make changes in CAS requirements to eliminate the problems created by the 1987 Budget Act until 1995, and the contracting community was saved from what could have been a huge financial problem only because DoD issued a waiver permitting contractors to comply with the changed statutory requirements and ignore the conflicting CAS provisions until CASB changed the CAS provisions. A decade later, defense contractors identified a similar problem during the drafting of the Pension Protection Act of 2006. In response, Congress added a provision postponing the applicability of the statute to major defense contractors for 2 years, requiring CASB to issue final regulations harmonizing the CAS rules with the new statute and imposing a deadline on issuance of the harmonization rules.⁶ CASB missed that harmonization deadline by more than 2 years.⁷

The standards and regulations published by the original CASB need to be updated to reflect fundamental changes in the nature of government procurement over the last 30 years. CASB has known for years that growth in the use of indefinite quantity and task order contracts has created issues about coverage and cost impact that the original board never contemplated and that urgently require the current board's attention. Since its establishment in 1988, the new board has not published any new regulations or modified any existing standard or regulation to address those issues. The 19 standards that the original board promulgated were written in an era when CAS applied only to defense contracts and when most major defense contracts were for hardware. Those standards are now applicable to all government agencies that are acquiring services, software, health care, and other solutions for which the original standards may be difficult to apply. Because CASB has failed to address these problems, a commercial company selling the same service or product that it sells in the commercial market may find that its contracts are potentially subject to CAS coverage because of one small line item in a hybrid contract, creating serious barriers to entry into the government market.⁸ The challenge of applying CAS to hybrid contracts is addressed in detail elsewhere in this *Volume 2 Report*.

When the new CASB was created in 1988, the decision to move the board to OFPP was driven by concerns that it would have been unconstitutional for the board to resume operations in GAO, which is not part of the executive branch.⁹ Although assigning responsibility for CAS to OFPP made sense in

⁵ Pub. L. No. 100–203, 101 Stat. 13301 (1987). Pension Protection Act of 2006, Pub. L. 109–280, 120 Stat. 780 (2006).

⁶ Section 106(d) of the Pension Protection Act of 2006, Pub. L. No. 109–280, 120 Stat. 780 (2006).

⁷ In fairness to the CAS Board, it worked closely with the government and with affected contractors to develop and implement a harmonization process that was designed to minimize disruption of the procurement cycle. The failure to meet the harmonization deadline was in part the result of negotiations with industry and the government to minimize disruption of the normal procurement process.

⁸ For example, if a software company enters into a contract with the Government to provide the same software and support services it offers in the commercial market at fixed prices, that contract would normally be exempt from CAS-coverage. If the contract includes a line item reimbursing the contractor for actual travel costs associated with providing support services, however, under the current regulations the entire contract could be CAS-covered because of that single cost-reimbursement line item. The value of the fixed price software and support services might be \$1 billion and the estimated value of the travel cost reimbursement might be only \$1 million, but the entire \$1.001 billion contract could be covered by CAS.

⁹ In *The Boeing Co. v. United States*, 680 F.2d 132 (Ct. Cl. 1982), the Court found that Boeing's argument that the original CAS statute was unconstitutional was "by no means insubstantial." *Id.* at 141.

many ways, the activity of the CAS Board has been limited in the nearly 30 years it has been part of OFPP. The board recently resumed meetings in 2018 for what appears to be the first time in more than 6 years. Prior to that meeting, the most recent minutes posted on the Office of Management and Budget (OMB) website were from a meeting held October 5, 2011. Although there were reportedly meetings in 2017, there is no published evidence or record of them.

In response to the lack of activity by CASB, Section 820(a) of the FY 2017 NDAA required that CASB meet at least quarterly and publish in the Federal Register notice of each meeting and an agenda for each meeting.¹⁰ The FY 2017 NDAA also requires that CASB appoint an executive secretary and authorizes creation of two additional senior staff positions for the board. Those new NDAA provisions are not yet effective, and there is little evidence that things have changed. CASB continues to lack a chair due to the vacant OFPP Administrator position, and it has demonstrated little potential to address well-known issues.

The FY 2017 NDAA also created a Defense Cost Accounting Standards Board (Defense CASB), effective October 1, 2018, to be responsible for making recommendations about changes to CASB, to be exclusively responsible for implementation of the cost accounting standards in DoD, and to “develop standards to ensure that commercial operations performed by Government employees at the Department of Defense adhere to cost accounting standards (based on cost accounting standards established under section 1502 of title 41 or Generally Accepted Accounting Principles [GAAP]) that inform managerial decision making.”¹¹

Creation of the Defense CASB is an attempt to solve the problem of the nonfunctioning CASB. Adding another regulatory organization is the wrong solution. Government and industry representatives who spoke with the Section 809 Panel expressed they do not support creation of a Defense CASB. Stakeholders are concerned by the many unanswered questions raised by creating this board, including whether the new board will be biased toward DoD issues, and if the two boards will create competing sets of CAS.¹² Creation of a Defense CASB would almost certainly be counter-productive.

The most pressing problem with the current CASB formulation is the administration of the board at OFPP, partly due to a lack of leadership and subject matter expertise. The OFPP administrator position changes frequently and is often vacant, leaving the role in the hands of an acting administrator, most often a career civil servant versed in procurement policy, but without the requisite authority or

¹⁰ Section 820 of the FY 2017 NDAA, Pub. L. No. 114-238, 130 Stat. 2000 (2017). Creation of Defense CASB codified at 10 U.S.C. § 190.

¹¹ Section 820(b) of the FY 2017 NDAA, Pub. L. No. 114-238, 130 Stat. 2000 (2017).

¹² See, for example, Paul E. Pompeo, “Senate Proposes Yet Another Cost Accounting Standards Board for Government Contractors,” Arnold & Porter Advisory, May 25, 2016, accessed May 15, 2018, <https://www.arnoldporter.com/en/perspectives/publications/2016/05/senate-proposes-yet-another>. John Chierichella and Adam Bartolanzo, “Defense Contractors to Face New Cost Accounting Oversight with Creation of Defense Cost Accounting Standards Board,” Government Contracts & Investigations Blog, April 26, 2017, accessed May 15, 2018, <https://www.governmentcontractslawblog.com/2017/04/articles/departments-of-defense/cost-accounting-standards-board/>. Robert Kramer, “Committee on Government Business Discusses the New Defense Cost Accounting Standards Board Proposal,” Financial Executives International, August 19, 2016, accessed May 15, 2018, <https://www.financialexecutives.org/Influence/Committees/Government-Business/News/Committee-on-Government-Business-Discusses-the-New.aspx>.

experience in accounting and contract management to push forward needed CAS reforms.¹³ Currently the administrator position has been unfilled since January 2016. As a practical matter, when there is no Senate-confirmed administrator, nothing of substance happens at the CASB. Even when there is someone in the job, most OFPP administrators are not accountants, have not previously shown an interest in the issues within the board's jurisdiction, and are not experientially well-qualified to lead the board. Based on CASB's consistent lack of activity, OFPP administrators clearly have not prioritized CAS.

Housing CASB in OFPP has also proven a problem from a budgetary point of view. The original board had a large and experienced professional staff that performed its own independent research, did its own drafting, and provided high-quality advice to the board members. Since its move to OFPP, CASB has essentially had no staff of its own due to inadequate funding from OFPP.¹⁴ To the limited extent that it has done anything substantive, the OFPP CASB has effectively subcontracted its research and drafting to employees at other government agencies. Those employees are inevitably affected by their respective agency agendas and thus cannot provide the kind of independent analysis and advice that the board needs.

Nearly 20 years ago, these same issues were identified by a GAO CASB review panel created at the direction of Congress. The panel's 1999 report detailed the many problems resulting from the 1988 decision to place the CAS Board in OFPP.¹⁵ It concluded the following:

[P]lacement in OFPP/OMB has unduly constrained the Board's work and lent some credence to the contention that the Board's pronouncements have been unduly affected by procurement policy considerations....[T]he Panel believes that shifting the Board out of OFPP/OMB could reinforce its independence. This removal should facilitate the use of advisory committees, task forces, and staff for individual members, which would improve the CAS Board process and allow for greater acceptance of its pronouncements.¹⁶

Although placing CASB within OFPP may seem logical because of the ostensible relationship between procurement and cost accounting at the transactional level, CASB does not make procurement policy. It publishes very technical accounting rules about how costs on government contracts are measured, assigned to cost accounting periods, and allocated to individual contracts. The primary purpose of CAS and cost accounting regulations is to insure that the accounting for all costs charged on government contracts reflects sound and consistently applied principles, so costs are charged to contracts on the basis of demonstrable causal/beneficial relationships. The standards protect the government from abuses by contractors, but they also protect contractors from pressure by their government customers to manipulate accounting data in ways that do not reflect causal/beneficial relationships.

¹³ Since 2000, the position has been held by six appointed officials, with acting administrators for over six of those 18 years. (Administrators were Angela Styles, 2001-2003; David Safavian, 2004-2005; Paul Denett, 2006-2008; Dan Gordon, 2009-2011; Joe Jordan, 2011-2013; and Anne Rung, 2014-2016.)

¹⁴ Section 820 (a) of the FY 2017 NDAA, Pub. L. No. 114-238, 130 Stat. 2000 (2017) includes a provision that requires funding for a staff of three at the Board. The proposed statutory change will address, as needed, a source of funding for the positions.

¹⁵ GAO, *Future Role of the Cost Accounting Standards Board*, SP-99-1 (1999).

¹⁶ *Ibid*, 51.

Neither OFPP administrators nor OFPP staff have expertise about the kinds of technical accounting and contract management issues that CASB's standards and regulations address. By maintaining an association between CAS and OFPP, CASB could make judgments biased toward procurement policy rather than content-neutral rules about how and when costs are charged to government contracts. To perform its functions adequately and efficiently, CASB should be an independent organization within the Executive Branch.

The 1999 GAO CASB review panel laid out criteria that a new CASB should meet. Among other things, GAO recommended there is a continued need for a CASB and that CASB should be an independent agency that is not "subject to the control of any other government agency that may have conflicting procurement policy/funding concerns."¹⁷ Members should represent government and private industry, retaining a government majority. These members should be part-time; the chair may be a full-time employee. The panel also emphasized the board's authority: "the Board's regulations should be binding and take precedence over other regulations regarding the allocation, measurement, and assignment of costs."¹⁸ These criteria should be heeded in the creation of a reinvigorated CASB.

The 1999 GAO CASB review panel devoted an entire chapter to the organization of CASB, with extensive findings on how to structure its composition, where to locate the board's operations, what types of restructuring authorities were needed to accomplish the recommendations, and what restructuring authorities were already permitted CASB's enabling legislation.¹⁹ GAO proposed three alternatives to ensure CASB retained its impartiality and operated more efficiently, but that could also be designed to address the board's rulemaking requirements to ensure any regulations would be binding and not subject to constitutional challenge.

The first option recommended the General Services Administration (GSA) house the CASB's operations and provide administrative support to the board as an independent agency with its own appropriated funding. The second option was to place CASB within DoD as an independent agency with appropriated funding, but the 1999 GAO CASB review panel noted a substantial risk that the agency with the most CAS-covered contracts (DoD) could unduly influence the promulgation of the CAS for procurement policy reasons. The third option was to authorize CASB as a completely independent federal agency outside any existing agency, but that alternative was limited by the potentially high cost to the government to establish the CAS Board outside of a host federal agency. To date, none of these options have been initiated or addressed in any detail until they resurfaced in the context of the Section 809 Panel's streamlining mandate.

Contemplating those alternatives, both the Section 809 Panel and the 1999 GAO CAS Review Panel independently concluded that CASB should be an independent organization, outside of OFPP. The board needs to be physically located in an existing agency required to provide office space and facilities, including clerical support, but this agency should have no responsibility for CASB's

¹⁷ Ibid, 52.

¹⁸ Ibid, 52.

¹⁹ Ibid, 46-56.

substantive work. The GAO review panel noted that GSA provides a physical location for a number of government entities that are not part of GSA, making it a suitable home for CASB's offices.

The GSA model resolves the housing problem by moving CASB out of OFPP, but it does not address how to ensure the constitutionality of any regulatory promulgation. Both panels recognize that for regulations to be binding, members of any CASB should be officers of the United States under the Appointments Clause (Article II, Section 2, Clause 2 of the Constitution.)²⁰ To address this challenge, the Section 809 Panel recommends that any statutory enactment enabling the physical move of CASB out of OFPP also designate the OMB director as the principal officer over CASB with the authority to delegate CASB members to act as officers of the United States. OFPP should remain responsible for the mechanics of publishing the regulations in the Code of Federal Regulations, where they have been located since 1993, but it will have no responsibility for determining the substance of the CAS requirements.²¹

Concurrent with the physical move outside OFPP, independence could be assured in the statute by, among other things, establishing appointment rules for CASB members that assure impartiality through specific-term appointments; create limitations on removal to misconduct, malfeasance or not performing the functions of the office; and specify that CASB members will not be subject to the supervision of anyone at OMB. Models for such an administrative construct include the DoD Board of Actuaries²² and the Federal Energy Regulatory Commission.²³

Section 809 Panel analysis of CASB's inability to perform its mission identifies its location within OFPP as a core problem. CASB has a vital role to play in updating and overseeing cost accounting standards and regulations, and this role must be resumed. The Section 809 Panel has provided recommended changes to CAS program requirements, detailed in recommendations addressed elsewhere in this Volume 2 Report, and a reconstituted CASB is the appropriate organization to implement these recommendations.

Conclusions

CASB should be removed from OFPP. Such a move will require legislative action and a commitment to long-term, adequate funding. Legislation should be enacted that includes the following features:

- CASB should be physically located in GSA, which will provide office space and facilities, including clerical support. GSA will have no responsibility for CASB's substantive work.
- CASB should have a budget sufficient to support a full-time, permanent staff of at least three people.

²⁰ Ibid, 49.

²¹ Cost Accounting Standards Board, 48 CFR 99.

²² 10 U.S.C. § 183(b)(2), Department of Defense Board of Actuaries, "Members: The members of the Board shall serve for a term of 15 years, except that a member of the Board appointed to fill a vacancy occurring before the end of the term for which the member's predecessor was appointed shall only serve until the end of such term."

²³ 42 U.S.C. § 7171 (b), Appointment and Administration, Federal Energy Regulatory Commission, "...Member shall hold office for a term of 5 years and may be removed ...only for inefficiency, neglect of duty, or malfeasance in office."

- CASB should be part of the Executive Branch, but completely independent of any department of any other agency.
- The existing requirements for CASB to meet at least quarterly and to publish minutes of its meetings should be retained.
- Section 820 of the FY 2017 NDAA creating a Defense CASB should be repealed.
- CASB should have five members, much like the current board, with the following qualifications:
 - The CASB chair should be either a full-time government employee or a part-time special government employee. In either case, the chair should have extensive experience in administering and managing as a senior government official major CAS-covered contracts negotiated and awarded using the methods required by FAR Part 15.
 - Two members of CASB should be government employees, at least one of whom should be from DoD, both with experience in administering and managing CAS-covered contracts negotiated and awarded using the methods required by FAR Part 15. Government auditors and investigators should not be eligible to serve as members of CASB, both to avoid conflicts of interest and because they typically lack the administrative and management experience needed.
 - One member should be a senior employee or retired senior employee of a government contractor with substantial experience in the private sector involving administration and management of CAS-covered contracts negotiated and awarded using the methods required by FAR Part 15.
 - One member should be from the accounting profession, with substantial professional experience as an accountant involving CAS-covered contracts negotiated and awarded using the methods required by FAR Part 15.
- Authority to appoint the members of the CAS Board should be vested in the Director of OMB.
- There should be rules for member appointment, including the chair, that include limits on removal; appointment terms consistent with the length of experience necessary to govern, administer and reform CAS; and that provide for independence in the decisional and regulation process free from supervision by OMB.
- The statute creating CASB should also direct that the board's standards and regulations will continue to be published by OFPP, and/or other relevant regulatory bodies, in Part 99 of 48 CFR.
- Disestablish the Cost Accounting Standards Board and remove its statute from chapter 15 of Title 41 ("Division B, Office of Federal Procurement Policy"). Create a new independent board codified in Title 31 ("Financial Management").

Implementation

Legislative Branch

- Modify the 41 U.S.C. § 1501–1506 as described above.
- Modify 48 C.F.R. chapter 99.

Executive Branch

- Make administrative arrangements to house and support CASB operations.

Note: Explanatory report language, draft legislative text, and regulatory revisions can be found in the Implementation Details subsection at the end of Section 4.

Implications for Other Agencies

- CAS is applicable to all federal agencies, and all agencies would be affected by the recommended statutory revisions.

Recommendation 30: Reshape CAS program requirements to function better in a changed acquisition environment.

Problem

There has long been a sentiment within the government and defense industry that CAS program requirements lack sufficient nimbleness to accommodate the evolving acquisition environment. Except for changes in monetary thresholds, CAS program requirements have remained relatively static since the 1970s. This condition exists despite substantial changes in what DoD purchases, how DoD conducts purchases, and what contract vehicles DoD uses.

This condition also exists despite major legislative initiatives that have changed the landscape of government acquisition, such as the Competition in Contracting Act and the series of commercial item acquisition reforms such as the Federal Acquisition Streamlining Act (FASA), Federal Acquisition Reform Act (FARA), and Services Acquisition Reform Act (SARA).²⁴ Congress has prescribed preferences for both full and open competition and use of commercial items for acquiring products and services to satisfy government needs. Such prescribed preferences did not exist in the 1970s when CAS program requirements were instituted.

Independent studies conducted over time have consistently demonstrated that the government has faced substantial barriers to accessing important technologies because supplies exist that will not accept a CAS-covered contract.²⁵ CAS program requirements are not only incompatible with how business is

²⁴ Deficit Reduction Act of 1984, Pub. L. No. 98–369 (1985). Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103–355 (1994). FY 1996 NDAA, Pub. L. No. 104–106 (1996). FY 1996 NDAA, Pub. L. No. 104–106 (1996). FY 1996 NDAA, Pub. L. No. 104–106 (1996). FY 2004 NDAA, Pub. L. No. 108–136 (2003).

²⁵ The following are examples of such studies. Jacques S. Gansler, *Democracy's Arsenal: Creating a Twenty-First Century Defense Industry*, Cambridge, Mass.: The MIT Press, 2011, 34, 140–142, 186, 270–271. Advisory Panel, *Report of the Acquisition Advisory Panel to the Office*

conducted in today's marketplace, but they are incompatible with the way the government conducts its own business. The more prevalent concerns involving CAS program requirements are discussed below.

Background

CAS program requirements were instituted in the 1970s and generally have remained unchanged. The Section 809 Panel evaluated the compatibility of these requirements with modern government acquisition policies, procedures, and practices. Changes are needed that would help make CAS less of a burden for the defense acquisition community and less of a barrier to entry for companies looking to work with DoD. The panel's assessment focused on CAS applicability and exemptions (48 CFR 9903.201-1), types of CAS coverage (48 CFR 9903.201-2), and disclosure statement submission obligations (48 CFR 9903.202-1). CAS program requirements for foreign concerns and educational institutions are not part of this assessment.

As discussed above, Congress created the CAS Board (CASB) in 1970 to promulgate standards in the cost accounting practices followed by defense contractors.²⁶ The standards were applicable to negotiated national defense contracts in excess of \$100,000, except when the price negotiated was based on (a) established catalog or market prices of commercial items sold in substantial quantities to the general public (i.e., 'commercial item exemption') or (b) prices set by law or regulation. Congress directed that "In promulgating such standards, the Board shall take into account the probable costs of implementation compared to the probable benefits."²⁷

CAS program requirements were initially instituted in 1972.²⁸ CAS applied to all negotiated national defense contracts in excess of \$100,000. The only exemptions were those established by Congress: a commercial item exemption and contracts for which prices were set by law or regulation. Contracts exceeding \$100,000 were referred to as *CAS-covered contracts*. What *in excess of \$100,000* meant was not expressly defined by either Congress or CASB. CASB's preamble to the initial CAS program requirements referred to prime contract awards of negotiated national defense contracts.²⁹ This concept was understood in practice to mean the face value of a negotiated national defense contract at the time of award.

CAS program requirements on filing disclosure statements, which is a contractor's written description of its cost accounting practices, were also initially instituted in 1972. A separate disclosure statement was required to be submitted for each profit center, division, or similar organizational unit if their costs included in the face value of a negotiated national defense contract exceeded \$100,000. To lessen the administrative burden imposed on defense contractors at that time, the disclosure statement requirement was limited to companies which together with their subsidiaries received net awards of negotiated national defense prime contracts during FY 1971 totaling more than \$30 million. What was meant by *net awards* was not defined by CASB.

of Federal Procurement Policy and the United States Congress, January 2007, accessed March 28, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

²⁶ An Act to Amend the Defense Production Act of 1950, and Other Purposes, Pub. L. No. 91-379 (1970).

²⁷ Ibid, Sec. 103.

²⁸ 37 Fed. Reg. 4139 (Feb. 29, 1972).

²⁹ Preamble A: Original Publication of Part 401, 2-29-72, FAR Appendix B.

Any negotiated national defense contract in excess of \$100,000, unless exempted, was to contain the CAS clause. Procedurally, any solicitation for a negotiated national defense contract that might result in an award in excess of \$100,000 was to include the CAS notice alerting offerors that the contract might become CAS-covered and that a disclosure statement might be required. The CAS clause also set forth the obligation for prime contractors to apply CAS program requirements to subcontractors in the same manner as applied to prime contractors.

After the institution of CAS program requirements in 1972, CASB amended program requirements a number of times in a continuous effort to strike a balance, as Congress had directed, between the probable costs of implementing CAS and the probable benefits received. The more substantial amendments relevant to issues discussed here were the following (all of these amendments were later revised):

- In 1974, CASB added an exemption for CAS-covered contracts less than \$500,000.³⁰ That is, although the CAS-covered contract threshold specified by Congress would continue to be \$100,000, CAS would not become effective until a contractor received a CAS-covered contract of \$500,000 or more. This contract was called the *trigger contract*. Once a trigger contract was awarded, all CAS-covered contracts subsequently awarded to that contractor would become subject to CAS.
- In 1977, CASB created two levels of CAS coverage: *modified* and *full*.³¹ Modified CAS coverage required compliance with only two standards: CAS 401, Consistency in Estimating, Accumulating, and Reporting Costs, and CAS 402, Consistency in Allocating Costs Incurred for the Same Purpose. These standards became known as the *consistency standards*. Full CAS coverage required compliance with all standards (presently, there are 19 standards).

Modified CAS coverage was available for any business unit which in its immediately preceding cost accounting period received less than \$10 million in CAS-covered awards, providing that the sum of such awards was less than 10 percent of the business unit's total sales during that period. Anything above this threshold required full CAS coverage.

Similar changes were also made to the threshold requiring disclosure statement submission. A disclosure statement was required for a single CAS-covered award of \$10 million or more. Also, a disclosure statement was to be submitted by any business unit, or segment of a company, receiving a CAS-covered contract if it received net awards of CAS-covered contracts totaling \$10 million or more in its preceding cost accounting period.

- In 1980, CASB added an exemption for any firm-fixed-price (FFP) contract or subcontract awarded without submission of any cost data, provided that the failure to submit such data was not attributable to a waiver of the requirement for certified cost or pricing data.³² At the time, CASB declined to narrow the exemption to *certified* cost or pricing data because, in the opinion

³⁰ 39 Fed. Reg. 44389 (Dec. 24, 1974).

³¹ 42 Fed. Reg. 45625 (Sept. 12, 1977). The CASB also added an exemption for small business concerns.

³² 45 Fed. Reg. 62011 (Sept. 18, 1980). The proviso reflected CASB's concern that contracting officers could exempt CAS by waiving the submission of certified cost or pricing data. This proviso was removed in 1993.

of CASB, any cost data submitted would presumably be used by contracting officers; thus, the government would benefit from the application of CAS.

The CASB ceased operations in 1980.³³ The prevailing view was that CASB had completed its mission to promote uniformity and consistency in cost accounting practices used in defense contracting. CASB's regulations, including its standards, however, continued to apply to existing and future negotiated national defense contracts. It was not long before it became obvious that some form of governance over CAS was needed to administer CASB regulations and standards.

A *new* CASB was established under the OFPP Act of 1988.³⁴ It had a different organizational placement, structure, membership, and staffing than the original CASB.³⁵ The most substantial effect of reestablishing CASB under OFPP was making CAS program requirements applicable to all federal contracts instead of only negotiated national defense contracts.

Government Accountability Office (GAO) CASB Review Panel

The most recent assessment of CAS program requirements was conducted by the GAO CASB Review Panel in 1999. As requested by Congress, GAO established a panel of CAS experts to make recommendations to Congress in view of the "far-reaching procurement reforms of recent years."³⁶ Consistent with Congress's direction in 1970, the GAO panel sought to strike a balance between the probable costs of implementing CAS and the probable benefits received.

New to what was recognized to be included in CAS implementation costs was the GAO panel's acknowledgement that, as several other studies had shown, some companies refused to do business with the government if the resulting contract was to be CAS-covered.³⁷ The GAO panel learned through public testimony that some companies created isolated CAS-covered business units for the purpose of doing business with the government while keeping their other business units free from CAS exposure. The GAO panel understood that when companies refused to accept CAS-covered contracts, the government was denied access to benefits that went beyond measurable costs. Simply put, CAS is a barrier to market access.

The GAO panel's assessment of CAS program requirements included a sensitivity analysis that measured the scope of CAS coverage in terms of dollars covered and business segments covered over varying monetary thresholds. Specifically, the analysis considered variations in the trigger contract threshold (then \$1 million) and full CAS-coverage threshold (then \$25 million).³⁸ Varying the

³³ The CASB was defunded by Congress for FY 1981.

³⁴ An Act to Amend and Extend the Office of Federal Procurement Policy Act, Pub. L. No. 100-679 (1988).

³⁵ These are often referred to as the *original* CASB (1972–1980) and *new* CASB (1988–present).

³⁶ GAO, *Future Role of the Cost Accounting Standards Board*, GAO SP-99-1, accessed February 27, 2018, <https://www.gao.gov/products/SP-99-1>.

³⁷ The following are examples of such reports. H.R. Committee on Armed Services Structure of U.S. Defense Industrial Base Panel, *Report Future of the Defense Industrial Base* (1992). Acquisition Law Advisory Panel to the United States Congress, Streamlining Defense Acquisition Laws, accessed June 6, 2017, <http://www.dtic.mil/docs/citations/ADA262699>. Advisory Panel, Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, January 2007, accessed March 28, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

³⁸ The trigger contract was limited to deciding between modified and full CAS-coverage. A contractor was not required to implement full CAS coverage until it received \$25 million in CAS-covered awards *and* one CAS-covered contract exceeded \$1 million.

individual CAS-covered contract threshold (then \$500,000) was not considered to be a meaningful assessment.

The GAO panel noted that the government's Federal Procurement Data System (FPDS), at that time, did not adequately capture CAS-coverage data. FPDS did not identify contract actions that were CAS-covered, and FPDS did not collect contract actions by CAS-covered business segments. The GAO panel instead used surrogate data developed from the Defense Contract Audit Agency's (DCAA's) defective pricing database. DCAA augmented this data with information obtained from its field offices on CAS-covered contracts not included in its defective pricing database. The surrogate data covered the 12-month period from April 1997 to March 1998.

The GAO panel's sensitivity analysis is summarized in Table 4-1. The then *current state* for comparison purposes, as portrayed in the second column, was \$72 billion in CAS-covered contracts and 588 CAS-covered business segments under both full CAS coverage and modified CAS coverage.

**Table 4-1. GAO Panel's Analysis of CAS Coverage in DoD Under Varying Scenarios
April 1997 to March 1998 (Dollars in Billions)**

	Full Coverage = \$25 million & Trigger = \$1 million	Full Coverage = \$50 million & Trigger = \$5 million	Full Coverage = \$50 million & Trigger = \$7.5 million	Full Coverage = \$50 million & Trigger = \$10 million
Dollars Covered	\$72	\$71	\$70	\$69
Coverage Types	Number Segments	Number Segments	Number Segments	Number Segments
Full CAS	280	189	189	185
Modified CAS	308	173	<i>Unknown</i>	94
Total	588	362		279

The GAO panel observed that (a) raising the full CAS-coverage threshold from \$25 million to \$50 million and (b) raising the trigger contract threshold to \$5 million yielded a negligible reduction in CAS-covered dollars (i.e., from \$72 billion to \$71 billion) but substantially reduced the number of CAS-covered business segments (i.e., from 588 to 362).

Although the GAO panel was satisfied with recommending an increase in the threshold for full CAS coverage to \$50 million, it was concerned about raising the trigger contract threshold from \$5 million to \$10 million. At a trigger contract threshold of \$10 million, the number of CAS-covered business segments under modified CAS coverage would be reduced from 588 business segments to 94 business segments, with the sharpest decrease being in modified CAS coverage. The decrease in full CAS coverage was generally unaffected after a trigger contract threshold increase to \$5 million (i.e., from 189 to 185). The GAO panel did not elaborate on its concern about the reduction in modified CAS coverage and ultimately settled on recommending a trigger contract threshold of \$7.5 million.

The GAO panel's recommendations were taken up by Congress under the FY 2000 NDAA as Streamlined Applicability of Cost Accounting Standards.³⁹ The CASB implemented the Act's provisions in 2000.⁴⁰

The GAO panel's efforts of 1999 stand as the most recent assessment of CAS program requirements. The panel's deliberations included a variety of issues and perspectives presented in public hearings by government officials, defense contractors, commercial companies, professional and trade associations, and others regarding CAS program requirements.⁴¹ Other than recommending changes to the CAS monetary thresholds, with one exception regarding the exemption for certain FFP contracts, the GAO panel did not take up any of the other issues regarding CAS program requirements.

Current Data on CAS Coverage

Since the GAO panel's review in 1999, enhancements in FPDS structure and processes have provided an improved view into DoD CAS-covered contracts, albeit still an imperfect view because there remain limitations in FPDS data collection protocols (e.g., actual CAS-covered contracts, type of CAS coverage, identification of CAS-covered business segments, CAS-covered subcontracts, CAS application to orders). The FPDS process has become more rigorous in that contracting officers must complete a contract action report (CAR) and confirm its accuracy prior to release of a contract award.⁴² The CAR must then be imported into FPDS within 3 business days after contract award. The chief acquisition officer of each agency must submit to GAO an annual certification that the agency's CAR data for the preceding fiscal year was complete and accurate.⁴³ These requirements are intended to improve the quality of reported FPDS data.

FPDS has a specific data element for CAS coverage. Data Element 6L (Cost Accounting Standards Clause) asks if the CAS clause has been included in the awarded contract. Possible answers include the following:⁴⁴

- Y = Yes, CAS clause included in the awarded contract
- N = No, CAS waiver approved
- X = Not applicable, exempt from CAS

The CAS clause, in its present form, could be regarded as self-deleting in that the CAS clause contains wording that states CAS applies unless the contract is otherwise exempt. Inclusion of the CAS clause in a contract, in and of itself, does not mean that the contract is actually CAS-covered. The contract could be exempt on a number of grounds.

³⁹ FY 2000 NDAA, Pub. L. No. 106–65, Section 8 (1999).

⁴⁰ 65 Fed. Reg. 5990 (Feb. 7, 2000).

⁴¹ The GAO panel conducted public hearings June 16–18, 1998. Testimonies were offered by 30 interested parties.

⁴² Responsibilities, FAR 4.604(b).

⁴³ Ibid, (c).

⁴⁴ GSA, *Federal Procurement Data System-Next Generation (FPDS-NG) Data Element Dictionary, Version 1.4*, accessed March 28, 2018, https://www.fpds.gov/downloads/Version_1.4_specs/FPDSNG_DataDictionary_V1.4.pdf.

Other than FPDS, there is no management information system within DoD that captures CAS-coverage information across DoD's supplier base. The Defense Contract Audit Agency (DCAA) no longer maintains the databases that were used to develop surrogate CAS-coverage data for the GAO panel in 1999. The Mechanization of Contract Administration Services (MOCAS) used by the Defense Contract Management Agency (DCMA) has limited value because its database is populated from the same original source that populates FPDS and only includes contracts over which DCMA has contract administration cognizance.

Despite these limitations, FPDS still provides a credible means for assessing the CAS program requirement issues discussed here. FPDS was queried for all contract actions that contained "Yes" in Data Element 6L for initial contract awards (identified as "Modification 0") occurring during the 5-year period spanning FY 2012 through FY 2016. The query was designed to return certain information, such as contract number, solicitation number, contract value, contract type, extent of competition, submission of cost or pricing data, and small business identification. Inspection of the query results illuminated the need to analyze contract awards in two separate groupings: definitive contracts and indefinite delivery vehicles (IDVs). Summary results are presented in Table 4-2 below.

**Table 4-2. Prime Contract Awards Containing CAS Clause Per FPDS Base and All Options Value^(Note 1)
FY 2012 through FY 2016 (Dollars in Billions)**

	2012	2013	2014	2015	2016
Dollars ^(Note 2)	\$74	\$50	\$46	\$38	\$105
Contracts	995	907	801	859	947

IDVs					
Dollars ^(Note 3)					
Contracts	744	715	706	742	735

Totals exclude contracts awarded to educational institutions, governmental entities, and small businesses, as best as could be determined from FPDS coding protocols.

Notes:

(1) CAS coverage is determined by face value of a contract at the time of award. Subsequent modifications (unless they add new work) and funding actions do not affect this determination. The Base and All Options Value (FPDS Data Element 3A) was considered the most appropriate value for determining CAS-covered dollars.

(2) Definitive contract dollar totals were somewhat skewed by the award of three unusually large TRICARE managed care support contracts by the Defense Health Agency (one in 2012; two in 2016).

(3) The Base and All Options Value for an IDV is meaningless because it bears no meaningful relationship to the value of orders that are actually placed under the IDV. The Base and All Options Value for some IDVs under a given solicitation was the same full amount of the total anticipated acquisition, and thus would vastly overstate DoD's CAS coverage. In other instances, the Base and All Options Value for some IDVs had no awarded value (i.e., face value = 0).

The amounts shown in Table 4-2 are not intended to be a tabulation of DoD CAS-covered awards for FY 2012 through FY 2016. Instead, the results were used to identify CAS coverage under certain conditions for a more directed assessment. The FPDS search tools, copies of contracts and related solicitations, and other databases, such as MOCAS, provided additional information about contract awards.

Discussion

The Section 809 Panel examined CAS program requirements with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage. The acquisition environment in which CAS was created in 1972 is not the acquisition environment of today. Not only have DoD acquisition policies, procedures, and practices evolved, but also improvements in areas such as technology, business practices, pricing policies, and oversight have lessened the government's contract cost accounting risks.

CAS Monetary Thresholds

There are four monetary thresholds within CAS program requirements that determine the nature and extent of CAS-coverage:

- The CAS-covered contract threshold is tied to the Truth in Negotiations Act (TINA) threshold, which was recently raised from \$750,000 to \$2 million, effective July 1, 2018.⁴⁵ The CAS-covered contract threshold automatically changes when the TINA threshold is changed.⁴⁶ The GAO panel did not recommend any change to the CAS-covered contract threshold.
- The trigger contract threshold is now \$7.5 million, based on the GAO panel's recommendation. CAS does not apply until a contractor receives a CAS-covered award of \$7.5 million or more. Once that threshold is reached, all CAS-covered contracts subsequently awarded to that contractor are subject to CAS.
- The current full CAS-coverage threshold, based on the recommendation of the GAO panel, is a CAS-covered contract of \$50 million or more. Contracts below this threshold are subject to modified CAS-coverage. In 1993, CASB added CAS 405, Accounting for Unallowable Costs, and CAS 406, Cost Accounting Period to modified CAS-coverage.⁴⁷
- Presently, the threshold for requiring a disclosure statement is \$50 million in total CAS-covered contracts. A disclosure statement is not required, however, for individual business segments of a contractor that have CAS-covered contracts that are valued at less than \$10 million and represent less than 30 percent of sales.

Since the GAO panel's recommended threshold increases in 1999, the Consumer Price Index for all urban consumers has risen 47 percent. To set a floor for considering threshold increases, the thresholds for the trigger contract, full CAS coverage, and disclosure statement should be increased by 47 percent. The results are shown in Table 4-3. The CAS-covered contract threshold is evaluated separately because of its ties to TINA threshold increases that have occurred since 1999 based on the Consumer Price Index for All Urban Consumers.

⁴⁵ FY 2013 NDAA, Pub. L. No. 112-239 (2012), as amended through Pub. L. No. 115-91, Sec. 811 (2017).

⁴⁶ The TINA threshold is to be periodically adjusted for inflation. Prior to the recent threshold increase to \$2 million, the inflation adjustment was aligned with the Consumer Price Index for All Urban Consumers (base year = 1994). Now, the inflation adjustment will be made under the provisions of Inflation Adjustments of Acquisition-Related Dollar Thresholds, 41 U.S.C. § 1908 (base year = 2000).

⁴⁷ 58 Fed. Reg. 58798 (Nov. 4, 1993).

Table 4-3. Effect of Increasing CAS Monetary Thresholds Based on Consumer Price Index for All Urban Consumers (Dollars in Millions)

Threshold	Now	Indexed	Minimum
Trigger contract threshold	\$7.5	\$11	\$10
Full CAS-coverage threshold	\$50	\$74	\$75
Disclosure statement threshold	\$50	\$74	\$75

The results displayed in Table 4-3 suggest that the trigger contract threshold be raised to not less than \$10 million and the full CAS-coverage and disclosure statement thresholds be raised to not less than \$75 million. This approach merely applies the effects of inflation on the thresholds, as of 2017. Given the challenge presented to the Section 809 Panel, other ways of structuring monetary thresholds within CAS program requirements should be considered.

When the \$500,000 trigger contract exemption was created in 1974, CASB was persuaded—only 2 years after instituting the initial CAS program requirements— that “maximum benefit to the Government with minimum cost can be achieved by limiting the mandatory application of its standards to contractors who receive awards which constitute a substantial majority of the national defense procurement dollars.”⁴⁸ The CASB essentially adopted the Pareto Principle which postulates that roughly 80 percent of the effects come from 20 percent of the causes. The CASB observed the following regarding the volume of DoD prime contract awards for FY 1973:

*[S]ome 70 percent of the prime contractors of the Department of Defense did not receive one or more negotiated awards in excess of \$500,000 in Fiscal Year 1973. Thus, only 30 percent, or approximately 750 prime contractors, who received contract awards totaling \$20 billion, would continue to be covered. The exemption [trigger contract] would remove coverage from only about 10 percent of the dollar value of annual DOD awards.*⁴⁹

The CASB’s observation matched what was reported by DoD for prime contract awards for FY 1973.⁵⁰ Specifically, that report aggregated DoD prime contract awards by size and competitive status.⁵¹ Pertinent amounts for negotiated awards, both competitive and noncompetitive, are shown below in Table 4-4.

⁴⁸ Preamble F to Amendments of 12-24-74, FAR Appendix B.

⁴⁹ 39 Fed. Reg. 44389 (Dec. 24, 1974).

⁵⁰ OASD (Comptroller), *Prime Contract Awards - Size Distribution Fiscal Year 1973 (ADA954446)*, Table 4, accessed May 3, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a954446.pdf>.

⁵¹ CASB did not exempt negotiated FFP contracts awarded without submission of any cost data until 1980.

Table 4-4. Negotiated Prime Contract Awards FY 1973 (Dollars in Millions)

Award Size	Awards	Distribution	Dollars	Distribution
More than \$500,000	6,758	27%	\$19,637	86%
Between \$100,000 and \$500,00	18,001	73%	\$3,291	14%
Totals	24,759	100%	\$22,928	100%

As shown in DoD's report on prime contract awards for FY 1973, by installing the trigger contract at \$500,000, the CAS coverage would still be applied to 86 percent of the dollars for negotiated prime contract awards.⁵² Yet, at the same time, the CAS administrative requirements associated with 73 percent of prime contract awards would be removed. In other words, by applying CAS to only 27 percent of awards, 86 percent of the dollars would be covered by CAS.

The GAO panel performed a similar type of analysis in 1999.⁵³ Raising the threshold for full CAS coverage from \$25 million to \$50 million and raising the trigger contract threshold from \$1 million to \$7.5 million would reduce dollars covered by \$2 billion (i.e., from \$72 billion to \$70 billion, roughly 3 percent).⁵⁴ At the same time, the number of business segments covered would be reduced from 588 to between 362 and 279 (about 45 percent), and almost all of that reduction was in modified CAS-coverage.⁵⁵

FPDS, notwithstanding its limitations, still provides the means to take a fresh look at CAS coverage. What can be said about FPDS is that it has captured the universe of potentially CAS-covered contracts. Contracts shown in FPDS as not containing the CAS clause would not be regarded as potentially CAS-covered contracts. Once the FPDS database is further culled to remove likely circumstances of exempted contracts, such as awards less than \$2 million (recently increased CAS-covered contract threshold); formally advertised awards; and awards to educational institutions, governmental entities, and small businesses, then the database becomes more usable for CAS analysis purposes. Using 5 years of contract award data, as opposed to the 1-year period previously used by CASB in 1974 and the GAO panel in 1999, adds credibility to the analysis.

The Section 809 Panel analyzed contract awards containing the CAS clause for DoD-definitive contracts awarded from FY 2012 through FY 2016, as reported by FPDS. IDVs were excluded because of their nature and distortive effect. Also removed from the analysis were the three TRICARE managed care support contracts, as they were likely to distort the results. A summary of reductions in CAS coverage at various breakpoints for potential CAS-covered contract thresholds is shown in Table 4-5.

⁵² OASD (Comptroller), *Prime Contract Awards - Size Distribution Fiscal Year 1973 (ADA954446)*, accessed May 3, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a954446.pdf>.

⁵³ GAO, *Future Role of the Cost Accounting Standards Board*, SP-99-1 (1999).

⁵⁴ Ibid, 28.

⁵⁵ Ibid, 29.

Table 4-5. Definitive Contracts with CAS Clause Per FPDS Impact on Percent of CAS-Coverage at Various CAS-Covered Contract Thresholds FY 2012–FY 2016

CAS-Covered Contract Threshold	Dollars Covered	Contracts Covered	Contractors Covered ⁵⁶
\$2 million ^(Note)	100%	100%	100%
\$5 million	99%	70%	61%
\$10 million	96%	49%	44%
\$25 million	92%	29%	28%

Note: The \$2 million threshold represents the current state, effective July 1, 2018. Per FPDS, there were 711 contractors receiving 3,326 contracts worth \$233.2 billion in definitive contracts containing the CAS clause (net of exclusions discussed above).⁵⁷

As shown in Table 4-5, raising the CAS-covered contract threshold had a relatively modest effect on reducing dollars of CAS coverage, but the reduction of CAS-covered contracts and, by implication, CAS-covered contractors was significant. One reason for this is that the size of DoD contract awards has increased substantially over the years. For example, in FY 1973, only about 2 percent of total negotiated prime contracts over the then existing CAS-covered contract threshold of \$100,000 in DoD exceeded \$10 million.⁵⁸ For FY 2012 through FY 2016, about 36 percent of definitive contracts over \$750,000 containing the CAS clause exceeded \$10 million, and they accounted for 96 percent of the dollars.

The results shown in Table 4-3 almost mirror what was observed by CASB in 1974 when installing the trigger contract: by applying CAS to only 28 percent of awards, 92 percent of the dollars would be covered by CAS. If 92 percent of DoD prime contract dollars can still be CAS covered at a \$25 million threshold, then the CAS-covered contract threshold should be decoupled from the TINA threshold altogether and set accordingly. At \$25 million, the threshold would be high enough to render the trigger contract unnecessary, and it could be eliminated as well.

The results shown in Table 4-3 and Table 4-5 raise the question of not only how much to increase CAS monetary thresholds, but more importantly, how to structure the CAS-covered contract threshold for the future. TINA and CAS serve different purposes. TINA provides the government with remedies for contractor-supplied pricing data that was not accurate, not complete, or not current. TINA is a specific remedy to a specific contract action. CAS imposes systemic requirements on contractor cost accounting practices, whether at modified or full CAS-coverage levels. CAS contractually imposes an obligation for the contractor to adjust contract prices if that contractor decides to change its cost accounting practices during the life of the contract. As such, CAS has broader ramifications than TINA, and this is why CAS is a major reason companies refuse to accept a CAS-covered contract.

⁵⁶ FPDS does not record CAS coverage by business segment. To simplify analysis, definitive contracts awarded to the same contractor at different contractor locations were consolidated into a single contractor name, as best as could be determined.

⁵⁷ Section 809 Panel analysis of FPDS data collected September 2017.

⁵⁸ OASD (Comptroller), *Prime Contract Awards - Size Distribution Fiscal Year 1973 (ADA954446)*, Table 4, accessed May 3, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a954446.pdf>.

In setting the CAS-covered contract threshold at \$25 million, there are other important risk mitigation factors to consider. First, the FAR imposes what is essentially modified CAS-coverage to all contracts falling under FAR Part 31 cost principles.⁵⁹ A comparison between modified CAS-coverage and the corresponding FAR provisions is shown in Table 4-6. Simply put, any contractor finding relief from a CAS-covered contract threshold of \$25 million would still be subjected to essentially the same requirements under the FAR. The difference would be that such contracts would not be deemed CAS covered and subjected to CAS administrative requirements.

Table 4-6. Modified CAS Coverage vs FAR Cost Principles

Cost Accounting Standard	Federal Acquisition Regulation
CAS 401, Consistency in Estimating, Accumulating, and Reporting Costs	No specific FAR requirement, although some principles are applied elsewhere (e.g., TINA)
CAS 402, Consistency in Allocating Costs Incurred for the Same Purpose	31.202, Direct Costs 31.203, Indirect Costs
CAS 405, Accounting for Unallowable Costs	31.201-6, Accounting for Unallowable Costs
CAS 406, Cost Accounting Period	31.203, Indirect Costs

With passage of the Sarbanes-Oxley Act of 2002, there have been improvements in the private sector's efforts to build effective safeguards into risk management infrastructure.⁶⁰ Although Sarbanes-Oxley's principal focus is on financial reporting, including compliance with GAAP, a higher degree of importance is placed on a company's internal controls. The underlying assumption is that an enhanced compliance structure increases confidence in a company's financial reporting. Compliance with contract obligations is an area of focus. For government contractors, compliance includes safeguards over government contract cost accounting. From a CAS perspective, the basic elements found in modified CAS coverage would need to be present in a defense contractor's internal control systems.

CAS & Hybrid Contracts

A hybrid contract describes a situation in which portions of a given contract (i.e., contract line item number (CLIN)), have different pricing and payment terms. Examples of such situations could be as follows:

- Part of a contract was awarded based on adequate pricing competition with no certified cost or pricing data provided by the contractor, but other parts of the same contract were not included in the evaluated price for contract award. This situation might occur when the government intends to negotiate pricing for the other parts after contract award, possibly with the submission of certified cost or pricing data.

⁵⁹ Several FAR cost principles also adopt cost accounting measurement and allocation requirements from certain standards.

⁶⁰ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (2002).

- Part of a contract contained commercial items that were priced using commercial pricing techniques without submission of certified cost or pricing data, but other parts of the same contract were based on negotiated pricing using certified cost or pricing data. This situation might occur when part of a contract for commercial items contains an item not considered a commercial item (i.e., major modification not performed commercially) and the price for that item was separately negotiated with submission of certified cost or pricing data.
- A contract has different contract type structures among the various CLINs, such as FFP pricing for some CLINs (e.g., unit prices for supplies and services) and cost reimbursement terms for other CLINs (e.g., travel, other direct charges).

In hybrid contracts, parts of a contract could be otherwise exempt from CAS program requirements if those parts had stood alone as a separate contract. The overriding question in such situations is if parts of a contract can be considered exempt from CAS and, if so, how such exemptions would be applied to CAS program requirements. For example, should a \$20 million contract that contained \$15 million in FFP CLINs awarded without submission of certified cost or pricing data be regarded as a \$20 million contract or \$5 million contract for CAS purposes? The answer would impose different CAS program requirements.

Even if hybrid contracts do not involve a portion that would be considered otherwise exempt, there still can be administrative concerns. For example, when aggregating CAS-covered contracts for purposes of determining the cost effects of changes in cost accounting practice, how should hybrid contracts be treated?

The CASB has long been aware of the hybrid contract issue. The CASB acknowledged the existence of such conditions as early as 1974:

Reduction of contract price by exclusion of commercial items. Some commentators, in reading the introductory comments to the Board's initial publication of this exemption, interpreted the phrase "minimum contract amount requiring compliance" in a manner not at all intended by the Board. These commentators interpreted this phrase to permit the price of a contract subject to standards to be reduced by the value of those individual contract items or subassemblies of final contract items whose prices could be considered to be "catalog" or "market" prices, if sold separately. They requested that the regulation be clarified to reflect their interpretation of the Board's introductory comments.

Those requesting this clarification misunderstood the Board's intentions. The Board does not intend that the price of a contract be adjusted to exclude the price of items or subassemblies which, if purchased separately, might be exempt from the Board's promulgations. Consequently, the change in the regulation requested by commentators on this point would be completely inappropriate.⁶¹

The issue of hybrid contracts in 1974 was mostly related to contracts for commercial items. Portions of the contract were based on established catalog prices; other portions were based on cost data. The full contract was regarded as CAS-covered. Subsequent commercial item acquisition reforms that occurred

⁶¹ 39 Fed. Reg. 44389 (Dec. 24, 1974).

in the 1990s, including creating a uniform contract format for commercial items that did not contain the CAS clause, partially alleviated the concern. The issue persists today in other areas as the government consolidates its requirements under omnibus contracts with multiple acquisition options (e.g., competed, sole source), proposal data requirements (i.e., certified cost or pricing data, cost or pricing data, other cost or pricing data), and payment provisions (e.g., FFP, time and material [T&M], cost reimbursement). In the past, private industry on multiple occasions had asked CASB to provide guidance, but without success.⁶² Private industry presented testimony before the GAO panel on the issue, also without any action taken. For example, the Government Electronic and Information Technology Association stated:

*[T]he CAS Board has not yet acted on the issue of hybrid commercial contracts ... This might occur, for example, on a firm-fixed price contract for commercial items, which contains a relatively minor provision ... for on-site maintenance to be paid on a time and materials basis. Assuming that the time and materials contract line item does not qualify for an exemption, is the entire contract CAS-covered or just the time and materials contract line item? In deciding the extent of CAS-coverage and Disclosure Statement obligations is the determining value the entire contract or just the time and materials portion?*⁶³

DoD contracting officers are instructed to prepare multiple CARs when the contract action includes line items with more than one type of contract pricing arrangement (e.g., fixed-price, cost-plus-fixed-fee).⁶⁴ A separate CAR is required for each type of contract pricing arrangement having a dollar value greater than \$5 million for that type. During FY 2012 through FY 2016, FPDS reported 204 definitive contracts with multiple CARs, denoting the presence of hybrid contracts. The number of hybrid contracts is likely to be larger in view of the \$5 million reporting criterion for each hybrid CLIN.

To present a more specific understanding of the nature and purpose of hybrid contracts, the Section 809 Panel selected a sample of hybrid contracts from the definitive contract population for electronic copies of selected contracts and obtained associated solicitations. Pertinent information was also acquired via the FPDS search tool. A synopsis of selected acquisitions is presented below.

- In 2016, the Air Force awarded a contract, with full and open competition, for computer facilities management services covering a base period and five option periods. The awarded value was \$72.9 million. The contract contained 274 CLINs, of which 231 were FFP, 35 were cost reimbursement for incidental costs (e.g., travel, supplies, directed overtime), and six were award fee provisions. The cost reimbursement CLINs accounted for about 17 percent of the contract value with the estimated values being inserted in the solicitation by contracting officers and not evaluated for award. Certified cost or pricing data were expressly not required, but supporting data other than certified cost and pricing data were requested for indirect labor rates. Because a portion of the contract requirements was on a cost reimbursable basis, offerors

⁶² For example, Council of Defense and Space Industry Associations letters to Dr. Steven Kelman, CASB Chairman, May 15, 1996, and July 30, 1997.

⁶³ Dan C. Heinemeier, "Issues on the Applicability of Cost Accounting Standards," in *Future Role of the Cost Accounting Standards Board* (Collingdale, PA: Diane Publishing, 1999), 316-317.

⁶⁴ Reporting Data, DFARS PGI 204.606(1)(ii)(A)(2).

were instructed to provide a copy of their disclosure statement; identification of CAS compliance, if applicable; and any CAS violations and subsequent corrections.

- In 2014, the Army awarded a contract, with full and open competition, for information technology and telecom facility operation and maintenance covering a base period and five option periods. The awarded value was \$516.7 million. The contract contained 73 CLINs, of which 12 were FFP, 21 were fixed-price-incentive (FPI), 20 were cost-plus-fixed-fee (CPFF), and 20 were T&M. The FPI arrangement, which represented 66 percent of the contract price, included both cost and performance incentives. Section L of the solicitation did not specify if certified cost or pricing data were required, although FPDS indicated that none were requested. Offerors were instructed to submit price proposals in a preset template.

Certain contracts awarded by the Defense Health Agency (DHA) possibly reveal another type of hybrid contract involving costs included in the contract value that are not actually incurred by the contractor in the performance of the contract. These might be described as *pass-through* expenditures. In 2015, DHA issued a solicitation for managed care support for DoD's TRICARE program covering 6 years (plus an option for 6 additional months). The award was to be based on adequate price competition, and no cost or pricing data were required. The resulting contract would contain 30 CLINs of which 11 were FFP, seven were CPFF, five were cost reimbursement, and seven were fixed fee. The CPFF CLINs were for patient claims that were to be reimbursed by the contractor under TRICARE guidelines and then vouchered to the government paying office. The claims were not costs of performance incurred by the contractor, but rather, they were obligations incurred by the TRICARE beneficiaries (e.g., doctor bills, hospital bills). The remainder of the contract is essentially FFP awarded on the basis of adequate price competition and otherwise exempted from CAS program requirements. The patient claims represented 94 percent of the two contracts (\$55 billion of \$58 billion) awarded under this particular solicitation. The two contracts contained the CAS clause.

The concern about hybrid contracts is not curtailing government practices for creating contracting vehicles intended to promote economy and efficiency in acquiring supplies and services. It is instead about the lack of CASB guidance on how to treat hybrid contracts when applying CAS program requirements. It seems appropriate to expressly recognize within CASB regulations existence of hybrid contracts and to provide guidance on how to apply CAS program requirements. The benefit would not only be a more precise application of CAS, but it might also bring more companies into the government marketplace if such application were better understood.

CAS and IDVs

IDVs enable government purchasers to establish contracts with single or multiple sources to satisfy requirements over an extended period.⁶⁵ Industry has referred to IDVs as *hunting licenses*, mostly because they impose contract obligations and require resources solely for the future chance to win work under the IDV. According to FPDS, the predominant contract type has been indefinite delivery contracts (IDC), but basic ordering agreements (BOAs) and blanket purchase agreements (BPAs) have been used for the same reason.

⁶⁵ Definitions, FAR 4.601, defines IDVs as an indefinite delivery contract or agreement having one or more ordering provisions.

The FPDS data for IDVs have limited value; although data are collected at the IDV level, the important events occur at the order level. Examining IDVs by dollars is meaningless because the amounts bear no relationship to the value of orders actually placed under IDVs. FPDS does, however, provide some insight into issues concerning CAS program requirements for IDVs, shown in Table 4-7.

**Table 4-7. Number of IDV Awards Containing CAS Clause Per FPDS
FY 2012–FY 2016**

Type	2012	2013	2014	2015	2016
BOA	80	59	68	79	96
BPA	14	13	4	6	6
IDC ^(Note)	650	643	634	657	633
Total	744	715	706	742	735

Note: FAR 16.5 defines indefinite delivery contracts as definite-quantity contracts, requirements contracts, and indefinite-quantity contracts.

The 3,642 IDVs reported for FY 2012 through FY 2016 together amounted to 2,435 acquisitions. The data reported at the IDV level tended to be FFP contracts (65 percent), awarded under full and open competition (47 percent), with no submission of cost or pricing data (53 percent). Many multiple award IDVs provided the mechanism for placing an order under a variety of circumstances, which included the possibility of requiring the submission of certified cost or pricing data during order placement.

To gain a better insight into the nature of IDVs, the Section 809 Panel selected a sample of IDCs for each service from among the largest acquisitions in terms of numbers of separate contracts issued under a particular solicitation. Electronic copies of selected contracts and associated solicitations were obtained. Some information was acquired via the FPDS search tools. A synopsis of each sampled acquisition is presented below. Each of these contracts, according to FPDS, contained the CAS clause.

- In 2013, the Army awarded multiple IDCs to 41 different contractors for support services through FY 2018. The awards were made with full and open competition, and no cost or pricing data were obtained. Offerors were instructed to propose ceiling labor rates for base and option periods. The contract contained different pricing terms for various CLINs (i.e., FFP, CPFF, cost reimbursement) which allowed pricing arrangements to be established separately for each order. The cumulative total of all task orders was not to exceed \$495 million, and the contract minimum was \$2,500. The face value of each of the 41 contracts awarded was \$495 million (aggregated as \$20.3 billion in FPDS). As of the end of FY 2016, funds totaling about \$193 million had been obligated, with almost 90 percent going to just five contractors. Obligations for the contract minimum had been issued to 24 contractors.
- In 2012, the Navy awarded multiple IDCs to 43 different contractors for training services through FY 2020. The awards were made with full and open competition, and no cost or pricing data were obtained. Offerors were instructed to provide direct labor rates and indirect expense rates for evaluation purposes only that were expressly not considered to be certified cost or pricing data. The contract contained different pricing terms for various CLINs (i.e., FFP, FPI, CPFF, CPIF) which allowed pricing arrangements to be established separately for each order. The contract provided for the possibility that cost or pricing data might be obtained at the time

of order placement. The cumulative total of all task orders was not to exceed \$780 million, and the contract minimum was \$1,000. The face value of each of the 43 contracts awarded was \$780 million (aggregated as \$33.5 billion in FPDS). As of the end of FY 2016, task orders obligations totaling roughly \$58 million had been issued, with 97 percent going to just five contractors. Obligations for the contract minimum had been issued to 37 contractors.

- In 2015, the Air Force awarded multiple IDCs to 25 different contractors for training systems through FY 2025. The awards were made with full and open competition, and no cost or pricing data were obtained. Offerors were instructed to propose FFP level-of-effort (FFP/LOE) wrap rates for labor. As adequate price competition was expected, no additional cost information was requested. The contract type would be established per individual task order (i.e., FFP, FFP/LOE, FPI, LH, T&M, CPIF, CPFF). The contract provided for the possibility that cost or pricing data might be obtained at the time of order placement. The cumulative total of all task orders was not to exceed \$20.9 billion, and the contract minimum was \$1,000. The face value of each of the 25 contracts awarded was \$20.9 billion (aggregated as \$522.5 billion in FPDS). According to FPDS, task orders obligations totaling about \$57 million had been issued, with 99 percent going to just four contractors. Obligations for the contract minimum had been issued to 20 contractors.

In each case the IDC was structured as an administrative vehicle for placing orders during the base year and option periods under a variety of pricing arrangements. Each sampled contract was conducted under full and open competition. Each solicitation in different ways expressly stated that the pricing information was not *certified* cost or pricing data. Subsequent orders would be placed under a variety of possible acquisition methods, order types, and price evaluation methods. Very few of the awarded contracts had received orders beyond the minimum.

In 1976, one of the first issues addressed by the DoD CAS Working Group concerned the question of CAS applicability to basic agreements and BOAs. The question posed was whether a basic agreement or BOA should include in its overall valuation for CAS threshold purposes individual orders that were valued less than the CAS-covered contract threshold (then \$100,000). The question was answered from a broader perspective; that is, because basic agreements and BOAs were expressly not contracts according to the ASPR (now FAR), CAS applicability was to be determined separately for each order.⁶⁶ This guidance has not been incorporated into CASB regulations or the FAR, but it is understood to still be in effect.⁶⁷ There is no DoD CAS Working Group guidance concerning IDCs which, unlike basic agreements, BOAs, and BPAs, are considered to be contracts. IDCs include definite-quantity contracts, requirements contracts, and indefinite-quantity contracts (see FAR Subpart 16.5).

In addition to the obvious hybrid contract issues concerning IDVs, excluding basic agreements, BOAs, and BPAs, the question regarding IDCs is how to consider their value for purposes of applying CAS monetary thresholds when the contract price on the face of the contract has no meaning. As seen from

⁶⁶ DoD CAS Working Group Paper 76-2, "Application of CAS to Contract Modifications and to Orders Placed Under Basic Agreements – Interim Guidance," (Feb. 24, 1976) in *Code of Federal Regulations, 1949-1984*, U.S. Government Printing Office, 1980.

⁶⁷ DCAA, *Contract Audit Manual*, 8-102.2b, accessed March 28, 2018, http://www.dcaa.mil/Content/Documents/cam/Chapter_08_-_Cost_Accounting_Standards.pdf.

the examples, the face value of many IDCs awarded under a given solicitation was the full projected value of the acquisition. Also, in many other cases, the face value of the IDC was \$0.

As the sampled IDCs reveal, the CAS clause was included in the IDC based on the prospect (however unlikely) of obtaining certified cost or pricing data at order placement. The government was, in effect, postponing CAS coverage decisions until the time of order placement. The CASB regulations do not accommodate this condition because CAS determinations on contracts are made at the time of contract award. Given the widespread use of IDCs, guidance is needed in this area for much the same reasoning as with hybrid contracts. CASB regulations should adopt the DoD CAS Working Group guidance for all IDVs, including IDCs, notwithstanding their inherent legal differences from basic agreements, BOAs, and BPAs.

CAS and Commercial Items

From the outset, CAS program requirements have been exempted on contracts for commercial items. Until 1994, this exemption was expressed as “contracts where price was based on established catalog or market prices of commercial items sold in substantial quantities to the general public.”⁶⁸ This same exemption had long been applied to TINA.

During the 1990s, there was a movement toward greater use of commercial items to satisfy government requirements. One of the impediments was the obsolete wording of the CAS (and TINA) commercial item exemption. The notion of a catalog price of something sold in substantial quantities to the general public was far too static to be applied in the rapidly evolving commercial marketplace. *Something sold* implied something was available in the market that was sold enough times to become a *substantial quantity*. This view denied the government access to the newest products and leading-edge commercial technologies. The commercial marketplace was progressing toward more bundled solutions as opposed to market basket offerings suggested by the notion of catalog pricing. If the government was going to achieve its goal of greater use of commercial items, then it needed to change its perception of catalog and market price. Accordingly, Congress in 1994, under FARA, replaced the catalog and market price wording to simply “contracts and subcontracts for the acquisition of commercial items.”⁶⁹

At the time, CASB chose not to use the wording adopted by Congress and instead limited the exemption to FFP contracts and FP contracts with economic price adjustment (FFP/EPA), provided that the price adjustment was not based on actual costs incurred.⁷⁰ This choice caused an immediate conflict with the FAR because there were more contract types permitted by Congress for the acquisition of commercial items than recognized by CASB. The conflict was further exacerbated by CASB’s failure to keep up with the pace of change as more permissible contract types were added for the acquisition of commercial items.

Why CASB found it necessary to single out FFP/EPA based on actual costs incurred was never adequately explained. The CASB admitted that such contracts were “rarely used, if ever.” The controls imposed by the FAR on FFP/EPA based on actual costs incurred would seem to have negated the

⁶⁸ 37 Fed. Reg. 4139 (Feb. 29, 1972).

⁶⁹ FY 1996 NDAA, Pub. L. No. 104–106, Sec. 4205 (1996), codified at Cost Accounting Standards, 41 U.S.C. § 1502(b)(1)(C)(i).

⁷⁰ 62 Fed. Reg. 31294 (Jun. 6, 1997).

necessity to apply CAS to this contract type (see FAR 16.203-4). The risks to the government had to be miniscule. Moreover, in taking this action, CASB created another hybrid contract situation: part of the FFP/EPA contract would be FFP, and part would be cost reimbursement.

The commercial item exemption in its current state under CAS program requirements is as follows (48 CFR 9903.201-1(b)(6)):

Firm fixed-priced, fixed-priced with economic price adjustment (provided that price adjustment is not based on actual costs incurred), time-and-materials, and labor-hour contracts and subcontracts for the acquisition of commercial items.

On October 5, 2011, CASB approved a proposed rule for publication to bring the commercial item exemption wording in line with what had been adopted by Congress: “contracts and subcontracts for the acquisition of commercial items.”⁷¹ The proposed rule was not published until a year later.⁷² Few public comments were received, with none of them having any import to the proposed change. What was proposed by CASB was simply the wording used by Congress and codified at 41 U.S.C. § 1502(b)(1)(C)(i). A final rule has not yet been issued by CASB.

CAS and Cost Data

Since the initial installation of CAS program requirements in 1972, there has been an on-going debate over the appropriateness of applying CAS to contracts for which price was not based on cost data. There was no progress until 1980, when CASB added an exemption for FFP contracts awarded without submission of cost data.⁷³ The CASB continued to hold the narrow view that any cost data submitted, no matter the reason, should make contracts subject to CAS. The CASB stated:

Situations occur in which cost data are submitted in support of a price but are not certified because the award is designated as adequate price competition. Whether the data are used in a particular case can be difficult to establish. The Board however is satisfied that such data would not be submitted unless they were to be used.

Subsequently, it has been argued that cost data submitted by a contractor for reasons other than establishing contract price should not make contracts subject to CAS. Examples of other reasons for submitting cost data included cost data used for price realism purposes (i.e., assessing an offeror’s understanding of program requirements) or used for evaluating compensation plans (i.e., assessing an offeror’s ability to attract skilled technicians needed to perform the work). During this time, in concert with the commercial item acquisition reforms, there was a movement within the government to better define what was and what was not certified cost or pricing data. In 1995, the government created a *bright-line test* by creating two categories of cost data: (a) cost or pricing data and (b) information other

⁷¹ Minutes of the October 5, 2011 CASB Meeting, accessed March 28, 2018, https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/casb/minutes/casb-70-meeting_minutes.pdf.

⁷² 77 Fed. Reg. 69422 (Nov. 19, 2012).

⁷³ 45 Fed. Reg. 62011 (Sept. 18, 1980).

than cost or pricing data.⁷⁴ Cost or pricing data meant certified cost or pricing data. All other cost or pricing data was information other than cost or pricing data.

The cost data issue was taken up by the GAO panel in 1999. The GAO panel recommended that CAS be exempt on FFP contracts for which the government did not obtain certified cost or pricing data at the time of award. The GAO panel reached this conclusion because when certified cost or pricing data were not obtained, the safeguards provided by CAS would, consequently, not be necessary.

The GAO panel's recommendation was enacted by Congress under the FY 2000 NDAA, as previously mentioned. Congress added the phrase "on the basis of adequate price competition" to the exemption—something the GAO panel had not recommended. The added phrase has the effect of being more limiting because "adequate price competition" is just one of the techniques set forth in the FAR to perform price analysis, as opposed to cost analysis. Certified cost or pricing data is not obtained when performing price analysis. The legislative history is unclear on why Congress included this phrase. The CASB implemented Congress's version in 2000.⁷⁵

A later advisory panel concluded in 2007 that, notwithstanding the so-called bright-line test, confusion remained about what cost or pricing data should be obtained by contracting officers to assess price reasonableness.⁷⁶ That panel observed instances in which cost or pricing data had not been obtained in situations when such data should have been obtained and placed blame on the bright-line test. In 2010, in response to that advisory panel's recommendations, the categories of cost data set forth in the FAR were reaggregated from two groupings into three groupings at FAR 2.101: (a) certified cost or pricing data, (b) cost or pricing data, and (c) data other than certified cost or pricing data.⁷⁷

The FAR's new three categories of cost data created an immediate conflict with CASB's exemption which had been based on the FAR's previous two categories of cost data. On October 5, 2011, CASB published a proposed rule to change the exemption wording to "submission of *certified* cost or pricing data" [emphasis added] in order to be compatible with the FAR's new definition.⁷⁸ A final rule was only recently issued by CASB.⁷⁹ Presently, the exemption at 48 CFR 9903.201-1(b)(15), in its limiting form, is as follows: "Firm-fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of cost or pricing data."

Notwithstanding CASB's pending rule exempting FFP contracts awarded without submission of certified cost or pricing data, practical problems remain. First, there are fixed-price contract types, other than FFP, where price is not based on certified cost or pricing data. The universe of fixed-price type contracts is much broader than FFP contracts (see FAR 16.2). Second, the present wording does not recognize that adequate price competition is just one of the price analysis techniques described in

⁷⁴ 60 Fed. Reg. 48208 (Sep 18, 1995).

⁷⁵ 65 Fed. Reg. 5990 (Feb. 7, 2000).

⁷⁶ Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, January 2007*, accessed March 28, 2018, https://www.acquisition.gov/sites/default/files/page_file/uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

⁷⁷ 75 Fed. Reg. 53135 (Aug. 30, 2010). FPDS does not presently capture the distinction between certified cost or pricing and noncertified cost or pricing data. FPDS only records whether cost or pricing data was obtained.

⁷⁸ 76 Fed. Reg. 61660 (Oct. 5, 2011).

⁷⁹ 83 Fed. Reg. 8634 (Feb. 28, 2018).

FAR 15.404-1 for evaluating pricing proposals. Price analysis does not rely on the submission of certified cost or pricing data. As it stands, the exemption at 48 CFR 9903.201-1(b)(15) runs counter to many of the procurement reforms installed over the years. To be fully useful, the exemption needs to apply to any fixed-price type contract whose price is based on price analysis without the submission of certified cost or pricing data. The three conditions of (a) fixed-price type contract, (b) price analysis, and (c) no certified cost or pricing data should be enough control the application of such an exemption.

CAS Notices and Clauses

When CASB published its CAS notice and CAS clause in 1972, it was reasonably clear that CASB intended the CAS notice be inserted in solicitations *likely* to result in a CAS-covered contract and that the CAS clause be inserted *only* in contracts that were actually CAS covered. Today, as made obvious from the FPDS data for the 5-year period FY 2012 through FY 2016, the CAS clause is being placed in contracts that are not likely to have been CAS covered. For example, Table 4-8 shows the number of contracts containing the CAS clause that were awarded under full and open competition or did not require the submission of cost or pricing data. Both conditions could be a reason for exempting the contract from CAS, although it is recognized that CAS might still apply in certain situations (e.g., CPFF contract awarded with full and open competition, hybrid contracts).

Table 4-8. Percentage of Contracts Awarded by Numbers of Actions Full and Open Competition or No Cost or Pricing Data Per FPDS FY 2012—FY 2016

Type	Definitive Contracts (Note 1)	Acquisitions Using IDCs (Note 2)
Full & Open Competition	51%	50%
No Cost or Pricing Data	43%	54%

Notes:

(1) Based on definitive contracts valued over \$750,000 at time of award.

(2) Based on acquisitions using IDCs valued over \$750,000 at time of award.

IDCs aggregated by acquisitions rather than by contracts to avoid distortive effect of multiple contracts awarded under a single acquisition (see discussion on IDVs).

This condition was caused, in part, by the way the CAS clause was initially crafted by CASB. The CAS clause begins with the provision, “Unless the contract is exempt under 9903.201–1 [exemptions] and 9903.201–2 [modified CAS-coverage].”⁸⁰ This verbiage creates the impression that the CAS clause is self-deleting or, as some have observed, self-initiating. Such an approach may have been reasonable in 1972 given the low monetary threshold for a CAS-covered contract (then \$100,000) and the few exemptions available. Almost all prime contract awards of negotiated national defense contracts would have been CAS covered in 1972. This approach, though perhaps expedient, is not reasonable for today’s acquisition environment; it is poor contract construction for imposing a clause of such importance.

Another contributing factor is how the CAS notices and CAS clauses work under the FAR, which was created in 1984 during the period when CASB did not exist. In 1984, the Armed Services Procurement Regulation and Federal Procurement Regulation were combined into the FAR. In addition to

⁸⁰ Contract Clauses, 48 CFR 9903.201-4.

combining and reshaping procurement policies and practices, the FAR changed how the solicitation and contract award process functioned. The Uniform Contract Format for negotiated contracts at FAR 15.201-4 prescribes the structure for preparing solicitations and contracts. The structure of FAR Table 15-1 is shown in Table 4-9.

Table 4-9. FAR Table 15-1 Uniform Contract Format

Section	Title
Part I – The Schedule	
A	Solicitation/contract form
B	Supplies or services and prices/costs
C	Description/specifications/statements of work
D	Packaging and marking
E	Inspection and acceptance
F	Deliveries or performance
G	Contract administration data
H	Special contract requirements
Part II – Contract Clauses	
I	Contract Clauses
Part III – List of Documents, Exhibits, and Other Attachments	
J	List of Attachments
Part IV – Representations and Instructions	
K	Representations, certifications, and other statements of offerors or respondents
L	Instructions, conditions, and notices to offerors or respondents
M	Evaluation factors for award

The solicitation contains Parts I, II, III, and IV, which means the solicitation would normally contain the CAS clause, especially if the resulting contract were likely to be CAS-covered. The CAS clause itself, however, is incorporated by reference to the corresponding FAR provision, rather than being inserted in Section I by its full text. In preparing the resulting contract, contracting officers are instructed not to physically include Part IV but retain it in the contract file. A major part of the solicitation that determines CAS coverage, such as the instruction on submitting cost or pricing data or describing the extent of price competition, does not become part of the resulting contract. Stated another way, an important piece of information for activating the CAS clause's self-deleting provision is unavailable to the contracting parties.

FAR 30.201-4(a) instructs contracting officers to insert the CAS clause in negotiated contracts *unless* the contract is exempted or the contract is subject to modified coverage. Logically, the CAS clause would be placed in any solicitation, as it is reasonable to put potential offerors on notice that the resulting contract might be CAS covered. More importantly, there is no instruction in the FAR advising contracting officers to remove the CAS clause from the Uniform Contract Format if it is not CAS

covered.⁸¹ In practice, as FPDS clearly shows, contracting officers tend to leave the CAS clause in the resulting contract.

As a practical matter, there are three problems with including the CAS clause, by reference, in contracts that are not CAS covered:

- Contracting officers (i.e., procuring contracting officer) leave the determination of CAS coverage up to other parties, which typically involves a different contracting officer (i.e., administrative contracting officer). The CARs prepared by contracting officers will be of little help because they only record if the CAS clause is in the contract. In cases for which discerning CAS coverage becomes necessary, such as having to perform a cost impact analysis due to a change in cost accounting practice, this effort often occurs well after contract award, resulting in a complicated and laborious process. Because Part IV (Sections L and M) has been removed from the awarded contract, key information for establishing CAS coverage may not be readily available or available at all. The CAR, FPDS, and MOCAS will be of no help.
- Some companies, as previously stated, will not pursue a government business opportunity if the resulting contract might impose CAS. That the CAS clause is self-deleting provides these companies little assurance. Their risk is too great. An abundance of caution causes such companies to pass on solicitations that may result in the CAS clause being included in the resulting contract. The lack of CASB guidance on hybrid contracts and IDVs only exacerbates the problem. As the GAO panel observed, a company's decision to not be a part of the government supplier base is not in the government's best interests.
- As long as contracting officers continue to include the CAS clause in contracts that are otherwise exempt, the FPDS database (and MOCAS) will be of little use on CAS matters. The reality is that DoD (or perhaps any federal agency) cannot say what the population of CAS-covered contracts actually is.

It is simply good contracting practice to place in contracts only those terms and conditions that are actually imposed on a contractor. Conversely, it is poor practice to place clauses in contracts that may or may not be activated, unless the situation calls for that type of clause, like a clause contingent on possible future events (e.g., disputes clause). The CAS clause imposes substantive systemic, financial, and administrative obligations on the part of the contractor, especially for full CAS coverage. Such obligations need to be more clearly understood between the contracting parties rather than communicated through a clause that is incorporated by reference to the FAR provision that may or may not be activated. Contracting officers should make an affirmative written determination at the time of award that a contract will be CAS-covered and provide contractors means to confirm or question contracting officers' determinations.

⁸¹ Interestingly, Administration of Cost Accounting Standards, FAR 52.230-6(l)(1), instructs contractors to not use self-deleting CAS clauses in subcontracts.

Conclusions

Nothing should be taken from the discussion of issues about CAS program requirements as meaning that CAS does not provide a worthwhile means of oversight for cost accounting on DoD contracts. Any negotiated contract that *establishes its price* based on an accumulated cost build-up methodology, projected or actual, should be subjected to CAS program requirements, unless otherwise exempted.

The individual issues discussed, taken as a whole, expose CAS program requirements that are out of touch with today's business practices in the public and private sectors. CAS program requirements should be reshaped for the future as noted below:

- Decouple the CAS-covered contract monetary threshold from the TINA monetary threshold and set the monetary threshold at \$25 million. The monetary threshold should be stated at the outset of 48 CFR Chapter 99 and, thereby, eliminate the need for the monetary exemption at 9903.201-1(b)(2), which is used for inflation adjustments.
- Eliminate the trigger contract exemption at 41 U.S.C. §1502(b)(1)(C)(iv) and 48 CFR 9903.201-1(b)(7), as it would no longer be necessary if the CAS-covered contract monetary threshold were raised to \$25 million.
- Raise the full CAS-coverage monetary threshold to \$100 million.
- Raise the disclosure statement monetary threshold to \$100 million. The condition for not requiring a disclosure statement from a segment that has CAS-covered contracts totaling less than \$10 million and representing less than 30 percent of segment sales should be eliminated, as it would be no longer necessary.
- Revise commercial item exemption at 48 CFR 9903.201-1(b)(6) as proposed by CASB in 2012.
- Expand the CAS exemption at 48 CFR 9903.201-1(b)(15) to include any *fixed-price type contract* whose price is based on *price analysis* without the submission of *certified* cost or pricing data.
- Add specific guidance for hybrid contracts to CAS program requirements at 48 CFR 9903.201-1 that would exclude exempted portions of contracts from CAS-coverage, including the application of monetary thresholds. Add a definition of *hybrid contract* to the CAS definitions at 48 CFR 9903.301.
- Require contracting officers, to the maximum extent practicable, to identify the portions of the contract that are not CAS-covered when a hybrid contract is contemplated.
- Add specific guidance for indefinite delivery vehicles to CAS program requirements at 48 CFR 9903.201-1 that would determine CAS applicability at the time of order placement. Evaluate each order for CAS applicability on its own. Add a definition of *indefinite delivery vehicle*, using the existing definition at FAR 4.601.
- Place the CAS clause by full text in contracts that at the time of award are CAS-covered pursuant to CFR Part 9903. Require contracting officers to make an affirmative written

determination at the time of award that a given contract, in whole or part, will be CAS covered. Provide contractors means to confirm or question contracting officers' determinations.

- Revise the CAS clause to (a) remove the self-deleting provision for CAS coverage, (b) accommodate provisions for hybrid contracts and indefinite delivery vehicles, and (c) state that, if subsequent to award of the CAS-covered contract, it is established that the contract, or portions thereof, should not have been determined to be CAS covered, the CAS clause will be deemed inapplicable to the contract, or portions thereof.

Implementation

Legislative Branch

- Modify 41 U.S.C. § 1502 to accomplish the following:
 - Decouple monetary threshold for a CAS-covered contract from the TINA monetary threshold and set at \$25 million.
 - Eliminate the trigger contract exemption.
 - Remove the CAS exemption for firm, fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data as a legislative exemption (it duplicates what is already stated at 48 CFR 9903.201-1(b)(15)).

Executive Branch

- CASB should revise 48 CFR Chapter 99 to accomplish the following:
 - Raise CAS-covered contract threshold to \$25 million;
 - Eliminate trigger contract exemption;
 - Raise full CAS-coverage threshold to \$100 million;
 - Raise disclosure statement threshold to \$100 million and eliminate segment exemption;
 - Revise commercial item exemption;
 - Revise certified cost or pricing data exemption;
 - Provide guidance for hybrid contracts;
 - Provide guidance for indefinite delivery vehicles;
 - Prohibit placing CAS clause in contracts that are not CAS-covered; and
 - Remove self-deleting provision of the CAS clause.
- The FAR Council should harmonize all relevant sections of the FAR affected by CASB revisions to 48 CFR Chapter 99.

Note: Explanatory report language, draft legislative text, and regulatory revisions can be found in the Implementation Details subsection at the end of Section 4.

Implications for Other Agencies

- CAS applies to all federal agencies, and they would be affected by all of the recommended revisions to 41 U.S.C. § 1502 and 48 CFR Chapter 99.

Section 4
Cost Accounting Standards
Implementation Details

Recommendations 29 and 30

RECOMMENDED REPORT LANGUAGE

SEC 901. Cost Accounting Standards Board

This section would disestablish the current Cost Accounting Standards Board (CASB) that resides at the Office of Federal Procurement Policy. It would re-establish the CASB as an independent organization within the executive branch and revise qualifications for CASB members. The committee notes the board has met only intermittently since its creation in 1988, which hinders its ability to respond to CAS matters in a timely and effective manner. In disestablishing the current CASB, this section would remove its charter from title 41, United States Code, and create a new independent board codified in title 31, United States Code.

This section also would repeal Section 820 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-238), which created the Defense Cost Accounting Standards Board, eliminating the potential confusion of having two competing CAS Boards.

SEC. 902. Applicability of Cost Accounting Standards

This section would update program requirements for cost accounting standards (CAS). It would update various thresholds, exemptions, and types of coverage for CAS. The committee notes that these program requirements have not been significantly revised since the 1970s despite substantial changes in technology, pricing policies, and business practices.

The section would raise the thresholds for CAS coverage, full CAS coverage, and the disclosure statement of contractor cost accounting practices. This section also would clarify guidance for application of CAS to hybrid contracts and indefinite delivery vehicles, as well as ensure the CAS clause is included only in contracts or parts of contracts that require CAS coverage. The section would remove the requirement to submit cost or pricing data for fixed price contracts or subcontracts awarded with adequate price competition.

The committee is aware that reducing burdensome accounting requirements may improve the government's access to innovative non-traditional companies while retaining oversight for cost accounting on large contracts.

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COST ACCOUNTING STANDARDS

[(1) This draft assumes as current law the amendments effective as of Oct. 1, 2018, made by section 820 of the National Defense Authorization Act for Fiscal Year 2017 (P. L. 114-328; 130 Stat. 2273, 2276).

[(2) Section 901 generally has an effective date of four months after enactment. See subsection (f).

[(3) The draft legislative text below is followed by a “Sections Affected” display, showing the text of the provision of law affected by the draft legislative text.]

TITLE IX—COST ACCOUNTING STANDARDS

SEC. 901. COST ACCOUNTING STANDARDS BOARD.

(a) DISESTABLISHMENT OF CURRENT BOARDS.—

(1) TITLE 41 BOARD.—The Cost Accounting Standards Board provided for under section 1501 of title 41, United States Code, is disestablished.

(2) TITLE 10 BOARD.—The Defense Cost Accounting Standards Board provided for under section 190 of title 10, United States Code, is disestablished.

(b) ESTABLISHMENT OF NEW BOARD OUTSIDE OF OFPP.—

(1) ESTABLISHMENT; MEMBERSHIP.—Subtitle III of title 31, United States Code, is amended by adding at the end the following new chapter:

“CHAPTER 41—COST ACCOUNTING STANDARDS

“Sec.

“4101. Cost Accounting Standards Board.

“4102. Cost accounting standards.

“4103. Contract price adjustment.

“4104. Effect on other standards and regulations

“4105. Examinations.

“4106. Authorization of appropriations.

“§ 4101. Cost Accounting Standards Board

“(a) ORGANIZATION.—There is in the executive branch of the Government an independent board known as the Cost Accounting Standards Board.

“(b) MEMBERSHIP.—

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“(1) APPOINTMENT.—The Board consists of five members who shall be appointed by the Director of the Office of Management and Budget from among persons experienced in Government contract cost accounting. The Director shall designate one of the members to serve as Chair of the Board.

“(2) QUALIFICATIONS.—

“(A) IN GENERAL.—The members of the Board shall have qualifications as follows:

“(i) CHAIR.—The member designated by the Director to serve as Chair of the Board—

“(I) shall be a full-time Government employee or a part-time special Government employee;

“(II) shall have extensive experience as a senior Government official in administering and managing contracts described in subparagraph (B); and

“(III) may not be the Administrator of the Office of Federal Procurement Policy or an employee of the Office of Federal Procurement Policy.

“(ii) GOVERNMENT REPRESENTATIVES.—Two members of the Board shall be representatives of the Government who have experience in administering and managing contracts described in subparagraph (B), one of whom shall be an officer or employee of the Department of Defense (who may not be a Government auditor or investigator) and the other of

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1 whom shall be an officer or employee of a department or agency other
2 than the Department of Defense.

3 “(iii) SENIOR CONTRACTOR EMPLOYEE.—One member of the Board
4 shall be an individual in the private sector who is a senior employee, or
5 retired senior employee, of a Government contractor with substantial
6 experience in the private sector involving administration and management
7 of contracts described in subparagraph (B).

8 “(iv) MEMBER OF ACCOUNTING PROFESSION.—One member of the
9 Board shall be a member of the accounting profession with substantial
10 professional experience as an accountant with contracts described in
11 subparagraph (B).

12 “(B) CONTRACTS DESCRIBED.—For purposes of subparagraph (A),
13 contracts described in this subparagraph are Government contracts negotiated on
14 the basis of cost and awarded under Federal acquisition regulations governing
15 negotiated procurements.

16 “(3) TERM OF OFFICE.—

17 “(A) LENGTH OF TERM.—The members of the Board shall serve for a term
18 of four years.

19 “(B) REQUIREMENT RELATING TO DOD BOARD MEMBER.—A member
20 serving on the Board under paragraph (2)(A)(ii) as a representative of the
21 Department of Defense may not continue to serve after ceasing to be an officer or
22 employee of the Department of Defense.

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1 “(4) VACANCY.—A vacancy on the Board shall be filled in the same manner in
2 which the original appointment was made. A member appointed to fill a vacancy serves
3 for the remainder of the term for which that member's predecessor was appointed.

4 “(5) LIMITATION ON REMOVAL.—A member of the Board may be removed by the
5 Director only for misconduct or failure to perform functions vested in the Board.

6 “(c) MEETINGS.—The Board shall meet not less than once each quarter and shall publish
7 in the Federal Register notice of each meeting and its agenda before such meeting is held.”.

8 (2) DUTIES.—Section 4101 of title 31, United States Code, as added by paragraph
9 (1), is amended by adding after subsection (c) the following new subsection:

10 “(d) DUTIES.—The Board shall have the following duties:

11 “(1) To ensure that the cost accounting standards used by Federal contractors rely,
12 to the maximum extent practicable, on commercial standards and accounting practices
13 and systems.

14 “(2) To review on an ongoing basis any cost accounting standards established
15 under section 4102 of this title (or section 1502 of title 41) and to conform such
16 standards, where practicable, to Generally Accepted Accounting Principles.

17 “(3) To annually review disputes involving such standards brought to the boards
18 established in section 7105 of title 41 (relating to agency boards of contract appeals) or
19 Federal courts and consider whether greater clarity in such standards could avoid such
20 disputes.”.

21 (3) ANNUAL REPORT.—Section 4101 of title 31, United States Code, as added by
22 paragraph (1), is amended by adding after subsection (d), as added by paragraph (2), the
23 following new subsection:

COST ACCOUNTING STANDARDS

1 “(e) ANNUAL REPORT.—

2 “(1) REPORT REQUIRED.—The Board shall submit to the specified congressional
3 committees an annual report describing the actions taken during the prior year—

4 “(A) to conform the cost accounting standards established under section
5 4102 of this title with Generally Accepted Accounting Principles, including
6 actions to—

7 “(i) prescribe standards and regulations that have contributed to
8 increasing consistency and uniformity of accounting practices on
9 Government contracts; and

10 “(ii) identify regulatory changes made as a result of the review
11 process in subsection (c)(3); and

12 “(B) to minimize the burden on contractors while protecting the interests
13 of the Federal Government.

14 “(2) SPECIFIED CONGRESSIONAL COMMITTEES.—In this subsection, the term
15 ‘specified congressional committees’ means—

16 “(A) the Committee on Armed Services, the Committee on Homeland
17 Security and Governmental Affairs, and the Committee on Appropriations of the
18 Senate; and

19 “(B) the Committee on Armed Services, the Committee on Oversight and
20 Government Reform, and the Committee on Appropriations of the House of
21 Representatives.”.

22 (4) ADMINISTRATIVE AND PERSONNEL MATTERS.—

COST ACCOUNTING STANDARDS

(A) TRANSFERS.—Subsections (f), (g), (h), and (i) of section 1501 of title 41, United States Code, are transferred to section 4101 of title 31, United States Code, as added by paragraph (1), and added at the end.

(B) CHANGES TO REFERENCES TO ADMINISTRATOR OF OFPP.—Subsections (f), (g), (h)(2), and (i)(3) of such section, as so transferred, are amended by striking “Administrator” and inserting “Director”.

(5) OFFICES.—Section 4101 of title 31, United States Code, as added by paragraph (1), is further amended by adding at the end the following new subsection:

“(j) LOCATION OF OFFICE SPACE.—The Administrator of General Services, in providing office space for the Board, shall ensure that the Board is not co-located with the Office of Federal Procurement Policy.”.

(6) INITIAL APPOINTMENTS.—

(A) TIME LIMIT FOR INITIAL APPOINTMENTS.—The Director of the Office of Management and Budget shall make the initial appointment of members of the Board under section 4101(b) of title 31, United States Code, as added by paragraph (1), within 120 days after the date of the enactment of this Act.

(B) TERMS OF MEMBERS FIRST APPOINTED.—Notwithstanding the term length specified in paragraph (3) of such section, of the members first appointed to the Board—

(i) two (including the Chair) shall be appointed for a term of six years;

(ii) two shall be appointed for a term of four years; and

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(iii) one, who shall be the member appointed under paragraph

(2)(A)(i) of such section as an officer or employee of the Department of

Defense, shall be appointed for a term of two years.

(B) The table of chapters at the beginning of subtitle III of such title is amended

by adding at the end the following new item:

“41. Cost Accounting Standards4101”

(b) TRANSFER OF OTHER SECTIONS OF TITLE 41 CHAPTER.—Sections 1502, 1503, 1504, 1505, and 1506 of title 41, United States Code, are transferred to chapter 41 of title 31, United States Code, as added by subsection (a), added at the end, and redesignated as sections 4102, 4103, 4104, 4105, and 4106, respectively.

(c) AMENDMENTS TO REVISED CHAPTER.—

(1) SECTION 4102.—Subsection (a)(2) of section 4102 of title 31, United States Code, as transferred and redesignated by subsection (b), is amended by striking the paragraph heading and the first sentence and inserting the following: “RULES AND PROCEDURES.—The Board shall prescribe rules and procedures governing actions of the Board under this chapter.”.

(2) SECTION 4103.—Section 4103 of such title, as transferred and redesignated by subsection (b), is amended—

(A) in subsection (a), by striking “of this title” and inserting “of title 41”;

and

(B) in subsection (b), by striking “section 1502(f)(2)” and inserting

“section 4102(f)(2)”.

(3) SECTION 4104.—Section 4104 of such title, as transferred and redesignated by subsection (b), is amended—

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(A) in subsection (a)—

(i) by inserting “by the Cost Accounting Standards Board under chapter 15 of title 41 or” after “regulations prescribed”; and

(ii) by striking “this division” both places it appears in paragraph (2) and inserting “this chapter”; and

(B) in subsection (b)—

(i) by inserting “of the Office of Federal Procurement Policy” after “Administrator”; and

(ii) by striking “of this title” and inserting “of title 41”.

(d) CONFORMING REPEALS.—

(1) TITLE 41.—Title 41, United States Code, is amended as follows:

(A) **Chapter 15 is repealed.**

(B) The table of chapters at the beginning of subtitle I is amended by striking the item relating to chapter 15.

(2) TITLE 10.—Title 10, United States Code, is amended as follows:

(A) **Section 190 is repealed.**

(B) The table of sections at the beginning of chapter 7 is amended by striking the item relating to section 190.

(e) COMPTROLLER GENERAL REPORT.—Section 820(c) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 130 Stat. 2276) is amended by striking “section 1501 of title 41” and inserting “section 4101 of title 31”.

(f) EFFECTIVE DATE.—

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(1) GENERAL RULE.—Except as provided in paragraphs (2) and (3), this section and the amendments made by this section shall take effect on the first day of the first month beginning more than 120 days after the date of the enactment of this Act.

(2) INITIAL APPOINTMENT OF MEMBERS OF NEW BOARD.—Subsection (a)(6) shall take effect on the date of the enactment of this Act.

(3) DOD BOARD.—Subsections (a)(2) and (d)(2) shall take effect on the date of the enactment of this Act.

SEC. 902. APPLICABILITY OF COST ACCOUNTING STANDARDS.

(a) REVISION TO THRESHOLD FOR CONTRACTS COVERED BY COST ACCOUNTING STANDARDS.—Paragraph (1)(B) of subsection (b) of section 4102 of title 31, United States Code, as transferred and redesignated by section 901(b), is amended by striking “the amount set forth in” and all that follows and inserting “\$25,000,000.”.

(b) REPEAL OF CERTAIN STATUTORY EXEMPTIONS.—Paragraph (1)(C) of such subsection is amended—

(1) by inserting “or” at the end of clause (i);

(2) by striking the semicolon at the end of clause (ii) and inserting a period; and

(3) by striking clauses (iii) and (iv).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to any contract awarded after the date of the enactment of this Act.

[Showing proposed changes to Chapter 15 of title 41, United States Code, including transfer of that chapter to a new chapter 41 of title 31, United States Code. Matter to be omitted is shown in ~~strike thru~~; matter to be inserted is shown in **bold underlined**]

CHAPTER ~~15~~ 41—COST ACCOUNTING STANDARDS

COST ACCOUNTING STANDARDS

[Note: The proposal would transfer Chapter 15 of title 41, USC, to a new Chapter 41 of title 31, USC, WITH the amendments shown below]

Sec.

~~1501~~ **4101.** Cost Accounting Standards Board.

~~1502~~ **4102.** Cost accounting standards.

~~1503~~ **4103.** Contract price adjustment.

~~1504~~ **4104.** Effect on other standards and regulations.

~~1505~~ **4105.** Examinations.

~~1506~~ **4106.** Authorization of appropriations.

§1501 4101. Cost Accounting Standards Board

~~(a) ORGANIZATION.~~—The Cost Accounting Standards Board is an independent board in the Office of Federal Procurement Policy.

(a) ORGANIZATION.—**There is in the executive branch of the Government an independent board known at the Cost Accounting Standards Board.**

~~(b) MEMBERSHIP.~~—

~~(1) NUMBER OF MEMBERS, CHAIRMAN, AND APPOINTMENT.~~—The Board consists of 5 members. One member is the Administrator, who serves as Chairman. The other 4 members, all of whom shall have experience in Federal Government contract cost accounting, are as follows:

~~(A) 2 representatives of the Federal Government—~~

~~(i) one of whom is a representative of the Department of Defense appointed by the Secretary of Defense; and~~

~~(ii) one of whom is an officer or employee of the General Services Administration appointed by the Administrator of General Services.~~

~~(B) 2 individuals from the private sector, each of whom is appointed by the Administrator, and—~~

~~(i) one of whom is a representative of industry; and~~

~~(ii) one of whom is particularly knowledgeable about cost accounting problems and systems and, if possible, is a representative of a public accounting firm.~~

~~(2) TERM OF OFFICE.~~—

~~(A) LENGTH OF TERM.~~—The term of office of each member, other than the Administrator, is 4 years. The terms are staggered, with the terms of 2 members expiring in the same year, the term of another member expiring the next year, and the term of the last member expiring the year after that.

~~(B) INDIVIDUAL REQUIRED TO REMAIN WITH APPOINTING agency.~~—A member appointed under paragraph (1)(A) may not continue to serve after ceasing to be an officer or employee of the agency from which that member was appointed.

~~(3) VACANCY.~~—A vacancy on the Board shall be filled in the same manner in which the original appointment was made. A member appointed to fill a vacancy serves for the remainder of the term for which that member's predecessor was appointed.

(b) MEMBERSHIP.—

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(1) APPOINTMENT.—The Board consists of five members who shall be appointed by the Director of the Office of Management and Budget from among persons experienced in Government contract cost accounting. The Director shall designate one of the members to serve as Chair of the Board.

(2) QUALIFICATIONS.—

(A) IN GENERAL.—The members of the Board shall have qualifications as follows:

(i) CHAIR.—The member designated by the Director to serve as Chair of the Board—

(I) shall be a full-time Government employee or a part-time special Government employee;

(II) shall have extensive experience as a senior Government official in administering and managing contracts described in subparagraph (B); and

(III) may not be the Administrator of the Office of Federal Procurement Policy or an employee of the Office of Federal Procurement Policy.

(ii) GOVERNMENT REPRESENTATIVES.—Two members of the Board shall be representatives of the Government who have experience in administering and managing contracts described in subparagraph (B), one of whom shall be an officer or employee of the Department of Defense (who may not be a Government auditor or investigator) and the other of whom shall be an officer or employee of a department or agency other than the Department of Defense.

(iii) SENIOR CONTRACTOR EMPLOYEE.—One member of the Board shall be an individual in the private sector who is a senior employee, or retired senior employee, of a Government contractor with substantial experience in the private sector involving administration and management of contracts described in subparagraph (B).

(iv) MEMBER OF ACCOUNTING PROFESSION.—One member of the Board shall be a member of the accounting profession with substantial professional experience as an accountant with contracts described in subparagraph (B).

(B) CONTRACTS DESCRIBED.—For purposes of subparagraph (A), contracts described in this subparagraph are Government contracts negotiated on the basis of cost and awarded under Federal acquisition regulations governing negotiated procurements.

(3) TERM OF OFFICE.—

(A) LENGTH OF TERM.—The members of the Board shall serve for a term of four years.

(B) REQUIREMENT RELATING TO DOD BOARD MEMBER.—A member serving on the Board under paragraph (2)(A)(ii) as a representative of the Department of Defense may not continue to serve after ceasing to be an officer or employee of the Department of Defense.

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(4) VACANCY.—A vacancy on the Board shall be filled in the same manner in which the original appointment was made. A member appointed to fill a vacancy serves for the remainder of the term for which that member's predecessor was appointed.

(5) LIMITATION ON REMOVAL.—A member of the Board may be removed by the Director only for misconduct or failure to perform functions vested in the Board.

(c) MEETINGS.—The Board shall meet not less than once each quarter and shall publish in the Federal Register notice of each meeting and its agenda before such meeting is held.

~~(c) DUTIES.—The Board shall—~~

~~(1) ensure that the cost accounting standards used by Federal contractors rely, to the maximum extent practicable, on commercial standards and accounting practices and systems;~~

~~(2) within one year after the date of enactment of this subsection, and on an ongoing basis thereafter, review any cost accounting standards established under section 1502 of this title and conform such standards, where practicable, to Generally Accepted Accounting Principles; and~~

~~(3) annually review disputes involving such standards brought to the boards established in section 7105 of this title or Federal courts, and consider whether greater clarity in such standards could avoid such disputes.~~

(d) DUTIES.—The Board shall have the following duties:

(1) To ensure that the cost accounting standards used by Federal contractors rely, to the maximum extent practicable, on commercial standards and accounting practices and systems.

(2) To review on an ongoing basis any cost accounting standards established under section 4102 of this title (or section 1502 of title 41) and to conform such standards, where practicable, to Generally Accepted Accounting Principles.

(3) To annually review disputes involving such standards brought to the boards established in section 7105 of title 41 (relating to agency boards of contract appeals) or Federal courts and consider whether greater clarity in such standards could avoid such disputes.

~~(d) MEETINGS.—The Board shall meet not less than once each quarter and shall publish in the Federal Register notice of each meeting and its agenda before such meeting is held.~~

~~(e) REPORT.—The Board shall annually submit a report to the congressional defense committees, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate describing the actions taken during the prior year—~~

~~(1) to conform the cost accounting standards established under section 1502 of this title with Generally Accepted Accounting Principles; and~~

~~(2) to minimize the burden on contractors while protecting the interests of the Federal Government.~~

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(e) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Board shall submit to the specified congressional committees an annual report describing the actions taken during the prior year—

(A) to conform the cost accounting standards established under section 4102 of this title with Generally Accepted Accounting Principles, including actions to—

(i) prescribe standards and regulations that have contributed to increasing consistency and uniformity of accounting practices on Government contracts; and

(ii) identify regulatory changes made as a result of the review process in subsection (c)(3); and

(B) to minimize the burden on contractors while protecting the interests of the Federal Government.

(2) SPECIFIED CONGRESSIONAL COMMITTEES.—In this subsection, the term “specified congressional committees” means—

(A) the Committee on Armed Services, the Committee on Homeland Security and Governmental Affairs, and the Committee on Appropriations of the Senate; and

(B) the Committee on Armed Services, the Committee on Oversight and Government Reform, and the Committee on Appropriations of the House of Representatives.

(f) SENIOR STAFF.—The ~~Administrator~~ **Director**, after consultation with the Board—

(1) without regard to the provisions of title 5 governing appointments in the competitive service—

(A) shall appoint an executive secretary; and

(B) may appoint, or detail pursuant to section 3341 of title 5, two additional staff members; and

(2) may pay those employees without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5 relating to classification and General Schedule pay rates, except that those employees may not receive pay in excess of the maximum rate of basic pay payable for level IV of the Executive Schedule.

(g) OTHER STAFF.—The ~~Administrator~~ **Director** may appoint, fix the compensation of, and remove additional employees of the Board under the applicable provisions of title 5.

(h) DETAILED AND TEMPORARY PERSONNEL.—For service on advisory committees and task forces to assist the Board in carrying out its functions and responsibilities—

(1) the Board, with the consent of the head of a Federal agency, may use, without reimbursement, personnel of that agency; and

(2) the ~~Administrator~~ **Director**, after consultation with the Board, may procure temporary and intermittent services of personnel under section 3109(b) of title 5.

(i) COMPENSATION.—

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(1) OFFICERS AND EMPLOYEES OF THE GOVERNMENT.—Members of the Board who are officers or employees of the Federal Government, and officers and employees of other agencies of the Federal Government who are used under subsection (h)(1), shall not receive additional compensation for services but shall continue to be compensated by the employing department or agency of the officer or employee.

(2) APPOINTEES FROM PRIVATE SECTOR.—Each member of the Board appointed from the private sector shall receive compensation at a rate not to exceed the daily equivalent of the rate for level IV of the Executive Schedule for each day (including travel time) in which the member is engaged in the actual performance of duties vested in the Board.

(3) TEMPORARY AND INTERMITTENT PERSONNEL.—An individual hired under subsection (h)(2) may receive compensation at a rate fixed by the ~~Administrator~~ **Director**, but not to exceed the daily equivalent of the rate for level V of the Executive Schedule for each day (including travel time) in which the individual is properly engaged in the actual performance of duties under this chapter.

(4) TRAVEL EXPENSES.—While serving away from home or regular place of business, Board members and other individuals serving on an intermittent basis under this chapter shall be allowed travel expenses in accordance with section 5703 of title 5.

(j) LOCATION OF OFFICE SPACE.—The Administrator of General Services, in providing office space for the Board, shall ensure that the Board is not co-located with the Office of Federal Procurement Policy.

§1502 4102. Cost accounting standards

(a) AUTHORITY.—

(1) COST ACCOUNTING STANDARDS BOARD.—The Cost Accounting Standards Board has exclusive authority to prescribe, amend, and rescind cost accounting standards, and interpretations of the standards, designed to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the Federal Government.

(2) ~~ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY.—The Administrator, after consultation with the Board, shall prescribe rules and procedures governing actions of the Board under this chapter.~~ **RULES AND PROCEDURES.—The Board shall prescribe rules and procedures governing actions of the Board under this chapter.** The rules and procedures shall require that any action to prescribe, amend, or rescind a standard or interpretation be approved by majority vote of the Board.

(b) MANDATORY USE OF STANDARDS.—

(1) SUBCONTRACT.—

(A) DEFINITION.—In this paragraph, the term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(B) WHEN STANDARDS ARE TO BE USED.—Cost accounting standards prescribed under this chapter are mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs

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in connection with the pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the Federal Government in excess of the amount set forth in section 2306a(a)(1)(A)(i) of title 10 as the amount is adjusted in accordance with applicable requirements of law \$25,000,000.

(C) NONAPPLICATION OF STANDARDS.—Subparagraph (B) does not apply to—

(i) a contract or subcontract for the acquisition of a commercial item; or

(ii) a contract or subcontract where the price negotiated is based on a price set by law or regulation;—

~~(iii) a firm, fixed price contract or subcontract awarded on the basis of adequate price competition without submission of certified cost or pricing data; or~~

~~(iv) a contract or subcontract with a value of less than \$7,500,000 if, when the contract or subcontract is entered into, the segment of the contractor or subcontractor that will perform the work has not been awarded at least one contract or subcontract with a value of more than \$7,500,000 that is covered by the standards.~~

(2) EXEMPTIONS AND WAIVERS BY BOARD.—The Board may—

(A) exempt classes of contractors and subcontractors from the requirements of this chapter; and

(B) establish procedures for the waiver of the requirements of this chapter for individual contracts and subcontracts.

(3) WAIVER BY HEAD OF EXECUTIVE AGENCY.—

(A) IN GENERAL.—The head of an executive agency may waive the applicability of the cost accounting standards for a contract or subcontract with a value of less than \$100,000,000 if that official determines in writing that the segment of the contractor or subcontractor that will perform the work—

(i) is primarily engaged in the sale of commercial items; and

(ii) would not otherwise be subject to the cost accounting standards under this section.

(B) IN EXCEPTIONAL CIRCUMSTANCES.—The head of an executive agency may waive the applicability of the cost accounting standards for a contract or subcontract under exceptional circumstances when necessary to meet the needs of the agency. A determination to waive the applicability of the standards under this subparagraph shall be set forth in writing and shall include a statement of the circumstances justifying the waiver.

(C) RESTRICTION ON DELEGATION OF AUTHORITY.—The head of an executive agency may not delegate the authority under subparagraph (A) or (B) to an official in the executive agency below the senior policymaking level in the executive agency.

(D) CONTENTS OF FEDERAL ACQUISITION REGULATION.—The Federal Acquisition Regulation shall include—

(i) criteria for selecting an official to be delegated authority to grant waivers under subparagraph (A) or (B); and

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(ii) the specific circumstances under which the waiver may be granted.

(E) REPORT.—The head of each executive agency shall report the waivers granted under subparagraphs (A) and (B) for that agency to the Board on an annual basis.

(c) REQUIRED BOARD ACTION FOR PRESCRIBING STANDARDS AND INTERPRETATIONS.—Before prescribing cost accounting standards and interpretations, the Board shall—

(1) take into account, after consultation and discussions with the Comptroller General, professional accounting organizations, contractors, and other interested parties—

(A) the probable costs of implementation, including any inflationary effects, compared to the probable benefits;

(B) the advantages, disadvantages, and improvements anticipated in the pricing and administration of, and settlement of disputes concerning, contracts; and

(C) the scope of, and alternatives available to, the action proposed to be taken;

(2) prepare and publish a report in the Federal Register on the issues reviewed under paragraph (1);

(3)(A) publish an advanced notice of proposed rulemaking in the Federal Register to solicit comments on the report prepared under paragraph (2);

(B) provide all parties affected at least 60 days after publication to submit their views and comments; and

(C) during the 60-day period, consult with the Comptroller General and consider any recommendation the Comptroller General may make; and

(4) publish a notice of proposed rulemaking in the Federal Register and provide all parties affected at least 60 days after publication to submit their views and comments.

(d) EFFECTIVE DATES.—Rules, regulations, cost accounting standards, and modifications thereof prescribed or amended under this chapter shall have the full force and effect of law, and shall become effective within 120 days after publication in the Federal Register in final form, unless the Board determines that a longer period is necessary. The Board shall determine implementation dates for contractors and subcontractors. The dates may not be later than the beginning of the second fiscal year of the contractor or subcontractor after the standard becomes effective.

(e) ACCOMPANYING MATERIAL.—Rules, regulations, cost accounting standards, and modifications thereof prescribed or amended under this chapter shall be accompanied by prefatory comments and by illustrations, if necessary.

(f) IMPLEMENTING REGULATIONS.—The Board shall prescribe regulations for the implementation of cost accounting standards prescribed or interpreted under this section. The regulations shall be incorporated into the Federal Acquisition Regulation and shall require contractors and subcontractors as a condition of contracting with the Federal Government to—

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(1) disclose in writing their cost accounting practices, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs; and

(2) agree to a contract price adjustment, with interest, for any increased costs paid to the contractor or subcontractor by the Federal Government because of a change in the contractor's or subcontractor's cost accounting practices or a failure by the contractor or subcontractor to comply with applicable cost accounting standards.

(g) NONAPPLICABILITY OF CERTAIN SECTIONS OF TITLE 5.—Functions exercised under this chapter are not subject to sections 551, 553 to 559, and 701 to 706 of title 5.

§1503 4103. Contract price adjustment

(a) DISAGREEMENT CONSTITUTES A DISPUTE.—If the Federal Government and a contractor or subcontractor fail to agree on a contract price adjustment, including whether the contractor or subcontractor has complied with the applicable cost accounting standards, the disagreement will constitute a dispute under chapter 71 ~~of this title~~ **of title 41**.

(b) AMOUNT OF ADJUSTMENT.—A contract price adjustment undertaken under ~~section 1502(f)(2)~~ **section 4102(f)(2)** of this title shall be made, where applicable, on relevant contracts between the Federal Government and the contractor that are subject to the cost accounting standards so as to protect the Federal Government from payment, in the aggregate, of increased costs, as defined by the Cost Accounting Standards Board. The Federal Government may not recover costs greater than the aggregate increased cost to the Federal Government, as defined by the Board, on the relevant contracts subject to the price adjustment unless the contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of the price negotiation and which it failed to disclose to the Federal Government.

(c) INTEREST.—The interest rate applicable to a contract price adjustment is the annual rate of interest established under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. 6621) for the period. Interest accrues from the time payments of the increased costs were made to the contractor or subcontractor to the time the Federal Government receives full compensation for the price adjustment.

§1504 4104. Effect on other standards and regulations

(a) PREVIOUSLY EXISTING STANDARDS.—All cost accounting standards, waivers, exemptions, interpretations, modifications, rules, and regulations prescribed **by the Cost Accounting Standards Board under chapter 15 of title 41 or** by the Cost Accounting Standards Board under section 719 of the Defense Production Act of 1950 (50 U.S.C. App. 2168)—

(1) remain in effect until amended, superseded, or rescinded by the Board under this chapter; and

(2) are subject to the provisions of ~~this division~~ **this chapter** in the same manner as if prescribed by the Board under ~~this division~~ **this chapter**.

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(b) INCONSISTENT AGENCY REGULATIONS.—To ensure that a regulation or proposed regulation of an executive agency is not inconsistent with a cost accounting standard prescribed or amended under this chapter, the Administrator **of the Office of Federal Procurement Policy**, under the authority in sections 1121, 1122(a) to (c)(1), 1125, 1126, 1130, 1131, and 2305 ~~of this title~~ **of title 41** shall rescind or deny the promulgation of the inconsistent regulation or proposed regulation and take other appropriate action authorized under sections 1121, 1122(a) to (c)(1), 1125, 1126, 1130, 1131, and 2305.

(c) COSTS NOT SUBJECT TO DIFFERENT STANDARDS.—Costs that are the subject of cost accounting standards prescribed under this chapter are not subject to regulations established by another executive agency that differ from those standards with respect to the measurement, assignment, and allocation of those costs.

§1505 4105. Examinations

To determine whether a contractor or subcontractor has complied with cost accounting standards prescribed under this chapter and has followed consistently the contractor's or subcontractor's disclosed cost accounting practices, an authorized representative of the head of the agency concerned, of the offices of inspector general established under the Inspector General Act of 1978 (5 U.S.C. App.), or of the Comptroller General shall have the right to examine and copy documents, papers, or records of the contractor or subcontractor relating to compliance with the standards.

§1506 4106. Authorization of appropriations

Necessary amounts may be appropriated to carry out this chapter.

Recommended Changes to 48 CFR Chapter 99

Chapter 99 - Cost Accounting Standards Board, Office of Federal Procurement Policy, Office of Management and Budget

- Part 9900 - Scope of Chapter (§ 9900.000)
- Subchapter A - Administration (Parts 9901 - 9902)
- Subchapter B - Procurement Practices and Cost Accounting Standards (Parts 9903 - 9906-9999)

Part 9900 - Scope of Chapter

This chapter describes policies and procedures for applying the Cost Accounting Standards (CAS) to negotiated contracts and subcontracts. This chapter does not apply to sealed bid contracts or to any contract with a small business concern (see 9903.201-1(b) for these and other exemptions).

Chapter 99, Subchapter A - Administration

- Part 9901 - Rules and Procedures (§§ 9901.301 - 9901.317)
- Part 9902 [Reserved]

Part 9901 - Rules and Procedures

9901.301 thru 9901.305

No Changes

9901.306 Standards applicability.

Cost Accounting Standards promulgated by the Board shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the United States Government in excess of ~~\$500,000~~ **\$25 million**, other than contracts or subcontracts that have been exempted by the Board's regulations.

9901.307 thru 9901.317

No Changes

Part 9902 [Reserved]

Part 9903 - Contract Coverage

Part 9903, Subpart 9903.1 - General

9903.101 Cost Accounting Standards.

Public Law 100-679 (41 U.S.C. 422) requires certain contractors and subcontractors to comply with Cost Accounting Standards (CAS) and to disclose in writing and follow consistently their cost accounting practices.

9903.102 OMB approval under the Paperwork Reduction Act.

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) imposes a requirement on Federal agencies to obtain approval from the Office of Management and Budget (OMB) before collecting information from ten or more members of the public. The information collection and recordkeeping requirements contained in this regulation have been approved by OMB. OMB has assigned Control Numbers 0348-0051 and 0348-0055 to the paperwork, recordkeeping and forms associated with this regulation.

Part 9903, Subpart 9903.2 - CAS Program Requirements

- 9903.201 Contract requirements.
- 9903.201-1 CAS applicability.
- 9903.201-2 Types of CAS coverage.
- 9903.201-3 Solicitation provisions.
- 9903.201-4 Contract clauses.
- 9903.201-5 Waiver.
- 9903.201-6 Findings.
- 9903.201-7 Cognizant Federal agency responsibilities.
- 9903.201-8 Compliant accounting changes due to external restructuring activities.
- 9903.202 Disclosure requirements.
- 9903.202-1 General requirements.
- 9903.202-2 Impracticality of submission.
- 9903.202-3 Amendments and revisions.
- 9903.202-4 Privileged and confidential information.
- 9903.202-5 Filing Disclosure Statements.
- 9903.202-6 Adequacy of Disclosure Statement.
- 9903.202-7 [Reserved]
- 9903.202-8 Subcontractor Disclosure Statements.
- 9903.202-9 Illustration of Disclosure Statement Form, CASB-DS-1.
- 9903.202-10 Illustration of Disclosure Statement Form, CASB DS-2.

9903.201 Contract requirements.

9903.201-1 CAS applicability.

(a)(1) This subsection describes the rules for determining whether a proposed contract or subcontract is exempt from CAS. (See 9904 or 9905, as applicable.) Negotiated contracts not exempt in accordance with 9903.201-1(b) shall be subject to CAS. A CAS-covered contract may be subject to full, modified or other types of CAS coverage. The rules for determining the applicable type of CAS coverage are in 9903.201-2.

(2) For purposes of determining CAS applicability, the term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(3) For hybrid contracts (see definition at 9903.301), the exemptions at 9903.201-1(b) shall be applied to any portion of a contract or subcontract where CAS would not apply if that portion were awarded as a separate contract or subcontract. The dollar value of the portion exempted shall not be considered in applying any dollar threshold set forth in 9903.

(4) For indefinite delivery vehicles (see definition at 9903.301), the CAS applicability determination shall be made separately for each order placed under the indefinite delivery vehicle.

(b) The following categories of contracts and subcontracts are exempt from all CAS requirements:

(1) Sealed bid contracts.

~~(2) Negotiated contracts and subcontracts not in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)). For purposes of this paragraph (b)(2), an order issued by one segment to another segment shall be treated as a subcontract.~~
[Reserved]

(3) Contracts and subcontracts with small businesses.

(4) Contracts and subcontracts with foreign governments or their agents or instrumentalities or, insofar as the requirements of CAS other than 9904.401 and 9904.402 are concerned, any contract or subcontract awarded to a foreign concern.

(5) Contracts and subcontracts in which the price is set by law or regulation.

~~(6) Firm fixed priced, fixed priced with economic price adjustment (provided that price adjustment is not based on actual costs incurred), time and materials, and labor hour contracts.~~
Contracts and subcontracts for the acquisition of commercial items.

~~(7) Contracts or subcontracts of less than \$7.5 million, provided that, at the time of award, the business unit of the contractor or subcontractor is not currently performing any CAS covered contracts or subcontracts valued at \$7.5 million or greater.~~ **[Reserved]**

(8) - (12) [Reserved]

(13) Subcontractors under the NATO PHM Ship program to be performed outside the United States by a foreign concern.

(14) [Reserved]

(15) ~~Firm-fixed-price~~ **Any portion of a negotiated fixed-price type** contracts or subcontracts (**see definition at 9903.301**) awarded on the basis of ~~adequate price competition~~ **price analysis** without submission of **certified** cost or pricing data.

9903.201-2 Types of CAS coverage.

(a) Full coverage. Full coverage requires that the business unit comply with all of the CAS specified in part 9904 that are in effect on the date of the contract award and with any CAS that become applicable because of later award of a CAS-covered contract. Full coverage applies to contractor business units that -

(1) Receive a single CAS-covered contract award of ~~\$50~~ **\$100** million or more; or

(2) Received ~~\$50~~ **\$100** million or more in net CAS-covered awards during its preceding cost accounting period.

(b) Modified coverage.

(1) Modified CAS coverage requires only that the contractor comply with Standard 9904.401, Consistency in Estimating, Accumulating, and Reporting Costs, Standard 9904.402, Consistency in Allocating Costs Incurred for the Same Purpose, Standard 9904.405, Accounting for Unallowable Costs and Standard 9904.406, Cost Accounting Standard - Cost Accounting Period. Modified, rather, than full, CAS coverage may be applied to a covered contract of less than ~~\$50~~ **\$100** million awarded to a business unit that received less than ~~\$50~~ **\$100** million in net CAS-covered awards in the immediately preceding cost accounting period.

(2) If any one contract is awarded with modified CAS coverage, all CAS-covered contracts awarded to that business unit during that cost accounting period must also have modified coverage with the following exception: if the business unit receives a single CAS-covered contract award of ~~\$50~~ **\$100** million or more, that contract must be subject to full CAS coverage. Thereafter, any covered contract awarded in the same cost accounting period must also be subject to full CAS coverage.

(3) A contract awarded with modified CAS coverage shall remain subject to such coverage throughout its life regardless of changes in the business unit's CAS status during subsequent cost accounting periods.

(c) Coverage for educational institutions -

Not addressed here

(d) Subcontracts. Subcontract awards subject to CAS require the same type of CAS coverage as would prime contracts awarded to the same business unit. In measuring total net CAS-covered awards for a year, a transfer by one segment to another shall be deemed to be a subcontract award by the transferor.

(e) Foreign concerns.

Not addressed here

9903.201-3 Solicitation provisions.

(a) Cost Accounting Standards Notices and Certification.

(1) The contracting officer shall insert the provision set forth below, Cost Accounting Standards Notices and Certification, in solicitations for proposed contracts **that are likely to be** subject to CAS as specified in 9903.201.

(2) When a hybrid contract is contemplated (see definition at 9903.301), the contracting officer shall, to the maximum extent practicable, identify the portions of the proposed contract that are likely to be exempted from CAS pursuant to 9903.201-1(a)(3).

(3) For indefinite delivery vehicles (see definition at 9903.301), the CAS Disclosure Statement shall be deferred until an order will meet the criteria specified in the solicitation provision.

(4) The provision allows offerors to -

(i) Certify their Disclosure Statement status;

(ii) [Reserved]

(iii) Claim exemption from full CAS coverage and elect modified CAS coverage when appropriate; and

(iv) Certify whether award of the contemplated contract would require a change to existing cost accounting practices.

(25) If an award to an educational institution is contemplated prior to July 1, 1997, the contracting officer shall use the basic provision set forth below with its Alternate I, unless the contract is to be performed by an FFRDC (see 9903.201(c)(5)), or the provision at 9903.201(c)(6) applies.

Not addressed here

Cost Accounting Standards Notices and Certification (~~JUL 2011~~ TBD)

Note:

This notice does not apply to small businesses or foreign governments.

This notice is in three parts, identified by Roman numerals I through III.

Offerors shall examine each part and provide the requested information in order to determine Cost Accounting Standards (CAS) requirements applicable to any resultant contract.

If the offeror is an educational institution, Part II does not apply unless the contemplated contract will be subject to full or modified CAS-coverage pursuant to 9903.201-2(c)(5) or 9903.201-2(c)(6).

Not addressed here

I. Disclosure Statement - Cost Accounting Practices and Certifications

(a) Any contract in excess of ~~the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B))~~ **\$25 million**, resulting from this solicitation, except for those contracts which are exempt as specified in 9903.201-1.

(b) Any offeror submitting a proposal which, if accepted, will result in a contract subject to the requirements of 48 CFR, chapter 99 must, as a condition of contracting, submit a Disclosure Statement as required by 9903.202. When required, the Disclosure Statement must be submitted as a part of the offeror's proposal under this solicitation unless the offeror has already submitted a Disclosure Statement disclosing the practices used in connection with the pricing of this proposal. If an applicable Disclosure Statement has already been submitted, the offeror may satisfy the requirement for submission by providing the information requested in paragraph (c) of Part I of this provision.

Caution: In the absence of specific regulations or agreement, a practice disclosed in a Disclosure Statement shall not, by virtue of such disclosure, be deemed to be a proper, approved, or agreed-to-practice for pricing proposals or accumulating and reporting contract performance cost data.

(c) Check the appropriate box below:

☐ (1) Certificate of Concurrent Submission of Disclosure Statement.

The offeror hereby certifies that, as a part of the offer, copies of the Disclosure Statement have been submitted as follows: (i) Original and one copy to the cognizant Administrative Contracting Officer (ACO) or cognizant Federal agency official authorized to act in that capacity, as applicable, and (ii) one copy to the cognizant Federal auditor.

(Disclosure must be on Form No. CASB DS-1 or CASB DS-2, as applicable. Forms may be obtained from the cognizant ACO or cognizant Federal agency official acting in that capacity and/or from the looseleaf version of the Federal Acquisition Regulation.)

Date of Disclosure Statement:

Name and Address of Cognizant ACO or Federal Official where filed:

The offeror further certifies that the practices used in estimating costs in pricing this proposal are consistent with the cost accounting practices disclosed in the Disclosure Statement.

☐ (2) Certificate of Previously Submitted Disclosure Statement. The offeror hereby certifies that the required Disclosure Statement was filed as follows:

Date of Disclosure Statement:

Name and Address of Cognizant ACO or Federal Official where filed:

The offeror further certifies that the practices used in estimating costs in pricing this proposal are consistent with the cost accounting practices disclosed in the applicable Disclosure Statement.

☐ (3) Certificate of Monetary Exemption.

The offeror hereby certifies that the offeror, together with all divisions, subsidiaries, and affiliates under common control, did not receive net awards of negotiated prime contracts and subcontracts subject to CAS totaling ~~\$50~~ \$100 million or more in the cost accounting period immediately preceding the period in which this proposal was submitted.

The offeror further certifies that if such status changes before an award resulting from this proposal, the offeror will advise the Contracting Officer immediately.

☐ (4) Certificate of Interim Exemption.

The offeror hereby certifies that (i) the offeror first exceeded the monetary exemption for disclosure, as defined in (3) above, in the cost accounting period immediately preceding the period in which this offer was submitted and (ii) in accordance with 9903.202-1, the offeror is not yet required to submit a Disclosure Statement. The offeror further certifies that if an award resulting from this proposal has not been made within 90 days after the end of that period, the offeror will immediately submit a revised certificate to the Contracting Officer, in the form specified under subparagraph (c)(1) or (c)(2) of Part I of this provision, as appropriate, to verify submission of a completed Disclosure Statement.

CAUTION: Offerors currently required to disclose because they were awarded a CAS-covered prime contract or subcontract of ~~\$50~~ \$100 million or more in the current cost accounting period may not claim this exemption (4). Further, the exemption applies only in connection with proposals submitted before expiration of the 90-day period following the cost accounting period in which the monetary exemption was exceeded.

II. Cost Accounting Standards - Eligibility for Modified Contract Coverage

If the offeror is eligible to use the modified provisions of 9903.201-2(b) and elects to do so, the offeror shall indicate by checking the box below. Checking the box below shall mean that the resultant contract is subject to the Disclosure and Consistency of Cost Accounting Practices clause in lieu of the Cost Accounting Standards clause.

☐ The offeror hereby claims an exemption from the Cost Accounting Standards clause under the provisions of 9903.201-2(b) and certifies that the offeror is eligible for use of the Disclosure and Consistency of Cost Accounting Practices clause because during the cost accounting period immediately preceding the period in which this proposal was submitted, the offeror received less than ~~\$50~~ **\$100** million in awards of CAS-covered prime contracts and subcontracts. The offeror further certifies that if such status changes before an award resulting from this proposal, the offeror will advise the Contracting Officer immediately.

CAUTION: An offeror may not claim the above eligibility for modified contract coverage if this proposal is expected to result in the award of a CAS-covered contract of ~~\$50~~ **\$100** million or more or if, during its current cost accounting period, the offeror has been awarded a single CAS-covered prime contract or subcontract of ~~\$50~~ **\$100** million or more.

III. Additional Cost Accounting Standards Applicable to Existing Contracts

The offeror shall indicate below whether award of the contemplated contract would, in accordance with subparagraph (a)(3) of the Cost Accounting Standards clause, require a change in established cost accounting practices affecting existing contracts and subcontracts.

☐ Yes ☐ No

(End of provision)

Alternate I (OCT 1994). Insert the following subparagraph (5) at the end of Part I of the basic clause:

Not addressed here

9903.201-4 Contract clauses.

(a) Cost Accounting Standards.

(1) **Upon the contracting officer's affirmative written determination that the awarded contract will be CAS-covered, pursuant to 9903.201,** ~~the contracting officer shall insert as full text the clause set forth below, Cost Accounting Standards,~~ **only in negotiated CAS-covered contracts, unless the contract is exempted (see 9903.201-1);** the contract is subject to modified coverage (see 9903.201-2); or the clause prescribed in paragraph (e) of this section is used.

(2) **When a hybrid contract is contemplated (see definition at 9903.301), the contracting officer shall, to the maximum extent practicable, identify the portions of the proposed contract that are exempted from CAS pursuant to 9903.201-1(a)(3).**

(23) The clause below requires the contractor to comply with all CAS specified in part 9904, to disclose actual cost accounting practices (applicable to CAS-covered contracts only), and to follow disclosed and established cost accounting practices consistently.

Cost Accounting Standards (~~JUL 2011~~ TBD)

~~(a) Unless the contract is exempt under 9903.201-1 and 9903.201-2, the provisions of 9903 are incorporated herein by reference and the Contractor in connection with this contract, shall -~~

(1) (CAS-covered Contracts Only) By submission of a Disclosure Statement, disclosed in writing the Contractor's cost accounting practices as required by 9903.202-1 through 9903.202-5 including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs. The practices disclosed for this contract shall be the same as the practices currently disclosed and applied on all other contracts and subcontracts being performed by the Contractor and which contain a Cost Accounting Standards (CAS) clause. If the Contractor has notified the Contracting Officer that the Disclosure Statement contains trade secrets, and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of the Government.

(2) Follow consistently the Contractor's cost accounting practices in accumulating and reporting contract performance cost data concerning this contract. If any change in cost accounting practices is made for the purposes of any contract or subcontract subject to CAS requirements, the change must be applied prospectively to this contract and the Disclosure Statement must be amended accordingly. If the contract price or cost allowance of this contract is affected by such changes, adjustment shall be made in accordance with subparagraph (a)(4) or (a)(5) of this clause, as appropriate.

(3) Comply with all CAS, including any modifications and interpretations indicated thereto contained in part 9904, in effect on the date of award of this contract or, if the Contractor has submitted cost or pricing data, on the date of final agreement on price as shown on the Contractor's signed certificate of current cost or pricing data. The Contractor shall also comply with any CAS (or modifications to CAS) which hereafter become applicable to a contract or subcontract of the Contractor. Such compliance shall be required prospectively from the date of applicability of such contract or subcontract.

(4)(i) Agree to an equitable adjustment as provided in the Changes clause of this contract if the contract cost is affected by a change which, pursuant to subparagraph (a)(3) of this clause, the Contractor is required to make to the Contractor's established cost accounting practices.

(ii) Negotiate with the Contracting Officer to determine the terms and conditions under which a change may be made to a cost accounting practice, other than a change made under other provisions of subparagraph (a)(4) of this clause; provided that no agreement may be made under this provision that will increase costs paid by the United States.

(iii) When the parties agree to a change to a cost accounting practice, other than a change under subdivision (a)(4)(i) of this clause, negotiate an equitable adjustment as provided in the Changes clause of this contract.

(5) Agree to an adjustment of the contract price or cost allowance, as appropriate, if the Contractor or a subcontractor fails to comply with an applicable Cost Accounting Standard, or to follow any cost accounting practice consistently and such failure results in any increased costs paid by the United States. Such adjustment shall provide for recovery of the increased costs to the United States, together

with interest thereon computed at the annual rate established under section 6621(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 6621(a)(2)) for such period, from the time the payment by the United States was made to the time the adjustment is effected. In no case shall the Government recover costs greater than the increased cost to the Government, in the aggregate, on the relevant contracts subject to the price adjustment, unless the Contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of price negotiations and which it failed to disclose to the Government.

(b) If the parties fail to agree whether the Contractor or a subcontractor has complied with an applicable CAS in part 9904 or a CAS rule or regulation in part 9903 and as to any cost adjustment demanded by the United States, such failure to agree will constitute a dispute under the Contract Disputes Act (41 U.S.C. 601).

(c) The Contractor shall permit any authorized representatives of the Government to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.

(d) The contractor shall include in all negotiated subcontracts which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts, of any tier, including the obligation to comply with all CAS in effect on the subcontractor's award date or if the subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the subcontractor's signed Certificate of Current Cost or Pricing Data. If the subcontract is awarded to a business unit which pursuant to 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in 9903.201-4 shall be inserted. This requirement shall apply only to negotiated subcontracts in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)) **\$25 million**, except that the requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 9903.201-1.

(e) For indefinite delivery vehicles (see definition at 9903.301), the CAS applicability determination shall be made separately for each order at the time of order placement.

(f) If subsequent to award of this contract, it is established that the contract, or portions thereof, should not have been determined to be CAS-covered at the time of award under the provisions of 9903.201, this clause, or portions thereof, will be deemed as inapplicable to the contract.

(End of clause)

(b) [Reserved]

(c) Disclosure and Consistency of Cost Accounting Practices.

(1) Upon the contracting officer's affirmative written determination that the awarded contract will be subject to modified CAS-coverage, pursuant to 9903.201-2, the contracting officer shall insert as full text the clause set forth below, Disclosure and Consistency of Cost Accounting Practices, only in

~~negotiated~~ **CAS-covered** contracts when the contract amount is over the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)) **\$25 million**, but less than ~~\$50~~ **\$100** million, and the offeror certifies it is eligible for and elects to use modified CAS coverage (see 9903.201-2, unless the clause prescribed in paragraph (d) of this subsection is used).

(2) When a hybrid contract is contemplated (see definition at 9903.301), the contracting officer shall, to the maximum extent practicable, identify the portions of the proposed contract that are exempted from CAS pursuant to 9903.201-1(a)(3).

~~(23)~~ The clause below requires the contractor to comply with CAS 9904.401, 9904.402, 9904.405, and 9904.406, to disclose (if it meets certain requirements) actual cost accounting practices, and to follow consistently disclosed and established cost accounting practices.

Disclosure and Consistency of Cost Accounting Practices (~~JUL 2011~~ TBD)

(a) The Contractor, in connection with this contract, shall -

(1) Comply with the requirements of 9904.401, Consistency in Estimating, Accumulating, and Reporting Costs; 9904.402, Consistency in Allocating Costs Incurred for the Same Purpose; 9904.405, Accounting for Unallowable Costs; and 9904.406, Cost Accounting Standard - Cost Accounting Period, in effect on the date of award of this contract, as indicated in part 9904.

(2) (CAS-covered Contracts Only) If it is a business unit of a company required to submit a Disclosure Statement, disclose in writing its cost accounting practices as required by 9903.202-1 through 9903.202-5. If the Contractor has notified the Contracting Officer that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of the Government.

(3)(i) Follow consistently the Contractor's cost accounting practices. A change to such practices may be proposed, however, by either the Government or the Contractor, and the Contractor agrees to negotiate with the Contracting Officer the terms and conditions under which a change may be made. After the terms and conditions under which the change is to be made have been agreed to, the change must be applied prospectively to this contract, and the Disclosure Statement, if affected, must be amended accordingly.

(ii) The Contractor shall, when the parties agree to a change to a cost accounting practice and the Contracting Officer has made the finding required in 9903.201-6(c) that the change is desirable and not detrimental to the interests of the Government, negotiate an equitable adjustment as provided in the Changes clause of this contract. In the absence of the required finding, no agreement may be made under this contract clause that will increase costs paid by the United States.

(4) Agree to an adjustment of the contract price or cost allowance, as appropriate, if the Contractor or a subcontractor fails to comply with the applicable CAS or to follow any cost accounting practice, and such failure results in any increased costs paid by the United States. Such adjustment shall provide for recovery of the increased costs to the United States, together with interest thereon computed at the

annual rate established under section 6621(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 6621(a)(2)) for such period, from the time the payment by the United States was made to the time the adjustment is effected.

(b) If the parties fail to agree whether the Contractor has complied with an applicable CAS rule, or regulation as specified in parts 9903 and 9904 and as to any cost adjustment demanded by the United States, such failure to agree will constitute a dispute under the Contract Disputes Act (41 U.S.C. 601).

(c) The Contractor shall permit any authorized representatives of the Government to examine and make copies of any documents, papers, and records relating to compliance with the requirements of this clause.

(d) The Contractor shall include in all negotiated subcontracts, which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts of any tier, except that -

(1) If the subcontract is awarded to a business unit which pursuant to 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in 9903.201-4 shall be inserted.

(2) This requirement shall apply only to negotiated subcontracts in excess of ~~the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B))~~ **\$25 million**.

(3) The requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 9903.201-1.

(End of clause)

(d) [Reserved]

(e) Cost Accounting Standards - Educational Institutions.

Not addressed here

(f) Disclosure and Consistency of Cost Accounting Practices - Foreign Concerns.

Not addressed here

9903.201-5 Waiver.

(a) The head of an executive agency may waive the applicability of the Cost Accounting Standards for a contract or subcontract with a value of less than ~~\$15~~ \$100 million, if that official determines, in writing, that the business unit of the contractor or subcontractor that will perform the work -

(1) Is primarily engaged in the sale of commercial items; and

(2) Would not otherwise be subject to the Cost Accounting Standards under this Chapter.

(b) The head of an executive agency may waive the applicability of the Cost Accounting Standards for a contract or subcontract under exceptional circumstances when necessary to meet the needs of the agency. A determination to waive the applicability of the Cost Accounting Standards by the agency head shall be set forth in writing, and shall include a statement of the circumstances justifying the waiver.

(c) The head of an executive agency may not delegate the authority under paragraphs (a) and (b) of this section, to any official below the senior policymaking level in the agency.

(d) The head of each executive agency shall report the waivers granted under paragraphs (a) and (b) of this section, for that agency, to the Cost Accounting Standards Board, on an annual basis, not later than 90 days after the close of the Government's fiscal year.

(e) Upon request of an agency head or his designee, the Cost Accounting Standards Board may waive all or any part of the requirements of 9903.201-4(a), Cost Accounting Standards, or 9903.201-4(c), Disclosure and Consistency of Cost Accounting Practices, with respect to a contract subject to the Cost Accounting Standards. Any request for a waiver shall describe the proposed contract or subcontract for which the waiver is sought and shall contain -

(1) An unequivocal statement that the proposed contractor or subcontractor refuses to accept a contract containing all or a specified part of a CAS clause and the specific reason for that refusal;

(2) A statement as to whether the proposed contractor or subcontractor has accepted any prime contract or subcontract containing a CAS clause;

(3) The amount of the proposed award and the sum of all awards by the agency requesting the waiver to the proposed contractor or subcontractor in each of the preceding 3 years;

(4) A statement that no other source is available to satisfy the agency's needs on a timely basis;

(5) A statement of alternative methods considered for fulfilling the need and the agency's reasons for rejecting them;

(6) A statement of steps being taken by the agency to establish other sources of supply for future contracts for the products or services for which a waiver is being requested; and

(7) Any other information that may be useful in evaluating the request.

(f) Except as provided by the Cost Accounting Standards Board, the authority in paragraph (e) of this section shall not be delegated.

9903.201-6 Findings.

(a) Required change -

(1) Finding. Prior to making any equitable adjustment under the provisions of paragraph (a)(4)(i) of the contract clause set forth in 9903.201-4(a) or 9903.201-4(e), or paragraph (a)(3)(i) of the contract clause set forth in 9903.201-4(c), the Contracting Officer shall make a finding that the practice change was required to comply with a CAS, modification or interpretation thereof, that subsequently became applicable to the contract; or, for planned changes being made in order to remain CAS compliant, that the former practice was in compliance with applicable CAS and the planned change is necessary for the contractor to remain in compliance.

(2) Required change means a change in cost accounting practice that a contractor is required to make in order to comply with applicable Standards, modifications, or interpretations thereto, that subsequently become applicable to an existing CAS-covered contract due to the receipt of another CAS-covered contract or subcontract. It also includes a prospective change to a disclosed or established cost accounting practice when the cognizant Federal agency official determines that the former practice was in compliance with applicable CAS and the change is necessary for the contractor to remain in compliance.

(b) Unilateral change -

(1) Findings. Prior to making any contract price or cost adjustment(s) under the change provisions of paragraph (a)(4)(ii) of the contract clause set forth in 9903.201-4(a) or 9903.201-4(e), or paragraph (a)(3)(ii) of the contract clause set forth in 9903.201-4(c), the Contracting Officer shall make a finding that the contemplated contract price and cost adjustments will protect the United States from payment of increased costs, in the aggregate; and that the net effect of the adjustments being made does not result in the recovery of more than the estimated amount of such increased costs.

(2) Unilateral change by a contractor means a change in cost accounting practice from one compliant practice to another compliant practice that a contractor with a CAS-covered contract(s) elects to make that has not been deemed desirable by the cognizant Federal agency official and for which the Government will pay no aggregate increased costs.

(3) Action to preclude the payment of aggregate increased costs by the Government. In the absence of a finding pursuant to paragraph (c) of this subsection that a compliant change is desirable, no agreement may be made with regard to a change to a cost accounting practice that will result in the payment of aggregate increased costs by the United States. For these changes, the cognizant Federal agency official shall limit upward contract price adjustments to affected contracts to the amount of downward contract price adjustments of other affected contracts, i.e., no net upward contract price adjustment shall be permitted.

(c) Desirable change -

(1) Finding. Prior to making any equitable adjustment under the provisions of paragraph (a)(4)(iii) of the contract clause set forth in 9903.201-4(a) or 9903.201-4(e), or paragraph (a)(3)(ii) of the contract clause set forth in 9903.201-4(c), the cognizant Federal agency official shall make a finding that the change to a cost accounting practice is desirable and not detrimental to the interests of the Government.

(2) Desirable change means a compliant change to a contractor's established or disclosed cost accounting practices that the cognizant Federal agency official finds is desirable and not detrimental to the Government and is therefore not subject to the no increased cost prohibition provisions of CAS-covered contracts affected by the change. The cognizant Federal agency official's finding need not be based solely on the cost impact that a proposed practice change will have on a contractor's or subcontractor's current CAS-covered contracts. The change to a cost accounting practice may be determined to be desirable even though existing contract prices and/or cost allowances may increase. The determination that the change to a cost accounting practice is desirable, should be made on a case-by-case basis.

(3) Once a determination has been made that a compliant change to a cost accounting practice is a desirable change, associated management actions that also have an impact on contract costs should be considered when negotiating contract price or cost adjustments that may be needed to equitably resolve the overall cost impact of the aggregated actions.

(4) Until the cognizant Federal agency official has determined that a change to a cost accounting practice is deemed to be a desirable change, the change shall be considered to be a change for which the Government will not pay increased costs, in the aggregate.

(d) Noncompliant cost accounting practices -

(1) Findings. Prior to making any contract price or cost adjustment(s) under the provisions of paragraph (a)(5) of the contract clause set forth in 9903.201-4(a) or 9903.201-4(e), or paragraph (a)(4) of the contract clause set forth in 9903.201-4(c), the Contracting Officer shall make a finding that the contemplated contract price and cost adjustments will protect the United States from payment of increased costs, in the aggregate; and that the net effect of the adjustments being made does not result in the recovery of more than the estimated amount of such increased costs. While individual contract prices, including cost ceilings or target costs, as applicable, may be increased as well as decreased to resolve an estimating noncompliance, the aggregate value of all contracts affected by the estimating noncompliance shall not be increased.

9903.201-7 Cognizant Federal agency responsibilities.

(a) The requirements of part 9903 shall, to the maximum extent practicable, be administered by the cognizant Federal agency responsible for a particular contractor organization or location, usually the Federal agency responsible for negotiating indirect cost rates on behalf of the Government. The cognizant Federal agency should take the lead role in administering the requirements of part 9903 and coordinating CAS administrative actions with all affected Federal agencies. When multiple CAS-covered contracts or more than one Federal agency are involved, agencies should discourage Contracting Officers from individually administering CAS on a contract-by-contract basis. Coordinated administrative actions will provide greater assurances that individual contractors follow their cost accounting practices consistently under all their CAS-covered contracts and that changes in cost accounting practices or CAS noncompliance issues are resolved, equitably, in a uniform overall manner.

(b) Federal agencies shall prescribe regulations and establish internal policies and procedures governing how agencies will administer the requirements of CAS-covered contracts, with particular emphasis on inter-agency coordination activities. Procedures to be followed when an agency is and is not the cognizant Federal agency should be clearly delineated. Internal agency policies and procedures shall provide for the designation of the agency office(s) or officials responsible for administering CAS under the agency's CAS-covered contracts at each contractor business unit and the delegation of necessary contracting authority to agency individuals authorized to administer the terms and conditions of CAS-covered contracts, e.g., Administrative Contracting Officers (ACOs) or other agency officials authorized to perform in that capacity. Agencies are urged to coordinate on the development of such regulations.

9903.201-8 Compliant accounting changes due to external restructuring activities.

The contract price and cost adjustment requirements of this part 9903 are not applicable to compliant cost accounting practice changes directly associated with external restructuring activities that are subject to and meet the requirements of 10 U.S.C. 2325.

9903.202 Disclosure requirements.

9903.202-1 General requirements.

(a) A Disclosure Statement is a written description of a contractor's cost accounting practices and procedures. The submission of a new or revised Disclosure Statement is not required for any non-CAS-covered contract or from any small business concern.

(b) Completed Disclosure Statements are required in the following circumstances:

(1) Any business unit that is selected to receive a CAS-covered contract or subcontract of ~~\$50~~ **\$100** million or more shall submit a Disclosure Statement before award.

(2) Any company which, together with its segments, received net awards of negotiated prime contracts and subcontracts subject to CAS totaling ~~\$50~~ **\$100** million or more in its most recent cost accounting period, must submit a Disclosure Statement before award of its first CAS-covered contract in the immediately following cost accounting period. However, if the first CAS-covered contract is received within 90 days of the start of the cost accounting period, the contractor is not required to file until the end of 90 days.

(c) When a Disclosure Statement is required, a separate Disclosure Statement must be submitted for each segment whose costs included in the total price of any CAS-covered contract or subcontract exceed ~~the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B))~~ **\$25 million** unless (i) ~~The contract or subcontract is of the type or value exempted by 9903.201-1, or~~

~~(ii) In the most recently completed cost accounting period the segment's CAS covered awards are less than 30 percent of total segment sales for the period and less than \$10 million.~~

(d) Each corporate or other home office that allocates costs to one or more disclosing segments performing CAS-covered contracts must submit a Part VIII of the Disclosure Statement.

(e) Foreign contractors and subcontractors who are required to submit a Disclosure Statement may, in lieu of filing a Form No CASB-DS-1, make disclosure by using a disclosure form prescribed by an agency of its Government, provided that the Cost Accounting Standards Board determines that the information disclosed by that means will satisfy the objectives of Public Law 100-679. The use of alternative forms has been approved for the contractors of the following countries:

(1) Canada.

(2) Federal Republic of Germany.

(3) United Kingdom.

(f) Educational institutions - disclosure requirements.

Not addressed here

9903.202-2 Impracticality of submission.

9903.202-3 Amendments and revisions.

9903.202-4 Privileged and confidential information.

9903.202-5 Filing Disclosure Statements.

9903.202-6 Adequacy of Disclosure Statement.

9903.202-7 [Reserved]

9903.202-8 Subcontractor Disclosure Statements.

9903.202-9 Illustration of Disclosure Statement Form, CASB-DS-1.

No changes to the sections noted above

9903.202-10 Illustration of Disclosure Statement Form, CASB DS-2.

Not addressed here

Part 9903, Subpart 9903.3 - CAS Rules and Regulations

- 9903.301 Definitions.
- 9903.302 Definitions, explanations, and illustrations of the terms, “cost accounting practice” and “change to a cost accounting practice.”
- 9903.302-1 Cost accounting practice.
- 9903.302-2 Change to a cost accounting practice.
- 9903.302-3 Illustrations of changes which meet the definition of “change to a cost accounting practice.”
- 9903.302-4 Illustrations of changes which do not meet the definition of “Change to a cost accounting practice.”
- 9903.303 Effect of filing Disclosure Statement.
- 9903.304 Concurrent full and modified coverage.
- 9903.305 Materiality.
- 9903.306 Interpretations.
- 9903.307 Cost Accounting Standards Preambles.

9903.301 Definitions.

(a) The definitions set forth below apply to this chapter 99.

Accrued benefit cost method. See 9904.412-30.

Accumulating costs. See 9904.401-30.

Actual cash value. See 9904.416-30.

Actual cost. See 9904.401-30 for the broader definition and 9904.407-30 for a more restricted definition applicable only to the standard on the use of standard costs for direct material and direct labor.

Actuarial assumption. See 9904.412-30 or 9904.413-30.

Actuarial cost method. See 9904.412-30 or 9904.413-30.

Actuarial gain and loss. See 9904.412-30 or 9904.413-30.

Actuarial liability. See 9904.412-30 or 9904.413-30.

Actuarial valuation. See 9904.412-30 or 9904.413-30.

Allocate. See 9904.402-30, 9904.403-30, 9904.406-30, 9904.410-30, 9904.411-30, 9904.418-30 or 9904.420-30.

Asset accountability unit. See 9904.404-30.

Assignment of cost to cost accounting periods. See 9903.302-1(b).

Bid and proposal (B&P) cost. See 9904.420-30.

Business unit. See 9904.410-30, 9904.411-30 or 9904.414-30.

CAS-covered contract, as used in this part, means any negotiated contract or subcontract in which a CAS clause is required to be included.

Category of material. See 9904.411-30.

Change to a cost accounting practice. See 9903.302-2.

Compensated personal absence. See 9904.408-30.

Cost accounting practice. See 9903.302-1.

Cost input. See 9904.410-30.

Cost objective. See 9904.402-30, 9904.406-30, 9904.410-30 or 9904.411-30.

Cost of capital committed to facilities. See 9904.414-30.

Currently performing, as used in this part, means that a contractor has been awarded a contract, but has not yet received notification of final acceptance of all supplies, services, and data deliverable under the contract (including options).

Deferred compensation. See 9904.415-30.

Defined-benefit pension plan. See 9904.412-30.

Defined-contribution pension plan. See 9904.412-30.

Direct cost. See 9904.402-30 or 9904.418-30.

Directly associated cost. See 9904.405-30.

Disclosure statement, as used in this part, means the Disclosure Statement required by 9903.202-1.

Entitlement. See 9904.408-30.

Estimating costs. See 9904.401-30.

Expressly unallowable cost. See 9904.405-30.

Facilities capital. See 9904.414-30.

Final cost objective. See 9904.402-30 or 9904.410-30.

Fiscal year. See 9904.406-30.

Fixed-price type contract, as used in 9903.201-1(b)(15), means any contract of the type described in 48 CFR Subpart 16.2.

Funded pension cost. See 9904.412-30.

Funding agency. See 9904.412-30.

General and administrative (G&A) expense. See 9904.410-30 or 9904.420-30.

Home office. See 9904.403-30 or 9904.420-30.

Hybrid contract means a contract or subcontract that contains multiple contract types within its overall structure.

Immediate-gain actuarial cost method. See 9904.413-30.

Indefinite delivery vehicle means an indefinite delivery contract or agreement that has one or more of the following clauses:

(1) 48 CFR 52.216-18, "Ordering"

(2) 48 CFR 52.216-19, "Order Limitations"

(3) 48 CFR 52.216-20, "Definite Quantity"

(4) 48 CFR 52.216-21, "Requirements"

(5) 48 CFR 52.216-22, "Indefinite Quantity"

(6) Any other clause allowing ordering.

Independent research and development (IR&D) cost. See 9904.420-30.

Indirect cost. See 9904.402-30, 9904.405-30, 9904.418-30 or 9904.420-30.

Indirect cost pool. See 9904.401-30, 9904.402-30, 9904.406-30 or 9904.418-30.

Insurance administration expenses. See 9904.416-30.

Intangible capital asset. See 9904.414-30 or 9904.417-30.

Labor cost at standard. See 9904.407-30.

Labor-rate standard. See 9904.407-30.

Labor-time standard. See 9904.407-30.

Material cost at standard. See 9904.407-30.

Material inventory record. See 9904.411-30.

Material-price standard. See 9904.407-30.

Material-quantity standard. See 9904.407-30.

Measurement of cost. See 9904.302-1(c).

Moving average cost. See 9904.411-30.

Multiemployer pension plan. See 9904.412-30.

Negotiated subcontract, as used in this part, means any subcontract except a firm fixed-price subcontract made by a contractor or subcontractor after receiving offers from at least two persons not associated with each other or with such contractor or subcontractor, providing

- (1) The solicitation to all competitors is identical,
- (2) Price is the only consideration in selecting the subcontractor from among the competitors solicited, and
- (3) The lowest offer received in compliance with the solicitation from among those solicited is accepted.

Net awards, as used in this chapter, means the total value of negotiated CAS-covered prime contract and subcontract awards, including the potential value of contract options, received during the reporting period minus cancellations, terminations, and other related credit transactions.

Normal cost. See 9904.412-30 or 9904.413-30.

Operating revenue. See 9904.403-30.

Original complement of low cost equipment. See 9904.404-30.

Pay-as-you-go cost method. See 9904.412-30.

Pension plan. See 9904.412-30 or 9904.413-30.

Pension plan participant. See 9904.413-30.

Pricing. See 9904.401-30.

Production unit. See 9904.407-30.

Projected average loss. See 9904.416-30.

Projected benefit cost method. See 9904.412-30 or 9904.413-30.

Proposal. See 9904.401-30.

Repairs and maintenance. See 9904.404-30.

Reporting costs. See 9904.401-30.

Residual value. See 9904.409-30.

Segment. See 9904.403-30, 9904.410-30, 9904.413-30 or 9904.420-30.

Self-insurance. See 9904.416-30.

Self-insurance charge. See 9904.416-30.

Service life. See 9904.409-30.

Small business, as used in this part, means any concern, firm, person, corporation, partnership, cooperative, or other business enterprise which, under 15 U.S.C. 637(b)(6) and the rules and regulations of the Small Business Administration in part 121 of title 13 of the Code of Federal Regulations, is determined to be a small business concern for the purpose of Government contracting.

Spread-gain actuarial cost method. See 9904.413-30.

Standard cost. See 9904.407-30.

Tangible capital asset. See 9904.403-30, 9904.404-30, 9904.409-30, 9904.414-30 or 9904.417-30.

Termination gain or loss. See 9904.413-30.

Unallowable cost. See 9904.405-30.

Variance. See 9904.407-30.

Weighted average cost. See 9904.411-30.

(b) The definitions set forth below are applicable exclusively to educational institutions and apply to this chapter 99.

Not addressed here

9903.302 Definitions, explanations, and illustrations of the terms, “cost accounting practice” and “change to a cost accounting practice.”

9903.302-1 Cost accounting practice.

Cost accounting practice, as used in this part, means any disclosed or established accounting method or technique which is used for allocation of cost to cost objectives, assignment of cost to cost accounting periods, or measurement of cost.

(a) Measurement of cost, as used in this part, encompasses accounting methods and techniques used in defining the components of cost, determining the basis for cost measurement, and establishing criteria for use of alternative cost measurement techniques. The determination of the amount paid or a change in the amount paid for a unit of goods and services is not a cost accounting practice. Examples of cost accounting practices which involve measurement of costs are

- (1) The use of either historical cost, market value, or present value;
- (2) The use of standard cost or actual cost; or
- (3) The designation of those items of cost which must be included or excluded from tangible capital assets or pension cost.

(b) Assignment of cost to cost accounting periods, as used in this part, refers to a method or technique used in determining the amount of cost to be assigned to individual cost accounting periods. Examples of cost accounting practices which involve the assignment of cost to cost accounting periods are requirements for the use of specified accrual basis accounting or cash basis accounting for a cost element.

(c) Allocation of cost to cost objectives, as used in this part, includes both direct and indirect allocation of cost. Examples of cost accounting practices involving allocation of cost to cost objectives are the accounting methods or techniques used to accumulate cost, to determine whether a cost is to be directly or indirectly allocated to determine the composition of cost pools, and to determine the selection and composition of the appropriate allocation base.

9903.302-2 Change to a cost accounting practice.

Change to a cost accounting practice, as used in this part, means any alteration in a cost accounting practice, as defined in 9903.302-1, whether or not such practices are covered by a Disclosure Statement, except for the following:

(a) The initial adoption of a cost accounting practice for the first time a cost is incurred, or a function is created, is not a change in cost accounting practice. The partial or total elimination of a cost or the cost of a function is not a change in cost accounting practice. As used here, function is an activity or group of activities that is identifiable in scope and has a purpose or end to be accomplished.

(b) The revision of a cost accounting practice for a cost which previously had been immaterial is not a change in cost accounting practice.

9903.302-3 Illustrations of changes which meet the definition of “change to a cost accounting practice.”

(a) The method or technique used for measuring costs has been changed.

(b) The method or technique used for assignment of cost to cost accounting periods has been changed.

(c) The method or technique used for allocating costs has been changed.

9903.302-4 Illustrations of changes which do not meet the definition of “Change to a cost accounting practice.”

9903.303 Effect of filing Disclosure Statement.

(a) A disclosure of a cost accounting practice by a contractor does not determine the allowability of particular items of cost. Irrespective of the practices disclosed by a contractor, the question of whether or not, or the extent to which, a specific element of cost is allowed under a contract remains for consideration in each specific instance. Contractors are cautioned that the determination of the allowability of cost items will remain a responsibility of the contracting officers pursuant to the provisions of the applicable procurement regulations.

(b) The individual Disclosure Statement may be used in audits of contracts or in negotiation of prices leading to contracts. The authority of the audit agencies and the contracting officers is in no way abrogated by the material presented by the contractor in his Disclosure Statement. Contractors are cautioned that their disclosures must be complete and accurate; the practices disclosed may have a significant impact on ways in which contractors will be required to comply with Cost Accounting Standards.

9903.304 Concurrent full and modified coverage.

Contracts subject to full coverage may be performed during a period in which a previously awarded contract subject to modified coverage is being performed. Compliance with full coverage may compel the use of cost accounting practices that are not required under modified coverage. Under these circumstances the cost accounting practices applicable to contracts subject to modified coverage need not be changed. Any resulting differences in practices between contracts subject to full coverage and those subject to modified coverage shall not constitute a violation of 9904.401 and 9904.402. This principle also applies to contracts subject to modified coverage being performed during a period in which a previously awarded contract subject to full coverage is being performed.

9903.305 Materiality.

In determining whether amounts of cost are material or immaterial, the following criteria shall be considered where appropriate; no one criterion is necessarily determinative:

- (a) The absolute dollar amount involved. The larger the dollar amount, the more likely that it will be material.
- (b) The amount of contract cost compared with the amount under consideration. The larger the proportion of the amount under consideration to contract cost, the more likely it is to be material.
- (c) The relationship between a cost item and a cost objective. Direct cost items, especially if the amounts are themselves part of a base for allocation of indirect costs, will normally have more impact than the same amount of indirect costs.
- (d) The impact on Government funding. Changes in accounting treatment will have more impact if they influence the distribution of costs between Government and non-Government cost objectives than if all cost objectives have Government financial support.
- (e) The cumulative impact of individually immaterial items. It is appropriate to consider whether such impacts:
 - (1) Tend to offset one another, or
 - (2) Tend to be in the same direction and hence to accumulate into a material amount.
- (f) The cost of administrative processing of the price adjustment modification shall be considered. If the cost to process exceeds the amount to be recovered, it is less likely the amount will be material.

9903.306 Interpretations.

In determining amounts of increased costs in the clauses at 9903.201-4(a), Cost Accounting Standards, 9903.201- 4(c), Disclosure and Consistency of Cost Accounting Practices, and 9903.201-4(d), Consistency in Cost Accounting, the following considerations apply:

- (a) Increased costs shall be deemed to have resulted whenever the cost paid by the Government results from a change in a contractor's cost accounting practices or from failure to comply with applicable Cost Accounting Standards, and such cost is higher than it would have been had the practices not been changed or applicable Cost Accounting Standards complied with.
- (b) If the contractor under any fixed-price contract, including a firm fixed-price contract, fails during contract performance to follow its cost accounting practices or to comply with applicable Cost Accounting Standards, increased costs are measured by the difference between the contract price agreed to and the contract price that would have been agreed to had the contractor proposed in accordance with the cost accounting practices used during contract performance. The determination of the contract price that would have been agreed to will be left to the contracting parties and will depend on the circumstances of each case.

(c) The statutory requirement underlying this interpretation is that the United States not pay increased costs, including a profit enlarged beyond that in the contemplation of the parties to the contract when the contract costs, price, or profit is negotiated, by reason of a contractor's failure to use applicable Cost Accounting Standards, or to follow consistently its cost accounting practices. In making price adjustments under the Cost Accounting Standards clause at 9903.201-4(a) in fixed price or cost reimbursement incentive contracts, or contracts providing for prospective or retroactive price redetermination, the Federal agency shall apply this requirement appropriately in the circumstances.

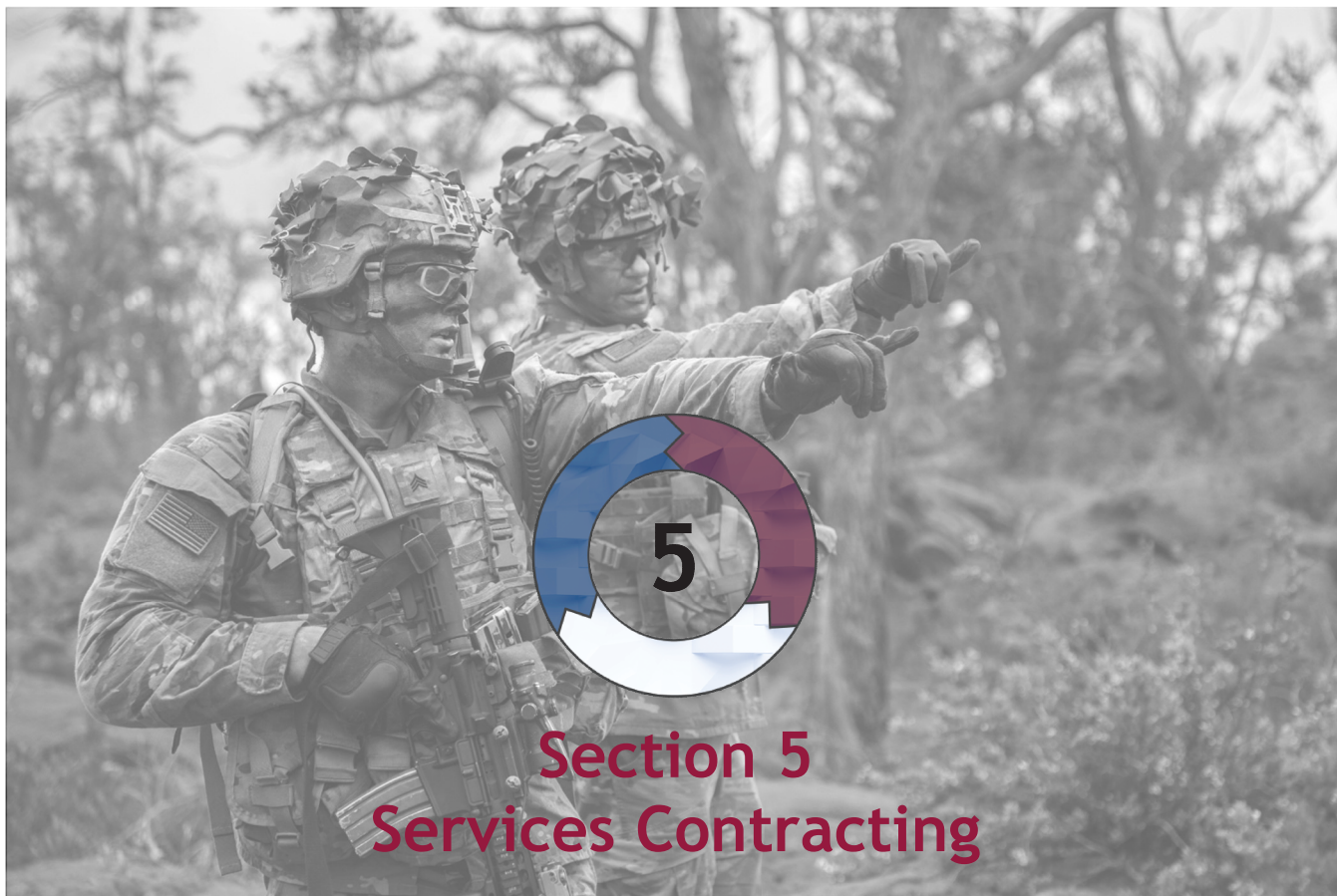
(d) The contractor and the contracting officer may enter into an agreement as contemplated by subdivision (a)(4)(ii) of the Cost Accounting Standards clause at 9903.201-4(a), covering a change in practice proposed by the Government or the contractor for all of the contractor's contracts for which the contracting officer is responsible, provided that the agreement does not permit any increase in the cost paid by the Government. Such agreement may be made final and binding, notwithstanding the fact that experience may subsequently establish that the actual impact of the change differed from that agreed to.

(e) An adjustment to the contract price or of cost allowances pursuant to the Cost Accounting Standards clause at 9903.201-4(a) may not be required when a change in cost accounting practices or a failure to follow Standards or cost accounting practices is estimated to result in increased costs being paid under a particular contract by the United States. This circumstance may arise when a contractor is performing two or more covered contracts, and the change or failure affects all such contracts. The change or failure may increase the cost paid under one or more of the contracts, while decreasing the cost paid under one or more of the contracts. In such case, the Government will not require price adjustment for any increased costs paid by the United States, so long as the cost decreases under one or more contracts are at least equal to the increased cost under the other affected contracts, provided that the contractor and the affected contracting officers agree on the method by which the price adjustments are to be made for all affected contracts. In this situation, the contracting agencies would, of course, require an adjustment of the contract price or cost allowances, as appropriate, to the extent that the increases under certain contracts were not offset by the decreases under the remaining contracts.

(f) Whether cost impact is recognized by modifying a single contract, several but not all contracts, or all contracts, or any other suitable technique, is a contract administration matter. The Cost Accounting Standards rules do not in any way restrict the capacity of the parties to select the method by which the cost impact attributable to a change in cost accounting practice is recognized.

9903.307 Cost Accounting Standards Preambles.

No changes



Eliminating the distinction between personal and nonpersonal services would enable DoD to acquire contracted mission support services efficiently and effectively.

RECOMMENDATION

Rec. 31: Eliminate the statutory and regulatory distinction between personal services contracts (PSC) and nonpersonal services (NPS) contracts.

INTRODUCTION

The regulatory and statutory distinctions between personal and nonpersonal services are outdated and inconsistent with the multisector workforce management approaches used by DoD and other federal agencies. Eliminating the statutory and regulatory distinctions between personal services contracts and nonpersonal services contracts will facilitate a multisector workforce needed to achieve and maintain national, strategic, and operational objectives and provide for managerial flexibility in determining how to fulfill service requirements.

RECOMMENDATION

Recommendation 31: Eliminate the statutory and regulatory distinction between personal services contracts (PSC) and nonpersonal services (NPS) contracts.

Problem

The current regulatory and statutory distinction between personal and nonpersonal services is outdated and inconsistent with the multisector workforce management approaches used by the DoD and other federal agencies. For DoD, general policy for total force management is found at 10 U.S.C. § 129a, General Policy for Total Force Management and implemented in DoDI 1100.22, Policy and Procedures for Determining Workforce Mix.¹ This distinction between personal service contracts (PSCs) and nonpersonal services (NPS) is derived from concerns about use of contracts and contractors to avoid or work around federal civil service hiring regulations. These concerns are no longer relevant to how the federal government uses and acquires contractor support. The distinction between personal and nonpersonal services should be eliminated and acquisition statutes and regulations should be revised to enable DoD to acquire contracted mission support services in the most efficient and effective manner possible for each unique requirement.

Background

Federal agencies have adopted a multisector workforce approach to gain access to the evolving necessary skills, technologies, and expertise required to accomplish their mission in the 21st century. Service acquisitions within DoD range from basic services, such as landscaping and janitorial services, to those that are more complex, like systems engineering support, cyber-security and analysis support, acquisition support, and other knowledge-based services (KBS).

The contractor workforce component of the total DoD workforce has increased substantially since the implementation of the personal services statutes and regulations in effect today.² This integration of contractor personnel into the total government workforce has largely been for KBS requirements. To facilitate resource allocation decision-making, DoD created a taxonomy for acquisition of services, supplies, and equipment in which KBS—also referred to as advisory and assistance services (A&AS)—is

¹ General Policy for Total Force Management, 10 U.S.C. § 129a. Policy and Procedures for Determining Workforce Mix, DoDI 1100.22 (2010).

² Personal Services Contracts, FAR Subpart 37.104(b), current to: FAC 2005-97 (2018). Personal services contracts, DFARS Subpart 237.104, current to: DPN 20171228 (2017).

defined.³ In FY 2017, DoD KBS expenditures were more than \$37 billion, the second largest expenditure element of the DoD taxonomy. That same year, PSCs were less than 1 percent of total DoD KBS contracts. In FY 2017, KBS expenditures for non-DoD government agencies were more than \$37 billion. PSCs were also less than 1 percent of non-DoD government KBS contracts.⁴

Contractor personnel are prohibited from, and do not perform, inherently governmental functions on either personal or nonpersonal services contracts. Contractor personnel provide KBS work alongside their government colleagues in support of organizational missions. PSCs are prohibited, unless the acquisition of the specific requirement is authorized by statute. A PSC is defined in the FAR as a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, government employees.⁵ FAR Subpart 37.104(d) states, ⁶

The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature.

1. *Performance on site.*
2. *Principal tools and equipment furnished by the government.*
3. *Services are applied directly to the integral effort of the agency or an organizational subpart in the furtherance of its assigned function or mission.*
4. *Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.*
5. *The need for the type of service provided can reasonably be expected to last beyond one year.*
6. *The inherent nature of the service, or the manner in which it is provided, reasonably requires, directly or indirectly, government direction or supervision of contractor employees in order to – (i) adequately protect the government's interest; (ii) retain control of the function involved; or (iii) retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.*

The NPS contracts on which 99 percent of the KBS services are acquired have similar characteristics to the above language found at FAR Subpart 37.104(d). As pointed out in the Section 809 Panel's January 2018 *Volume I Report*, Chapter 5, this situation has created misunderstandings by government personnel as to whether contractor personnel should be on a PSC or a NPS contract.⁷ The distinction between personal and nonpersonal services contracts should be eliminated which will remove the primary source of this misunderstanding.

³ OSD(AT&L), Defense Procurement Acquisition Policy (DPAP) Memo, *Taxonomy for the Acquisition of Services and Supplies and Equipment*, August 27, 2012, accessed April 9, 2018, <https://www.osd.mil/dpap/policy/policyvault/USA004219-12-DPAP.pdf>.

⁴ Data from FPDS, extracted April 4, 2018.

⁵ Personal Services Contracts, FAR Subpart 37.104(d), current to: FAC 2005-97 (2018).

⁶ Ibid.

⁷ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Volume 1 of 3* (2018).

The critical factor in the award and administration of these NPS contracts is to ensure that an employer-employee relationship between the government and the contractor employee is not created.

Management of the multisector workforce must adequately address the roles, relationships, and responsibilities between federal government employees and contractor employees. This includes:

- ensuring that contractor employees do not perform inherently governmental functions;
- making sure that agencies have sufficient in-house expertise and experience to perform critical functions, make critical decisions and manage the performance of their contractors;
- addressing the potential for personal conflicts of interest (PCI) and organizational conflict of interest (OCI) and ensuring that any OCIs or PCIs are avoided or adequately mitigated; and
- ensuring measures are in place to prevent the creation of an employer-employee relationship between the government and contractor employees as required at 5 CFR subsection 300.504 Subpart E.⁸

Inherently Governmental Functions

The FAR, DFARS, Office of Federal Procurement Policy (OFPP) Memos, and other DoD issuances provide policies for contracted services for mission support. As noted above, contracting for functions that are defined as inherently governmental are prohibited.⁹ The Federal Activities Inventory Reform Act (FAIR Act), Pub. L. No. 105-270, and OFPP Policy Letter 11-01, dated September 12, 2011, define an activity as inherently governmental when “it is so intimately related to the public interest as to require performance by federal government employees.”¹⁰ The rationale for limiting inherently governmental functions to performance by federal employees is that they are held accountable for their actions, bound by oath of office, and subject to an extensive list of limitations to their private conduct as set forth in the federal employee standards of conduct including requirements to be impartial in their public dealings, not misuse their position for private gain, have no personal conflicts of interest between their employment duties and their private financial enrichment, and limits on outside employment and private activities, such as political organizing or campaigning.¹¹

⁸ The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 392, accessed March 29, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf. Office of Management and Budget, Office of Federal Procurement (OFPP), Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, Fed. Reg. Vol. 76, No. 176, Notices (Sep. 12, 2011), accessed March 29, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>. Prohibition on employer-employee relationship, 5 CFR § 300.504 Subpart E, accessed March 30, 2018, https://www.ecfr.gov/cgi-bin/text-idx?SID=68e7ff72e2f1b15a8eebf07b534d0053&mc=true&node=pt5.1.300&rgn=div5#se5.1.300_1504.

⁹ Inherently Governmental Functions, FAR Subpart 7.5, current to: FAC 2005-97 (2018). Inherently Governmental Functions, DFARS Subpart 207.5, current to: DPN 20171228 (2017).

¹⁰ Office of Management and Budget, Office of Federal Procurement (OFPP), Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, Fed. Reg. Vol. 76, No. 176, Notices (Sep. 12, 2011), accessed March 29, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>.

¹¹ Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR 2635.

Critical Functions

“Critical function means a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations.” Agencies are responsible for properly identifying and resourcing functions that are at the core of an agency’s mission and operations with government personnel.¹² It is imperative that agencies have sufficient in-house expertise and experience to perform critical functions, make determinations of critical functions, define requirements for acquisition, and manage the performance of their contractors.¹³ Within DoD, policy for total force management, found at 10 U.S.C. § 129a, General Policy for Total Force Management, stipulates “the Secretary of Defense shall establish policies and procedures for determining the most appropriate and cost efficient mix of military, civilian, and contractor personnel to perform the mission of the Department of Defense.”¹⁴

A critical function is not inherently governmental, thus the function may be performed by both federal employees and contractors.¹⁵ Even though critical functions may be performed by a contractor, agencies must carefully consider and identify which critical functions must be performed by government employees and “ensure they have appropriate training, experience, and expertise to understand the agency’s requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce.”¹⁶

Personal Services Contracts

PSCs are used to fulfill a specific need or unique requirement that is authorized by statute.¹⁷ For example, 10 U.S.C. § 1091 provides authority for DoD to enter into PSCs to carry out health care responsibilities at medical treatment facilities.¹⁸ A PSC is defined in the FAR as a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, government employees.¹⁹

Congressional Acts

An early reference to PSCs is found in Section 10 of the Act of March 2, 1861.²⁰ The act was not an authorization to enter into a PSC; but provided an exemption to the advertising (competition)

¹² Office of Management and Budget, Office of Federal Procurement (OFPP), Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions Fed. Reg. Vol. 76, No. 176, Notices (Sep. 12, 2011), accessed March 29, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>.

¹³ The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, accessed March 29, 2018, 392, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

¹⁴ General Policy for Total Force Management, 10 U.S.C. § 129a.

¹⁵ Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, dated September 12, 2011, accessed April 5, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>.

¹⁶ Ibid.

¹⁷ Personal Services Contracts, FAR Subpart 37.104(b), current to: FAC 2005-97 (2018). Personal Services Contracts, DFARS Subpart 237.104, current to: DPN 20171228 (2017).

¹⁸ Personal Services Contracts, 10 U.S.C. § 1091.

¹⁹ Definitions, FAR Subpart 2.101, current to: FAC 2005-97 (2018).

²⁰ Department of the Army Pamphlet 27-100-6, Military Law Review, October 1959, “Personal Service Contracts,” Lieutenant Colonel Russell N. Fairbanks, 6.

requirement for personal services and specified that a contract or purchase be authorized by law or be under an appropriation.²¹

The Administrative Expenses Act of 1946, Section 9(a), defined services as “services required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis.”²² Note that Section 9(a) of the act did not use *personal* as a modifier of *services*.²³ Section 2(c)(4) of the Armed Services Procurement Act of 1956 adapted similar provisions.²⁴ These three acts demonstrate that Congress, beginning in 1861, recognized the necessity for contracted services by individuals or contractors that are not employed pursuant to the civil service and classification laws.²⁵

Comptroller General Decisions

A 1926 Comptroller General decision, *Personal Services At Seat of Government – Translators*, ruled that employment of a contractor for a personal service, if not authorized by a specific statutory authority, is not authorized.²⁶ The basis of this decision stemmed from an 1882 appropriation statute that disallowed the use of federal funds to pay personal services contractors unless the funds were explicitly appropriated for that purpose.²⁷ That is, if a civil service government employee could do the work, then the work could not be obtained by contract unless specifically authorized by statute.²⁸

A Comptroller General decision in 1943, “*Personal Services - Private Contract v. Government Personnel - Janitor Services*,” concluded that allowing a contractor to select persons to render services for the government would be inconsistent with the federal civil service laws, which require that all appointments of officers and employees be and by federal officials.²⁹

A Comptroller General decision in 1947, “*Personal Services - Procurement by contract*,” stated that in determining whether certain services are personal

“there are for consideration such factors as the degree of direct government supervision over the services performed, the furnishing of equipment and supplies to perform the services, the furnishing of office or working space, the use of special knowledge or equipment, the temporary character of services which to Government employee is qualified or available to perform, etc., and whether the fee or the amount of the contract price is based upon the results to be accomplished rather than the time actually worked, and

²¹ Public Contract Law Journal, Summer 2012, “At the Expense of Governmental Propriety: Personal Service Contractors in the Procurement Office,” William Charles Moorhouse, 6.

²² Administrative Expenses Act of 1946, ch. 744, 60 Stat. 806, Section 9(a) (1946).

²³ Department of the Army Pamphlet 27-100-6, Military Law Review, October 1959, “Personal Service Contracts,” Lieutenant Colonel Russell N. Fairbanks, 22.

²⁴ Ibid, 8.

²⁵ Ibid.

²⁶ A-16312, November 27, 1926, 6 Comps Gen. 364,” GAO, accessed March 30, 2018, <https://www.gao.gov/products/419562>.

²⁷ Employment at seat of Government only for services rendered, 5 U.S.C. § 3103. The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 400, accessed March 29, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

²⁸ The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 401, accessed March 29, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

²⁹ Ibid.

*whether the amount paid as compensation covers not only the contractor's time but the use of his facilities, office staff, equipment, etc."*³⁰

In summary, Comptroller General decisions concerning PSCs have generally focused on the need for specific statutory authorization and the degree of government supervision of contractor employees.³¹

The Pellerzi Standards

FAR Subpart 37.104(a) states "the Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract."³² This policy is derived from opinion letters issued in the late 1960s by two General Counsels of the United States Civil Service Commission, Leo Pellerzi and Anthony L. Mondello,³³ concerning the legality of certain contracts for technical support services at the Goddard Space Flight Center.³⁴ Of note, the Pellerzi opinion prescribed the six elements now found at FAR Subpart 37.104(d) that are used to determine the existence of a PSC.³⁵ Pellerzi's opinion was later supplemented by Mondello which states, "the touchstone of legality under the personnel laws is whether the contract create what is tantamount to an employer-employee relationship between the government and the employee of the contractor."³⁶ The critical factor being whether the government actually exercises "relatively continuous close supervision" of the manner and performance of the details of the jobs of the individual contractor employees.³⁷

The policy that limits use of PSCs seems clear; however, it has proven difficult to apply in practice. A research study, conducted by Russell N. Fairbanks in 1959, working as the Chief of the Procurement Law Division of the U.S. Army's Judge Advocate Generals' School, described in detail the origins and current state of the limitations on the use of PSCs.³⁸ He concluded that it is difficult to make a determination whether "any given contract will violate the Comptroller General's policy and constitute an unauthorized procurement of personal services, especially because the Comptroller General would frequently authorize personal services contracts in the name of economy, feasibility or necessity."³⁹

³⁰ "Bid Protests & Appropriations Law: B-62377, January 9, 1947, 26 Comp. Gen. 468," GAO, accessed March 30, 2018, <https://www.gao.gov/products/483619>.

³¹ Public Contract Law Journal, Summer 2012, "At the Expense of Governmental Propriety: Personal Service Contractors in the Procurement Office," William Charles Moorhouse, 9.

³² Personal Service Contracts, FAR Subpart 37.104(a), current to: FAC 2005-97 (2018).

³³ The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 401, accessed March 29, 2018, https://www.acquisition.gov/sites/default/files/page_file/uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

³⁴ Lodge 1858, *America Federation of Government Employees, et al. v. James E. Webb, Administrator, National Aeronautics and Space Administration*, U.S. Court of Appeals for the District of Columbia Circuit – 580 F.2d 496 (D.C. Cir. 1978), accessed March 30, 2018, <https://law.justia.com/cases/federal/appellate-courts/F2/580/496/83935/>.

³⁵ Personal Service Contracts, FAR Subpart 37.104(d), current to: FAC 2005-97 (2018).

³⁶ Collin D. Swan, "Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors," *George Washington Law Review*, Vol. 80, No. 2 (2012), 677, accessed March 30, 2018, <https://ssrn.com/abstract=1980795>.

³⁷ "Bid Protests & Appropriations Law: B-193035 Comp. General Decision, April 12, 1979," GAO, accessed on March 30, 2018, <https://www.gao.gov/products/451065>.

³⁸ Collin D. Swan, "Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors," *George Washington Law Review*, Vol. 80, No. 2 (2012), 678, accessed March 30, 2018, <https://ssrn.com/abstract=1980795>.

³⁹ Ibid.

This limitation on the use of PSCs, when combined with the language found at FAR Subpart 37.104(d), has created unnecessary confusion for the government acquisition workforce on use of personal and nonpersonal services contracts.

Regulations on PSCs

In 1966, DoD included in the Armed Services Procurement Regulation (ASPR) policy guidance to assist contracting officers in determining whether the services to be contracted for are either personal or nonpersonal. The purpose of this guidance was to ensure compliance with the civil service laws and the classification act as well as those statutes authorizing the limited use of personal services contracts.⁴⁰ The policy specified that unless authorized by “express statutory authority,” contracting officers “shall not” circumvent laws or regulations through a PSC “which is the procuring of services by contract in such a manner that the contractor or his employees are in effect employees of the Government.”⁴¹ Additionally, the policy listed a number of factors the contracting officer must weigh when making a determination whether a contracted service is personal or nonpersonal.⁴² Examples of factors to be considered include: (a) “to what extent the Government can obtain civil servants to do the job, or whether the contractor has specialized knowledge of equipment which is unavailable to the Government;”⁴³ (b) “to what extent the Government reserves the right to assign tasks to and prepare work schedules for contractor employees during performance of the contract;”⁴⁴ (c) “to what extent the Government retains the right to supervise the work of the contractor employees, either directly or indirectly;”⁴⁵ and (d) “to what extent the Government reserves the right to supervise or control the method in which the contractor performs the service, the number of people he will employ, the specific duties of individual employees, and similar details.”⁴⁶

In 1984, the FAR was issued and replaced the Defense Acquisition Regulation (DAR) which replaced the ASPR in 1978. FAR Part 37, Services Contracting, included an update to the policies and regulations for services contracting. The 1984 version of FAR Subpart 37.104(b)(2)(c), Personal Services, references the Pellerzi–Mondello opinions and Comptroller General decisions discussed above. It reads:

FAR Subpart 37.104(b)(2)(c) - The policy prohibiting the use of personal services contracts, without specific statutory authority, has evolved from published memoranda of the Civil Service Commission (Office of Personnel Management) and court and Comptroller General decisions over many years.

In 1989, the Office of Personnel Management (OPM) issued a final rule establishing criteria and conditions under which agencies may consider using temporary help service firms for meeting short terms temporary work needs.⁴⁷ Before the rule was finalized, federal employee unions and others

⁴⁰ Public Contract Law Journal, Summer 2012, “At the Expense of Governmental Propriety: Personal Service Contractors in the Procurement Office,” William Charles Moorhouse, 7.

⁴¹ Policy, Armed Services Procurement Regulation (ASPR) Part 22.102.1.

⁴² Criteria for Recognizing Personal Services, Armed Services Procurement Regulation (ASPR) Part 22.102.2.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Fed. Reg., Vol. 54, No. 15 (Jan. 25, 1989), 3762, accessed March 30, 2018, <https://www.gpo.gov/fdsys/pkg/FR-1989-01-25/pdf/FR-1989-01-25.pdf>.

raised concerns on matters such as the employer-employee relationship, supervision, costs, and OMB Circular A-76 requirements.⁴⁸ OPM stated:

In our capacity as the Federal agency authorized by statute to administer, execute, and enforce, the laws governing the civil service under 5 U.S.C. § 1103(a)(5), we believe such use is proper. There is no statutory prohibition. The guidance and opinions of the past, best known as the Pellerzi-Mondello opinions which placed the use of temporary help services under the general ban against contracting for personal service, must give way to a new interpretation based on court decisions, the statutory definition of a Federal supervisor, evolving experience, and the now established role which temporary help services perform.⁴⁹

Employer – Employee Relationship

The rule at 5 CFR § 300.504 Subpart E establishes a prohibition on the creation of an employer–employee relationships between the government and contractor employees and describes requirements to avoid any appearance of creating such a relationship.⁵⁰ This prohibition was implemented at FAR Subpart 37.112, Government use of Private Sector Temporaries.⁵¹

In May 2011, the DFARS was amended to implement Section 831 of the FY 2009 NDAA (Pub. L. No. 110-417). DoD was required to develop guidance on PSCs to mitigate the risks associated with creating an employer–employee relationship between government and contractor personnel. DFARS Subpart 211.106, Purchase Descriptions for Service Contracts, was added to require that statements of work or performance work statements clearly distinguish between government and contractor employees. DFARS Subpart 237.503, Agency-head Responsibilities, was added to ensure that procedures are adopted to prevent contracts from being awarded or administered as unauthorized PSCs.⁵²

A critical factor in the award and administration of services contracts is to ensure that an employer-employee relationship between the government and the contractor employee is not created. This requires measures to be in place to prevent the creation of an employer-employee relationship between the government and contractor employees as required at 5 CFR subsection 300.504 Subpart E.⁵³

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Prohibition on employer-employee relationship, 5 CFR § 300.504 Subpart E, accessed March 30, 2018, https://www.ecfr.gov/cgi-bin/text-idx?SID=68e7ff72e2f1b15a8eebf07b534d0053&mc=true&node=pt5.1.300&rgn=div5#se5.1.300_1504.

⁵¹ Government Use of Private Sector Temporaries, FAR Subpart 37.112, current to: FAC 2005-97 (2018).

⁵² Fed. Reg., Vol. 76, No. 87 (May 5, 2011), 25565, accessed March 30, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-05-05/pdf/2011-10878.pdf>.

⁵³ The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, accessed March 29, 2018, 392, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf. Office of Management and Budget, Office of Federal Procurement (OFPP), Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, Fed. Reg. Vol. 76, No. 176, Notices (Sep. 12, 2011), accessed March 29, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>. Prohibition on employer-employee relationship, 5 CFR § 300.504 Subpart E, accessed March 30, 2018, https://www.ecfr.gov/cgi-bin/text-idx?SID=68e7ff72e2f1b15a8eebf07b534d0053&mc=true&node=pt5.1.300&rgn=div5#se5.1.300_1504.

Statutory Authorities for the Award of Personal Services Contracts

FAR Subpart 37.104(b) states that agencies shall not award contracts for personal service requirements “unless specifically authorized by statute to do so.”⁵⁴

The authority at 5 U.S.C. § 3109, Employment of Experts and Consultants; Temporary or Intermittent, originated in Section 15 of the Administrative Expenses Act of 1946. Executive departments are authorized to procure “temporary (not in excess of one year) or intermittent services of experts or consultants or organizations thereof, including stenographic reporting services, by contract, and in such cases such service shall be without regard to the civil-service and classification laws.”⁵⁵ Experts and consultants can be procured as a personal or nonpersonal service. 5 U.S.C. § 3109(b) requires an appropriation or other statute as an authority to procure by contract for experts and consultants.⁵⁶

DoD is authorized to award contracts for personal service requirements under 10 U.S.C § 129b and 10 U.S.C. § 1091. The authority cited at 10 U.S.C § 129b authorizes the procurement of experts and consultants (or of organizations of experts and consultants) in accordance with 5 U.S.C. § 3109.⁵⁷ The authority at 10 U.S.C. § 1091 allows DoD to carry out health care responsibilities at medical treatment facilities within DoD. The contracts for personal services authorized at 10 U.S.C. § 1091 provide government protections under the Federal Tort Claims Act.⁵⁸

Personal and Organizational Conflicts of Interest

FAR Subpart 3.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, was added in November 2011 to implement Section 841(a) of the Duncan Hunter FY 2009 NDAA (Pub. L. No. 110-417). The policy requires contractors to identify and prevent personal conflicts of interest of their employees performing acquisition functions closely associated with inherently government functions and prohibits employees with access to nonpublic government information from using it for personal gain.⁵⁹ FAR 9.5 prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest.⁶⁰

Analysis of the Distinctions between Personal and Nonpersonal Services Contracts

Policies, procedures, and applicable clauses that are specific to the acquisition and management of contracted services are prescribed in FAR Part 37, Service Contracting and DFARS Part 237, Service Contracting. The policies, procedures, and prescriptive guidance are applicable to all contracts and orders for services regardless of the contract type or kind of service being acquired.⁶¹ The prescriptive

⁵⁴ Personal Services Contracts, FAR Subpart 37.104(b), current to: FAC 2005-97 (2018).

⁵⁵ Administrative Expenses Act of 1946, ch. 744, 60 Stat. 806, Section 15 (1946).

⁵⁶ Employment of Experts and Consultants; Temporary or Intermittent, 5 U.S.C. § 3109(b).

⁵⁷ Authority to Procure Personal Services, 10 U.S.C. § 129b. Employment of Experts and Consultants; Temporary or Intermittent, 5 U.S.C. § 3109.

⁵⁸ Personal Services Contracts, 10 U.S.C. § 1091.

⁵⁹ Rules and Regulations, Fed. Reg., Vol. 76, No. 212 (Nov. 2, 2011), 68017, accessed April 4, 2018; <https://www.gpo.gov/fdsys/pkg/FR-2011-11-02/pdf/2011-27780.pdf>.

⁶⁰ Organizational and Consultant Conflicts of Interest, FAR Subpart 9.5, current to: FAC 2005-97 (2018).

⁶¹ Service Contracting – Scope of Part, FAR Part 37.000, current to: FAC 2005-97 (2018). Service Contracting, DFARS Part 237, current to: DPN 20171228 (2017).

guidance found in FAR Part 37 and DFARS 237 makes no distinction between the prescriptive guidance for solicitations and for the award of nonpersonal and personal service contracts.

The FARSite Clause Logic web application is a tool designed to assist government contracting professionals in preparing solicitations and contracts.⁶² Under the selection for *Services*, there is no distinction between nonpersonal and PSCs. For example, the selections for *Service Conditions* include “continuity of services and preventing personal conflicts of interests,” and *Types of Service* include “special studies and analysis; information technology; and advisory and assistance services.”⁶³

The policy for PSCs outlined in FAR Subpart 37.104 addresses the unintentional creation of an employee–employer relationship in a PSC. If an employer–employee relationship is created, the major concern is that civil service laws may have been circumvented because federal employees must be hired under a competitive appointment. It is clear that one of the central issues to address in services contracts is how to prevent creation of an employer–employee relationship in the award and administration of personal and nonpersonal services contracts.

It is worth noting that PSCs cannot create an actual employer–employee relationship between the government and contractor employees based on the statutory definition for a federal employee.⁶⁴ A government employee must be appointed in the civil service; engaged in the performance of a federal function under authority of law or an Executive act; and subject to the supervision of an individual appointed in the civil service while engaged in the performance of the duties of their position.⁶⁵ Contractor employees are not appointed in the civil service and are also prohibited from performing inherently governmental functions. As long as the process in which a contract for services is awarded and administered is done in a way that prevents the establishment of an employer–employee relationship, there is no circumvention of any statutory or civil service hiring rules.

Discussion

The use of contractors in the multi-sector workforce is a growing component of the total DoD workforce and the current governing statutes need to be updated to align with that growth. For example, our review of 5 U.S.C. § 3109 found that authorities for both federal government employment and procurement by contract are comingled. Employing and procuring experts and consultants under the same statute has created confusion within the federal acquisition workforce regarding the proper acquisition and management of contractors performing under contracts for services.

The federal government has in place strong statutory requirements and regulatory processes on inherently governmental functions, OCI and PCI, critical functions and the avoidance of creating an employer–employee relationship in the award and administration of contracts for services. These requirements and processes ensure that contracts for services do not circumvent civil service hiring authorities.

⁶² FARSite Clause Logic, accessed April 4, 2018, http://pkllunx.hill.af.mil/demo_clslogic/app/frameset.htm.

⁶³ Ibid.

⁶⁴ Employee, 5 U.S.C. § 2105(a).

⁶⁵ Ibid.

The statutory and regulatory limitations on the use of PSCs are based on numerous Comptroller General decisions and Civil Service Commission legal opinions. The limitation on the award of PSCs is derived from concerns that PSCs may circumvent civil service rules. The focus of the statutory and regulatory requirements are to limit the use of PSCs to specific statutory authorizations.⁶⁶

The statutory limitation on the use of PSCs has created the implementation of unwieldy procedural safeguards and guidelines in the award and administration of services contracts resulting in unnecessarily long acquisition lead times and contract awards.⁶⁷ The limitation on the use of PSCs has resulted in agencies prescribing additional policies and guidance designed to help contracting officers avoid creating an employer–employee relationship between the government and contractor personnel.⁶⁸ Examples include the certification of nonpersonal services required by DoD to prevent contracts from being awarded or administered in a manner that constitutes an unauthorized PSC and the *U.S. Air Force Guide for the Government-Contractor Relationship*.⁶⁹

In 1989, OPM issued guidance that recognized the need to use contractors for temporary functions that could be done by government employees. OPM recognized the need to introduce changes to guidance and opinions of the past regarding personal service. Approximately 30 years have passed since that OPM decision and the use of contractors as a critical component of the total DoD workforce has increased substantially. The necessity to effectively manage the more complex and larger multi-sector workforce requires updating existing statutes and regulations.

The Department of Veterans Affairs (VA) procures health care services as nonpersonal services. The DoD also acquires health care services as nonpersonal services. The Veteran Affairs Acquisition Regulation Subpart 837.403 prescribes the requirements for contracted service health care providers with respect to the employee–employer relationship and indemnification and medical liability insurance.⁷⁰ DoD could follow the example of VA and procure health care providers exclusively as nonpersonal services. This approach will require modification of the statutory authority at 10 U.S.C. § 1091 for PSCs for health care providers within DoD.

Conclusions

The DoD multisector workforce approach is necessary to achieve and maintain national, strategic, and operational objectives. The growing threats to U.S. economic, political, and military power require a streamlined process to obtain (via contract) and retain private sector expertise (via proper contract award and administration). The elimination of the distinction between PSC and NPS contracts will allow better synchronization of work products and properly defined relationships between federal government and contractor employees. The current statutes and policies that characterize the

⁶⁶ The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 401, accessed March 29, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

⁶⁷ Ibid, 394.

⁶⁸ Ibid, 401.

⁶⁹ Agency-head responsibilities, DFARS Subpart 237.503, current on: DPN 20171228 (2017). U.S. Air Force, *Guide for the Government-Contractor Relationship*, October 2006, accessed March 30, 2018, http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/Topical/CCO_Predeploy_Plan/training/gov.ctr.relationshipaf.docx.

⁷⁰ Nonpersonal Health Care Services, VAAR Subpart 837.4, current on: VAAR Update 2008-04 (2018).

difference between PSC and NPS contractor employees are outdated and inefficient and must be changed.

The distinction between PSCs and NPS contracts by:

- Modify 5 U.S.C. § 3109 which provides the authority to procure services by contract and obtain services by employment. A modification to 5 U.S.C. § 3109 to remove “procure by contract” will result in making it solely an employment authority for experts and consultants, temporary or intermittent.
- Add a new section to Title 41, Public Contracts, which would provide that contracts that were previously considered to be personal services contracts may be entered into on the same basis as other services contracts and remove the compensation cap associated with personal services contracts in 5 U.S.C. § 3109.
- Repeal 10 U.S.C. § 129b which removes the authority to procure personal services and the compensation cap because all contracted services will be procured under general contracting authority.
- Modify 10 U.S.C. § 1091 which will authorize health care responsibilities under general contract authority.
- Modify 10 U.S.C. § 1089 and 10 U.S.C. § 1094 which will extend the authorization to provide contracted health care providers medical malpractice coverage and extend the authorization to provide contracted health care providers medical licensure portability on all contracted services for health care providers.

The statutory authorizations for PSCs served their purpose in the 19th and 20th centuries but is an ineffective and outdated approach to integrating and managing contractor employees within the DoD multisector workforce of the 21st century. To leverage commercial practices and solutions and commercial expertise within the U.S. government, the obsolete distinction and the exhaustive debates surrounding PSC and NPS contracts should end.

Eliminating this distinction would remove the bureaucracy and confusion around the use of PSCs. In their January 2007 report, the Acquisition Advisory Panel recommended “elimination of the prohibition on PSCs.”⁷¹ Their report describes the challenges and inefficiencies the prohibition creates within the multisector workforce when government and contractor employees are co-located and working together on projects.⁷²

⁷¹ The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 421, accessed March 29, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

⁷² Ibid, 421.

Implementation

Legislative Branch

- Amend 5 U.S.C. § 3109, Employment of Experts and Consultants; Temporary or Intermittent.
- Repeal 10 U.S.C. § 129b, Authority to Procure Personal Services.
- Amend 10 U.S.C. § 1091, Personal Services Contracts.
- Add a new section to Title 41 for contracts for services.
- Amend 10 USC §1089, Defense of Certain Suits arising out of Medical Malpractice.
- Amend 10 USC §1094, Licensure Requirement for Healthcare Professionals.

Executive Branch

- Amend DoDI 1100.22, Policy and Procedures for Determining Workforce Mix, to delete references to personal services.
- Cancel DoDI 6025.5, Personal Services Contracts for Health Care Providers.
- Make substantial changes to FAR Part 37 and DFARS Part 237, as required.

Note: Explanatory report language, draft legislative text, and regulatory revisions can be found in the Implementation Details subsection at the end of Section 5.

Implications for Other Agencies

- Other federal agencies face the same challenges concerning the management of the multisector workforce.

Section 5
Services Contracting
Implementation Details

Recommendation 31

RECOMMENDED REPORT LANGUAGE

SEC. XXX. Elimination of Distinction between Personal Services Contracts and Other Types of Services Contracts.

This section would eliminate the statutory distinction between personal services contracts and other types of contracts for services to remove confusion between such contracts and simplify bureaucracy.

Currently section 3109 of title 5, United States Code, authorizes an agency to “procure by contract” temporary or intermittent services of experts and consultants authorized by appropriation or other statute. The committee is aware that “procure by contract” has caused confusion in the potential creation of employer-employee relationships. However, the committee notes that removing the distinction will reinforce the supervisory relationship between the contractor and its employees, and that contractual terms and conditions will define the legal relationship between the government and its contractors. The committee notes that prohibitions on contractor performance of inherently governmental functions will remain in place as well as requirements on organizational conflicts of interest and personal conflicts of interest, and the need for agencies to identify and fully resource the performance of critical functions by government employees.

This section also would add a corresponding new section 3907 to title 41, United States Code, to state expressly that contracts for services similar to those covered by section 3109 or other contracts previously known as personal services contracts may be made on the same basis as other contracts for services.

This section would make several conforming amendments to titles 10 and 41, United States Code, including repeal of section 129b, title 10, United States Code, and revisions to section 1091, title 10, United States Code, since separate authority to enter into contracts would not be needed.

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DRAFT — PERSONAL SERVICES CONTRACTS

[NOTE: The draft legislative text below is followed by a “Sections Affected” display, showing in “redline” form how the text of current provisions of law would be affected by the draft legislative text.]

1 **SEC. ____ . ELIMINATION OF DISTINCTION BETWEEN PERSONAL SERVICES**

2 **CONTRACTS AND OTHER TYPES OF SERVICES CONTRACTS.**

3 **(a) New TITLE 41 SECTION.—**

4 (1) IN GENERAL.—Chapter 39 of **title 41**, United States Code, is amended by
5 adding at the end the following new section:

6 **“§ 3907. Contracts for services**

7 “(a) GENERAL RULE.—A contract for services of experts or consultants, including
8 stenographic services, and any other contract for services that is of a type that on the day before
9 the date of the enactment of this section was considered to be a ‘personal services contract’—

10 “(1) may be entered into on the same basis as any other contract for services; and

11 “(2) is not subject to any requirement for specific authorization in an
12 appropriation or other statute.

13 “(b) REFERENCES IN OTHER LAWS.—Any provision of law in effect on the date of the
14 enactment of this section that refers to authority to procure services, or to enter into a contract,
15 under section 3109 of title 5 is superseded by this section.”.

16 (2) CLERICAL AMENDMENT.—The table of sections at the beginning of such
17 chapter is amended by adding at the end the following new item:

“3907. Contracts for services.”.

18 **(b) REPEAL OF APPLICABILITY OF SECTION 3109 OF TITLE 5 TO CONTRACTS.—**

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(1) APPLICABILITY TO EMPLOYMENT ONLY.—Section **3109(b) of title 5**, United States Code, is amended—

(A) in the first sentence—

(i) by striking “may procure by contract the” and inserting “may employ experts or consultants to provide”; and

(ii) by striking “experts or consultants or an organization thereof”;

(B) in the second sentence—

(i) by striking “Services procured under this section are” and inserting “Employment under this section is”;

(ii) by inserting “and” at the end of paragraph (1);

(iii) by striking “; and” at the end of paragraph (2) and inserting a period; and

(iv) by striking paragraph (3); and

(C) in the last sentence, by striking “the procurement of the services” and inserting “such employment”.

(2) CONFORMING REPEALS OF TITLE 5 “NOTE” SECTIONS.—The following provisions of law are **repealed**:

(A) Section 401 of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2014 (division G of Public Law 113–76; **5 U.S.C. 3109 note**).

(B) Section 501 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1993 (Public Law 102–394; **5 U.S.C. 3109 note**).

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(C) Section 504 of the Energy and Water Development Appropriations Act, 1993 (Public Law 102-377; **5 U.S.C. 3109 note**).

(c) TITLE 10 GENERALLY. —

(1) REPEAL OF GENERAL PERSONAL SERVICES CONTRACT AUTHORITY.—Section **129b** of title 10, United States Code, is **repealed**.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 3 of such title is amended by striking the item relating to section 129b.

(d) TITLE 10 HEALTH SERVICES PROVIDERS. —

(1) REPEAL OF SEPARATE CONTRACTING AUTHORITY.—Section **1091** of title 10, United States Code, is **amended to read as follows**:

“§1091. Services contracts for health care responsibilities

“For purposes of sections 1089 and 1094 of this title (and any other provision of law referring to a contract under this section), a services contract described in this section is a services contract entered into by the Secretary of Defense or the Secretary of Homeland Security, with respect to the Coast Guard when the Coast Guard is not operating as a service in the Navy, to —

“(1) carry out health care responsibilities in medical treatment facilities under the jurisdiction of that Secretary, as determined to be necessary by the Secretary; or

“(2) carry out other health care responsibilities of the Secretary (such as the provision of medical screening examinations at Military Entrance Processing Stations) at locations outside medical treatment facilities, as determined necessary pursuant to regulations prescribed by the Secretary.”.

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(2) CONFORMING AMENDMENTS RELATING TO TITLE 10 HEALTH CARE

AUTHORITIES.—

(A) Section **1072(4)** of title 10, United States Code, is amended by striking “contracts entered into under section 1091 or 1097 of this title” and inserting “contracts described in section 1091 of this title or entered into under section 1097 of this title”.

(B) Section **1089(a)** of such title is amended in the last sentence—

(i) by striking “personal services contract entered into under” and inserting “services contract described in”; and

(ii) by striking “that is authorized in accordance with the requirements of such section 1091”.

(C) Section **1094(d)(2)** of such title is amended by striking “personal services contractor under” and inserting “health-care professional serving under a services contract described in”.

(D) Section 704(c) of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; **10 U.S.C. 1091 note**) is **repealed**.

(e) Section 1601(e) of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136; **10 U.S.C. 2358 note**) is **repealed**.

(e) OTHER AMENDMENTS TO TITLE 10.—Title 10, United States Code, is amended as follows:

(1) Section **2207(a)** is amended by striking “other than a contract for personal services”.

(2) Section **2209(b)** is amended by striking “, personal services,”.

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(3) Section **2324(k)** is amended—

(A) by striking “, or personal services contractor” each place it appears;

and

(B) by striking “, subcontract, or personal services contract” each place it appears and inserting “or subcontract”.

(4) Section **2330a** is amended—

(A) in subsection (c)(2), by striking subparagraph (F);

(B) in subsection (d)(2)—

(i) by striking subparagraph (A); and

(ii) by redesignating subparagraphs (B) and (C) as subparagraphs

(A) and (B), respectively;

(C) by striking subsection (g); and

(D) in subsection (h)—

(i) by striking paragraph (4); and

(ii) in paragraph (6), by striking “, including” and all the follows in that paragraph and inserting a period.

(5) Section **2409(a)(1)** is amended by striking “or personal services contractor” and inserting “or an individual who is a services contractor”.

(6) Sections **9446(a)(1)** and **9448(b)(3)** are amended by striking “personal”.

(f) OTHER AMENDMENTS TO TITLE 41.—Title 41, United States Code, is amended as follows:

(1) Section **4304(a)(15)** is amended by striking “, or personal service contractor”.

(2) Section **4310** is amended—

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(A) by striking “, subcontractor, or personal services contractor” each place it appears and inserting “or subcontractor”; and

(B) by striking “, subcontract, or personal services contract” each place it appears and inserting “or subcontract”.

(5) Section 4712(a)(1) is amended by striking “or personal services contractor” and inserting “or an individual who is a services contractor”.

(g) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to contracts entered into after the date of the enactment of this Act.

SECTIONS AFFECTED BY THE PROPOSAL

[Matter proposed to be deleted is shown in ~~stricken through~~ text; matter to be inserted is shown in *bold italic*.]

Title 5, United States Code

§3109. Employment of experts and consultants; temporary or intermittent

(a) For the purpose of this section—

(1) "agency" has the meaning given it by section 5721 of this title; and

(2) "appropriation" includes funds made available by statute under section 9104 of title 31.

(b) When authorized by an appropriation or other statute, the head of an agency may ~~procure by contract the~~ ***employ experts or consultants to provide*** temporary (not in excess of 1 year) or intermittent services ~~of experts or consultants or an organization thereof, including stenographic reporting services. Services procured~~ ***Employment*** under this section ~~are~~ ***is*** without regard to—

(1) the provisions of this title governing appointment in the competitive service; ***and***

(2) chapter 51 and subchapter III of chapter 53 of this title; ~~and~~ .

(3) ~~section 6101(b) to (d) of title 41, except in the case of stenographic reporting services by an organization.~~

However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of this title only when specifically authorized by the appropriation or other statute authorizing ~~the procurement of the services~~ ***such employment***.

(c) Positions in the Senior Executive Service or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service may not be filled under the authority of subsection (b) of this section.

(d) The Office of Personnel Management shall prescribe regulations necessary for the administration of this section. Such regulations shall include-

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- (1) criteria governing the circumstances in which it is appropriate to employ an expert or consultant under the provisions of this section;
 - (2) criteria for setting the pay of experts and consultants under this section; and
 - (3) provisions to ensure compliance with such regulations.
- (e) Each agency shall report to the Office of Personnel Management on an annual basis with respect to—
- (1) the number of days each expert or consultant employed by the agency during the period was so employed; and
 - (2) the total amount paid by the agency to each expert and consultant for such work during the period.

Title 10, United States Code

~~§129b. Authority to procure personal services~~

~~(a) AUTHORITY. Subject to subsection (b), the Secretary of Defense and the Secretaries of the military departments may—~~

~~(1) procure the services of experts or consultants (or of organizations of experts or consultants) in accordance with [section 3109 of title 5](#); and~~

~~(2) pay in connection with such services travel expenses of individuals, including transportation and per diem in lieu of subsistence while such individuals are traveling from their homes or places of business to official duty stations and return as may be authorized by law.~~

~~(b) CONDITIONS. The services of experts or consultants (or organizations thereof) may be procured under subsection (a) only if the Secretary of Defense or the Secretary of the military department concerned, as the case may be, determines that—~~

~~(1) the procurement of such services is advantageous to the United States; and~~

~~(2) such services cannot adequately be provided by the Department of Defense.~~

~~(c) REGULATIONS. Procurement of the services of experts and consultants (or organizations thereof) under subsection (a) shall be carried out under regulations prescribed by the Secretary of Defense.~~

~~(d) ADDITIONAL AUTHORITY FOR PERSONAL SERVICES CONTRACTS. (1) In addition to the authority provided under subsection (a), the Secretary of Defense may enter into personal services contracts if the personal services—~~

~~(A) are to be provided by individuals outside the United States, regardless of their nationality, and are determined by the Secretary to be necessary and appropriate for supporting the activities and programs of the Department of Defense outside the United States;~~

~~(B) directly support the mission of a defense intelligence component or counter-intelligence organization of the Department of Defense; or~~

~~(C) directly support the mission of the special operations command of the Department of Defense.~~

~~(2) The contracting officer for a personal services contract under this subsection shall be responsible for ensuring that—~~

~~(A) the services to be procured are urgent or unique; and~~

~~(B) it would not be practicable for the Department to obtain such services by other means.~~

~~(3) The requirements of [section 3109 of title 5](#) shall not apply to a contract entered into under this subsection.~~

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§1072. Definitions

In this chapter:

(1) ***

(4) The term “Civilian Health and Medical Program of the Uniformed Services” means the program authorized under sections 1079 and 1086 of this title and includes contracts ~~entered into under~~ *described in* section 1091 *of this title* or *entered into under section 1097 of this title* and demonstration projects under section 1092 of this title.

§1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply to such a physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) serving under a **personal** services contract ~~entered into under~~ *described in* section 1091 of this title or a subcontract at any tier under such a contract ~~that is authorized in accordance with the requirements of such section 1091.~~

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the

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proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f)(1) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(2) With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

(g) In this section, the term "head of the agency concerned" means—

(1) the Director of the Central Intelligence Agency, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Homeland Security, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) the Chief Operating Officer of the Armed Forces Retirement Home, in the case of an employee of the Armed Forces Retirement Home; and

(4) the Secretary of Defense, in all other cases.

~~§1091. Personal services contracts~~ *Services contracts for health care responsibilities*

For purposes of sections 1089 and 1094 of this title (and any other provision of law referring to a contract under this section), a services contract described in this section is a services contract entered into by the Secretary of Defense or the Secretary of Homeland Security, with respect to the Coast Guard when the Coast Guard is not operating as a service in the Navy, to —

(1) carry out health care responsibilities in medical treatment facilities under the jurisdiction of that Secretary, as determined to be necessary by the Secretary; or

(2) carry out other health care responsibilities of the Secretary (such as the provision of medical screening examinations at Military Entrance Processing Stations)

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at locations outside medical treatment facilities, as determined necessary pursuant to regulations prescribed by the Secretary.

~~(a) AUTHORITY. — (1) The Secretary of Defense, with respect to medical treatment facilities of the Department of Defense, and the Secretary of Homeland Security, with respect to medical treatment facilities of the Coast Guard when the Coast Guard is not operating as a service in the Navy, may enter into personal services contracts to carry out health care responsibilities in such facilities, as determined to be necessary by the Secretary. The authority provided in this subsection is in addition to any other contract authorities of the Secretary, including authorities relating to the management of such facilities and the administration of this chapter.~~

~~(2) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may also enter into personal services contracts to carry out other health care responsibilities of the Secretary (such as the provision of medical screening examinations at Military Entrance Processing Stations) at locations outside medical treatment facilities, as determined necessary pursuant to regulations prescribed by the Secretary.~~

~~(b) LIMITATION ON AMOUNT OF COMPENSATION. — In no case may the total amount of compensation paid to an individual in any year under a personal services contract entered into under subsection (a) exceed the amount of annual compensation (excluding the allowances for expenses) specified in section 102 of title 3.~~

~~(c) PROCEDURES. — (1) The Secretary shall establish by regulation procedures for entering into personal services contracts with individuals under subsection (a). At a minimum, such procedures shall assure —~~

~~(A) the provision of adequate notice of contract opportunities to individuals residing in the area of the medical treatment facility involved; and~~

~~(B) consideration of interested individuals solely on the basis of the qualifications established for the contract and the proposed contract price.~~

~~(2) Upon the establishment of the procedures under paragraph (1), the Secretary may exempt contracts covered by this section from the competitive contracting requirements specified in section 2304 of this title or any other similar requirements of law.~~

~~(3) The procedures established under paragraph (1) may provide for a contracting officer to authorize a contractor to enter into a subcontract for personal services on behalf of the agency upon a determination that the subcontract is —~~

~~(A) consistent with the requirements of this section and the procedures established under paragraph (1); and~~

~~(B) in the best interests of the agency.~~

~~(d) EXCEPTIONS. — The procedures and exemptions provided under subsection (c) shall not apply to personal services contracts entered into under subsection (a) with entities other than individuals or to any contract that is not an authorized personal services contract under subsection (a).~~

§1094. Licensure requirement for health-care professionals

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(a)(1) A person under the jurisdiction of the Secretary of a military department may not provide health care independently as a health-care professional under this chapter unless the person has a current license to provide such care. In the case of a physician, the physician may not provide health care as a physician under this chapter unless the current license is an unrestricted license that is not subject to limitation on the scope of practice ordinarily granted to other physicians for a similar specialty by the jurisdiction that granted the license.

(2) The Secretary of Defense may waive paragraph (1) with respect to any person in unusual circumstances. The Secretary shall prescribe by regulation the circumstances under which such a waiver may be granted.

(b) The commanding officer of each health care facility of the Department of Defense shall ensure that each person who provides health care independently as a health-care professional at the facility meets the requirement of subsection (a).

(c)(1) A person (other than a person subject to chapter 47 of this title) who provides health care in violation of subsection (a) is subject to a civil money penalty of not more than \$5,000.

(2) The provisions of subsections (c) and (e) through (h) of section 1128A of the Social Security Act (42 U.S.C. 1320a–7a) shall apply to the imposition of a civil money penalty under paragraph (1) in the same manner as they apply to the imposition of a civil money penalty under that section, except that for purposes of this subsection—

(A) a reference to the Secretary in that section is deemed a reference to the Secretary of Defense; and

(B) a reference to a claimant in subsection (e) of that section is deemed a reference to the person described in paragraph (1).

(d)(1) Notwithstanding any law regarding the licensure of health care providers, a health-care professional described in paragraph (2) or (3) may practice the health profession or professions of the health-care professional at any location in any State, the District of Columbia, or a Commonwealth, territory, or possession of the United States, regardless of where such health-care professional or the patient are located, so long as the practice is within the scope of the authorized Federal duties.

(2) A health-care professional referred to in paragraph (1) as being described in this paragraph is a member of the armed forces, civilian employee of the Department of Defense, **personal services contractor under health-care professional serving under a services contract described in** section 1091 of this title, or other health-care professional credentialed and privileged at a Federal health care institution or location specially designated by the Secretary for this purpose who—

(A) has a current license to practice medicine, osteopathic medicine, dentistry, or another health profession; and

(B) is performing authorized duties for the Department of Defense.

(3) A health-care professional referred to in paragraph (1) as being described in this paragraph is a member of the National Guard who—

(A) has a current license to practice medicine, osteopathic medicine, dentistry, or another health profession; and

(B) is performing training or duty under section 502(f) of title 32 in response to an actual or potential disaster.

(e) In this section:

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(1) The term “license”—

(A) means a grant of permission by an official agency of a State, the District of Columbia, or a Commonwealth, territory, or possession of the United States to provide health care independently as a health-care professional; and

(B) includes, in the case of such care furnished in a foreign country by any person who is not a national of the United States, a grant of permission by an official agency of that foreign country for that person to provide health care independently as a health-care professional.

(2) The term “health-care professional” means a physician, dentist, clinical psychologist, marriage and family therapist certified as such by a certification recognized by the Secretary of Defense, or nurse and any other person providing direct patient care as may be designated by the Secretary of Defense in regulations.

* * * * *

§2207. Expenditure of appropriations: limitation

(a) Money appropriated to the Department of Defense may not be spent under a contract ~~other than a contract for personal services~~ unless that contract provides that—

(1) the United States may, by written notice to the contractor, terminate the right of the contractor to proceed under the contract if the Secretary concerned or his designee finds, after notice and hearing, that the contractor, or his agent or other representative, offered or gave any gratuity, such as entertainment or a gift, to an officer, official, or employee of the United States to obtain a contract or favorable treatment in the awarding, amending, or making of determinations concerning the performance, of a contract; and

(2) if a contract is terminated under clause (1), the United States has the same remedies against the contractor that it would have had if the contractor had breached the contract and, in addition to other damages, is entitled to exemplary damages in an amount at least three, but not more than 10, as determined by the Secretary or his designee, times the cost incurred by the contractor in giving gratuities to the officer, official, or employee concerned.

The existence of facts upon which the Secretary makes findings under clause (1) may be reviewed by any competent court.

(b) This section does not apply to a contract that is for an amount not greater than the simplified acquisition threshold (as defined in section 134 of title 41).

§2209. Management funds

(a) To conduct economically and efficiently the operations of the Department of Defense that are financed by at least two appropriations but whose costs cannot be immediately distributed and charged to those appropriations, there is the Army Management Fund, the Navy Management Fund, and the Air Force Management Fund, each within its respective department and under the direction of the Secretary of that department. Each such fund shall consist of a corpus of \$1,000,000 and such amounts as may be appropriated thereto from time to time. An account for an operation that is to be financed by such a fund may be established only with the approval of the Secretary of Defense.

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(b) Under such regulations as the Secretary of Defense may prescribe, expenditures may be made from a management fund for material (other than for stock), ~~personal services~~, and services under contract. However, obligation may not be incurred against that fund if it is not chargeable to funds available under an appropriation of the department concerned or funds of another department or agency of the Department of Defense. The fund shall be promptly reimbursed from those funds for expenditures made from it.

(c) Notwithstanding any other provision of law, advances, by check or warrant, or reimbursements, may be made from available appropriations to a management fund on the basis of the estimated cost of a project. As adequate data becomes available, the estimated cost shall be revised and necessary adjustments made. Final adjustment shall be made with the appropriate funds for the fiscal year in which the advances or reimbursements are made. Except as otherwise provided by law, amounts advanced to management funds are available for obligation only during the fiscal year in which they are advanced.

* * * * *

§2324. Allowable costs under defense contracts

(a) ***

(k) PROCEEDING COSTS NOT ALLOWABLE.—(1) Except as otherwise provided in this subsection, costs incurred by a contractor or subcontractor, ~~or personal services contractor~~ in connection with any criminal, civil, or administrative proceeding commenced by the United States, by a State, or by a contractor or subcontractor, ~~or personal services contractor~~ employee submitting a complaint under section 2409 of this title are not allowable as reimbursable costs under a covered contract; *or* subcontract, ~~or personal services contract~~ if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation or to any other activity described in subparagraphs (A) through (C) of section 2409(a)(1) of this title, and (B) results in a disposition described in paragraph (2).

(2) A disposition referred to in paragraph (1)(B) is any of the following:

(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor or subcontractor, ~~or personal services contractor~~ liability on the basis of the violation or failure referred to in paragraph (1).

(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 2409 of this title by reason of the violation or failure referred to in paragraph (1).

(D) A final decision-

(i) to debar or suspend the contractor or subcontractor, ~~or personal services contractor~~;

(ii) to rescind or void the contract, ~~subcontract, or personal services contract~~ *or subcontract*; or

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(iii) to terminate the contract, ~~subcontract, or personal services contract~~ **or subcontract** for default;

by reason of the violation or failure referred to in paragraph (1).

(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).

(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor or subcontractor, ~~or personal services contractor~~ and the United States, the costs incurred by the contractor or subcontractor, ~~or personal services contractor~~ in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.

(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the head of the agency or Secretary of the military department concerned that awarded the covered contract, ~~subcontract, or personal services contract~~ **or subcontract** involved in the proceeding may allow the costs incurred by the contractor or subcontractor, ~~or personal services contractor~~ in connection with such proceeding as reimbursable costs if the agency head or Secretary determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of (A) a specific term or condition of the contract, ~~subcontract, or personal services contract~~ **or subcontract**, or (B) specific written instructions of the agency or military department.

(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor or subcontractor, ~~or personal services contractor~~ in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract, ~~subcontract, or personal services contract~~ **or subcontract** may be allowed as reimbursable costs under the contract, ~~subcontract, or personal services contract~~ **or subcontract** if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

(B)(i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

(C) In the case of a proceeding referred to in subparagraph (A), contractor or subcontractor, ~~or personal services contractor~~ costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor or subcontractor, ~~or personal services contractor~~ misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

(6) In this subsection:

(A) The term "proceeding" includes an investigation.

(B) The term "costs", with respect to a proceeding-

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(i) means all costs incurred by a contractor or subcontractor, ~~or personal services contractor~~, whether before or after the commencement of any such proceeding; and

(ii) includes-

(I) administrative and clerical expenses;

(II) the cost of legal services, including legal services performed by an employee of the contractor or subcontractor, ~~or personal services contractor~~;

(III) the cost of the services of accountants and consultants retained by the contractor or subcontractor, ~~or personal services contractor~~; and

(IV) the pay of directors, officers, and employees of the contractor or subcontractor, ~~or personal services contractor~~ for time devoted by such directors, officers, and employees to such proceeding.

(C) The term "penalty" does not include restitution, reimbursement, or compensatory damages.

* * * * *

§2330a. Procurement of services: tracking of purchases

(a) DATA COLLECTION REQUIRED.—The Secretary of Defense shall establish a data collection system to provide management information with regard to each purchase of services by a military department or Defense Agency in excess of \$3,000,000, regardless of whether such a purchase is made in the form of a contract, task order, delivery order, military interdepartmental purchase request, or any other form of interagency agreement, for services in the following service acquisition portfolio groups:

- (1) Logistics management services.
- (2) Equipment related services.
- (3) Knowledge-based services.
- (4) Electronics and communications services.

(b) DATA TO BE COLLECTED.—The data required to be collected under subsection (a) includes the following:

- (1) The services purchased.
- (2) The total dollar amount of the purchase.
- (3) The form of contracting action used to make the purchase.
- (4) Whether the purchase was made through—
 - (A) a performance-based contract, performance-based task order, or other performance-based arrangement that contains firm fixed prices for the specific tasks to be performed;
 - (B) any other performance-based contract, performance-based task order, or performance-based arrangement; or
 - (C) any contract, task order, or other arrangement that is not performance based.
- (5) In the case of a purchase made through an agency other than the Department of Defense, the agency through which the purchase is made.
- (6) The extent of competition provided in making the purchase and whether there was more than one offer.

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(7) Whether the purchase was made from—

(A) a small business concern;

(B) a small business concern owned and controlled by socially and economically disadvantaged individuals; or

(C) a small business concern owned and controlled by women.

(c) Inventory Summary.—(1) Not later than the end of the third quarter of each fiscal year, the Secretary of Defense shall prepare an annual inventory, and submit to Congress a summary of the inventory, of activities performed during the preceding fiscal year pursuant to staff augmentation contracts on behalf of the Department of Defense. The guidance for compiling the inventory shall be issued by the Under Secretary of Defense for Personnel and Readiness, the Under Secretary of Defense (Comptroller), and the Under Secretary of Defense for Acquisition, Technology, and Logistics, as follows:

(A) The Under Secretary of Defense for Personnel and Readiness, as supported by the Under Secretary of Defense (Comptroller), shall be responsible for developing guidance for—

(i) the collection of data regarding functions and missions performed by contractors in a manner that is comparable to the manpower data elements used in inventories of functions performed by Department of Defense employees;

(ii) the calculation of contractor full-time equivalents for direct labor, using direct labor hours in a manner that is comparable to the calculation of Department of Defense civilian full-time employees; and

(iii) the conduct and completion of the annual review required under subsection (e)(1).

(B) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall be responsible for developing guidance on other data elements and implementing procedures for requirements relating to acquisition.

(2) The entry for an activity on an inventory under this subsection shall include, for the fiscal year covered by such entry, the following:

(A) The functions and missions performed by the contractor.

(B) The contracting organization, the component of the Department of Defense administering the contract, and the organization whose requirements are being met through contractor performance of the function.

(C) The funding source for the contract under which the function is performed by appropriation and operating agency.

(D) The fiscal year for which the activity first appeared on an inventory under this section.

(E) The number of contractor employees, expressed as full-time equivalents for direct labor, using direct labor hours and associated cost data collected from contractors (except that estimates may be used where such data is not available and cannot reasonably be made available in a timely manner for the purpose of the inventory).

~~(F) A determination whether the contract pursuant to which the activity is performed is a personal services contract.~~

(G) A summary of the data required to be collected for the activity under subsection (a).

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(3) The inventory required under this subsection shall be submitted in unclassified form, but may include a classified annex.

(d) Review and Planning Requirements.—Within 90 days after the date on which an inventory is submitted under subsection (c), the Secretary of the military department or head of the Defense Agency responsible for activities in the inventory shall—

(1) review the contracts and activities in the inventory for which such Secretary or agency head is responsible, with particular focus and attention on the following categories of high-risk product service codes (also referred to as Federal supply codes):

(A) Special studies or analysis that is not research and development.

(B) Information technology and telecommunications.

(C) Support, including professional, administrative, and management;

(2) ensure that—

~~(A) each contract on the list that is a personal services contract has been entered into, and is being performed, in accordance with applicable statutory and regulatory requirements;~~

~~(B)~~ (A) the activities on the list do not include any inherently governmental functions; and

~~(C)~~ (B) to the maximum extent practicable, the activities on the list do not include any functions closely associated with inherently governmental functions; and

(3) identify activities that should be considered for conversion—

(A) to performance by civilian employees of the Department of Defense pursuant to section 2463 of this title; or

(B) to an acquisition approach that would be more advantageous to the Department of Defense.

(e) Development of Plan and Enforcement and Approval Mechanisms.—The Secretary of the military department or head of the Defense Agency responsible for activities in the inventory shall develop a plan, including an enforcement mechanism and approval process, to—

(1) provide for the use of the inventory by the military department or Defense Agency to implement the requirements of section 129a of this title;

(2) ensure the inventory is used to inform strategic workforce planning;

(3) facilitate use of the inventory for compliance with section 235 of this title; and

(4) provide for appropriate consideration of the conversion of activities identified under subsection (e)(3) within a reasonable period of time.

(f) Comptroller General Report.—Not later than March 31, 2018, the Comptroller General of the United States shall submit to the congressional defense committees a report on the status of the data collection required in subsection (a) and an assessment of the efforts by the Department of Defense to implement subsection (e).

~~(g) Rule of Construction.—Nothing in this section shall be construed to authorize the performance of personal services by a contractor except where expressly authorized by a provision of law other than this section.~~

(h) Definitions.—In this section:

(1) Performance-based.—The term "performance-based", with respect to a contract, task order, or arrangement, means that the contract, task order, or arrangement,

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respectively, includes the use of performance work statements that set forth contract requirements in clear, specific, and objective terms with measurable outcomes.

(2) Function closely associated with inherently governmental functions.—The term "function closely associated with inherently governmental functions" has the meaning given that term in section 2383(b)(3) of this title.

(3) Inherently governmental functions.—The term "inherently governmental functions" has the meaning given that term in section 2383(b)(2) of this title.

~~(4) Personal services contract.—The term "personal services contract" means a contract under which, as a result of its terms or conditions or the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of one or more Government officers or employees, except that the giving of an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that makes a contract a personal services contract.~~

(5) Service acquisition portfolio groups.—The term "service acquisition portfolio groups" means the groups identified in Department of Defense Instruction 5000.74, Defense Acquisition of Services (January 5, 2016) or successor guidance.

(6) Staff augmentation contracts.—The term "staff augmentation contracts" means services contracts for personnel who are physically present in a Government work space on a full-time or permanent part-time basis, for the purpose of advising on, providing support to, or assisting a Government agency in the performance of the agency's missions, ~~including authorized personal services contracts (as that term is defined in section 2330a(g)(5) of this title).~~

(7) Simplified acquisition threshold.—The term "simplified acquisition threshold" has the meaning given the term in section 134 of title 41.

(8) Small business act definitions.—

(A) The term "small business concern" has the meaning given such term under section 3 of the Small Business Act (15 U.S.C. 632).

(B) The terms "small business concern owned and controlled by socially and economically disadvantaged individuals" and "small business concern owned and controlled by women" have the meanings given such terms, respectively, in section 8(d)(3) of the Small Business Act (15 U.S.C. 637(d)(3)).

§2409. Contractor employees: protection from reprisal for disclosure of certain information

(a) PROHIBITION OF REPRISALS.—(1) An employee of a contractor, subcontractor, grantee, or subgrantee ~~or personal services contractor~~ **or an individual who is a services contractor** may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of the following:

§9446. Miscellaneous personnel authorities

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(a) **USE OF RETIRED AIR FORCE PERSONNEL.**—(1) Upon the request of a person retired from service in the Air Force, the Secretary of the Air Force may enter into a ~~personal~~ services contract with that person providing for the person to serve as an administrator or liaison officer for the Civil Air Patrol. The qualifications of a person to provide the services shall be determined and approved in accordance with regulations prescribed under section 9448 of this title.

(2) To the extent provided in a contract under paragraph (1), a person providing services under the contract may accept services on behalf of the Air Force.

(3) A person, while providing services under a contract authorized under paragraph (1), may not be considered to be on active duty or inactive-duty training for any purpose.

(b) **USE OF CIVIL AIR PATROL CHAPLAINS.**—The Secretary of the Air Force may use the services of Civil Air Patrol chaplains in support of the Air Force active duty and reserve component forces to the extent and under conditions that the Secretary determines appropriate.

§9448. Regulations

(a) **AUTHORITY.**—The Secretary of the Air Force shall prescribe regulations for the administration of this chapter.

(b) **REQUIRED REGULATIONS.**—The regulations shall include the following:

(1) Regulations governing the conduct of the activities of the Civil Air Patrol when it is performing its duties as a volunteer civilian auxiliary of the Air Force under section 9442 of this title.

(2) Regulations for providing support by the Air Force and for arranging assistance by other agencies under section 9444 of this title.

(3) Regulations governing the qualifications of retired Air Force personnel to serve as an administrator or liaison officer for the Civil Air Patrol under a ~~personal~~ services contract entered into under section 9446(a) of this title.

Title 41, United States Code

§ 3907. *Contracts for services*

(a) **GENERAL RULE.**—*A contract for services of experts or consultants, including stenographic services, and any other contract for services that is of a type that on the day before the date of the enactment of this section was considered to be a ‘personal services contract’—*

(1) may be entered into on the same basis as any other contract for services; and

(2) is not subject to any requirement for specific authorization in an appropriation or other statute.

(b) **REFERENCES IN OTHER LAWS.**—*Any provision of law in effect on the date of the enactment of this section that refers to authority to procure services, or to enter into a contract, under section 3109 of title 5 is superseded by this section.*

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§4304. Specific costs not allowable

(a) SPECIFIC COSTS.—The following costs are not allowable under a covered contract:

(1) ***

(15) Costs incurred by a contractor or subcontractor, ~~or personal services contractor~~ in connection with any criminal, civil, or administrative proceeding commenced by the Federal Government or a State, to the extent provided in section 4310 of this title.

§4310. Proceeding costs not allowable

(a) Definitions.—In this section:

(1) Costs.—The term "costs", with respect to a proceeding, means all costs incurred by a contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor**, whether before or after the commencement of the proceeding, including-

(A) administrative and clerical expenses;

(B) the cost of legal services, including legal services performed by an employee of the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor**;

(C) the cost of the services of accountants and consultants retained by the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor**; and

(D) the pay of directors, officers, and employees of the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** for time devoted by those directors, officers, and employees to the proceeding.

(2) Penalty.—The term "penalty" does not include restitution, reimbursement, or compensatory damages.

(3) Proceeding.—The term "proceeding" includes an investigation.

(b) In General.—Except as otherwise provided in this section, costs incurred by a contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government, by a State, or by a contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** or grantee employee submitting a complaint under section 4712 of this title are not allowable as reimbursable costs under a covered contract, ~~subcontract, or personal services contract~~ **or subcontract** if the proceeding—

(1) relates to a violation of, or failure to comply with, a Federal or State statute or regulation or to any other activity described in section 4712(a)(1) of this title; and

(2) results in a disposition described in subsection (c).

(c) Covered Dispositions.—A disposition referred to in subsection (b)(2) is any of the following:

(1) In a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in subsection (b).

(2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor, ~~subcontractor, or personal services~~

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~~contractor~~ **or subcontractor** liability on the basis of the violation or failure referred to in subsection (b).

(3) In any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 4712 of this title by reason of the violation or failure referred to in subsection (b).

(4) A final decision to do any of the following, by reason of the violation or failure referred to in subsection (b):

(A) Debar or suspend the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor**.

(B) Rescind or void the contract, ~~subcontract, or personal services contract~~ **or subcontract**.

(C) Terminate the contract, ~~subcontract, or personal services contract~~ **or subcontract** for default.

(5) A disposition of the proceeding by consent or compromise if the disposition could have resulted in a disposition described in paragraph (1), (2), (3), or (4).

(d) Costs Allowed by Settlement Agreement in Proceeding Commenced by Federal Government.—In the case of a proceeding referred to in subsection (b) that is commenced by the Federal Government and is resolved by consent or compromise pursuant to an agreement entered into by a contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** and the Federal Government, the costs incurred by the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** in connection with the proceeding that are otherwise not allowable as reimbursable costs under subsection (b) may be allowed to the extent specifically provided in that agreement.

(e) Costs Specifically Authorized by Executive Agency in Proceeding Commenced by State.—In the case of a proceeding referred to in subsection (b) that is commenced by a State, the executive agency that awarded the covered contract, ~~subcontract, or personal services contract~~ **or subcontract** involved in the proceeding may allow the costs incurred by the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** in connection with the proceeding as reimbursable costs if the executive agency determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of—

(1) a specific term or condition of the contract, ~~subcontract, or personal services contract~~ **or subcontract**; or

(2) specific written instructions of the executive agency.

(f) Other Allowable Costs.—

(1) In general.—Except as provided in paragraph (3), costs incurred by a contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government or a State in connection with a covered contract, ~~subcontract, or personal services contract~~ **or subcontract** may be allowed as reimbursable costs under the contract, ~~subcontract, or personal services contract~~ **or subcontract** if the costs are not disallowable under subsection (b), but only to the extent provided in paragraph (2).

(2) Amount of allowable costs.—

(A) Maximum amount allowed.—The amount of the costs allowable under paragraph (1) in any case may not exceed the amount equal to 80 percent of the

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amount of the costs incurred, to the extent that the costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(B) Content of regulations.—Regulations issued for the purpose of subparagraph (A) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the Federal Government as a party, and other factors as may be appropriate.

(3) When otherwise allowable costs are not allowable.—In the case of a proceeding referred to in paragraph (1), ~~contractor, subcontractor, or personal services contractor~~ **or subcontractor** costs otherwise allowable as reimbursable costs under this subsection are not allowable if—

(A) the proceeding involves the same ~~contractor, subcontractor, or personal services contractor~~ **or subcontractor** misconduct alleged as the basis of another criminal, civil, or administrative proceeding; and

(B) the costs of the other proceeding are not allowable under subsection (b).

§4712. Enhancement of contractor protection from reprisal for disclosure of certain information

(a) PROHIBITION OF REPRISALS.—

(1) IN GENERAL.—An employee of a contractor, subcontractor, grantee, or subgrantee ~~or personal services contractor~~ **or an individual who is a services contractor** may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

Other Provisions of Law

National Defense Authorization Act for Fiscal Year 1995 (Pub. L. 103–337; **10 U.S.C. 1091 note**)

SEC. 704. ***

(a) ***

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~~(c) PERSONAL SERVICE CONTRACTS TO PROVIDE CARE.—(1) The Secretary of Defense may enter into personal service contracts under the authority of section 1091 of title 10, United States Code, with persons described in paragraph (2) to provide the services of clinical counselors, family advocacy program staff, and victim's services representatives to members of the Armed Forces and covered beneficiaries who require such services. Notwithstanding subsection (a) of such section, such services may be provided in medical treatment facilities of the Department of Defense or elsewhere as determined appropriate by the Secretary.~~

~~(2) The persons with whom the Secretary may enter into a personal services contract under this subsection shall include clinical social workers, psychologists, marriage and family therapists certified as such by a certification recognized by the Secretary of Defense, psychiatrists, and other comparable professionals who have advanced degrees in counseling or related academic disciplines and who meet all requirements for State licensure and board certification requirements, if any, within their fields of specialization.~~

National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136; 10 U.S.C. 2358 note)

SEC. 1601. RESEARCH AND DEVELOPMENT OF DEFENSE BIOMEDICAL COUNTERMEASURES.

(a) IN GENERAL.—The Secretary of Defense (in this section referred to as the “Secretary”) shall carry out a program to accelerate the research, development and procurement of biomedical countermeasures, including but not limited to therapeutics and vaccines, for the protection of the Armed Forces from attack by one or more biological, chemical, radiological, or nuclear agents.

(b) INTERAGENCY COOPERATION.—***

(c) EXPEDITED PROCUREMENT AUTHORITY.—(1) For any procurement of property or services for use (as determined by the Secretary) in performing, administering, or supporting biomedical countermeasures research and development, the Secretary may, when appropriate, use streamlined acquisition procedures and other expedited procurement procedures authorized in—

(A) section 1903 of title 41, United States Code; and

(B) sections 2371 and 2371b of title 10, United States Code.

(2) Notwithstanding paragraph (1) and the provisions of law referred to in such paragraph, each of the following provisions shall apply to the procurements described in this subsection to the same extent that such provisions would apply to such procurements in the absence of paragraph (1):

(A) Chapter 37 of title 40, United States Code (relating to contract work hours and safety standards).

(B) Section 8703(a) of title 41, United States Code.

(C) Section 2313 of title 10, United States Code (relating to the examination of contractor records).

(3) The Secretary shall institute appropriate internal controls for use of the authority under paragraph (1), including requirements for documenting the justification for each use of such authority.

(d) DEPARTMENT OF DEFENSE FACILITIES AUTHORITY.—***

~~(e) AUTHORITY FOR PERSONAL SERVICES CONTRACTS.—(1) Subject to paragraph (2), the authority provided by section 1091 of title 10, United States Code, for personal services contracts to carry out health care responsibilities in medical treatment facilities of the Department of Defense shall~~

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~~also be available, subject to the same terms and conditions, for personal services contracts to carry out research and development activities under this section. The number of individuals whose personal services are obtained under this subsection may not exceed 30 at any time.~~

~~(2) The authority provided by such section 1091 may not be used for a personal services contract unless the contracting officer for the contract ensures that —~~

~~(A) the services to be procured are urgent or unique; and~~

~~(B) it would not be practicable for the Department of Defense to obtain such services by other measures.~~

(f) STREAMLINED PERSONNEL AUTHORITY.—(1) The Secretary may appoint highly qualified experts, including scientific and technical personnel, to carry out research and development under this section in accordance with the authorities provided in section 342 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103–337; 108 Stat. 2721), [former] section 1101 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Public Law 105–261 [5 U.S.C. 3104 note]), and section 1101 of this Act [enacting chapter 99 of Title 5, Government Organization and Employees, and provisions set out as a note under section 9901 of Title 5].

(2) The Secretary may use the authority under paragraph (1) only upon a determination by the Secretary that use of such authority is necessary to accelerate the research and development under the program.

(3) The Secretary shall institute appropriate internal controls for each use of the authority under paragraph (1).

Section 401 of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2014 (division G of Public Law 113–76; 5 U.S.C. 3109 note)

~~SEC. 401. In fiscal year 2014 and thereafter, the expenditure of any appropriation under this Act [div. G of Pub. L. 113–76] or any subsequent Act appropriating funds for departments and agencies funded in this Act, for any consulting service through procurement contract, pursuant to 5 U.S.C. 3109, shall be limited to those contracts where such expenditures are a matter of public record and available for public inspection, except where otherwise provided under existing law, or under existing Executive order issued pursuant to existing law.~~

Section 501 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1993 (Public Law 102-394; 5 U.S.C. 3109 note)

~~SEC. 501. The expenditure of any appropriation under this Act or subsequent Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts for any consulting service through procurement contract, pursuant to 5 U.S.C. 3109, shall be limited to those contracts where such expenditures are a matter of public record and available for public inspection, except where otherwise provided under existing law, or under existing Executive order issued pursuant to existing law.~~

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Section 504 of the Energy and Water Development Appropriations Act, 1993 (Public Law 102-377; **5 U.S.C. 3109 note**)

~~SEC. 504. The expenditure of any appropriation under this Act or subsequent Energy and Water Development Appropriations Acts for any consulting service through procurement contract, pursuant to [section 3109 of title 5, United States Code](#), hereafter shall be limited to those contracts where such expenditures are a matter of public record and available for public inspection, except where otherwise provided under existing law, or under existing Executive Order issued pursuant to existing law.~~

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Section 6

Additional Streamlining Recommendations

Eliminating passthrough taxes and updating assignment of claims regulations to reflect modern technology will help streamline acquisition.

RECOMMENDATIONS

Rec. 32: Exempt DoD from paying the Federal Retail Excise Tax.

Rec. 33: Update the Assignment of Claims processes under FAR Part 32.805.

INTRODUCTION

The Federal Retail Excise Tax (FRET) distorts DoD vehicle-buying decisions, increases administrative costs, and conflicts with current contract-pricing policy and governmentwide regulations limiting passthrough charges. DoD should be exempt from paying FRET. FAR Part 32.805, Procedures, specifies outdated procedures for the assignment of claims to contract payment that require a physical impress of the corporate seal of the assignor as well as original documentation related to corporate authority to execute assignment. The FAR should be updated to reflect the use of modern technology.

RECOMMENDATIONS

Recommendation 32: Exempt DoD from paying the Federal Retail Excise Tax.

Problem

The Federal Retail Excise Tax (FRET) distorts DoD vehicle-buying decisions, increases administrative costs, and conflicts with current contract-pricing policy and governmentwide regulations limiting pass-through charges.

Background

Section 4051 of the Internal Revenue Code of 1986 imposes a 12 percent tax, referred to as the Federal Retail Excise Tax (FRET), on the sale of certain medium and heavy trucks, trailers, semitrailers, and parts or accessories attached to such vehicles at time of sale.¹ FRET is imposed on the sale or refurbishment (improvements to a vehicle that total more than 75 percent of the cost of a new vehicle) of truck body types and chassis (hereafter covered vehicle) with a gross vehicle weight or maximum total weight of more than 33,000 pounds that transit the U.S. highway system.²

Vehicle buyers pay FRET as part of the purchase price, which transfers the tax burden to the vehicle Original Equipment Manufacturer (OEM) to pay to the IRS. The tax, which originated in 1917, has increased over time. At its current 12 percent, FRET is the highest percentage of all Federal *ad valorem* taxes (a tax charged as a percentage of the value).³ FRET was first implemented to offset costs of World War I and is currently used to help fund the Highway Trust Fund (HTF)—a fund managed by the Department of Transportation to support surface transportation and mass transit construction and maintenance projects.⁴

HTF, which provides funding to maintain federal highways, generates income on a user-pay basis through two primary sources—fuel taxes and truck-related taxes.⁵ In user-pay systems, costs to pay for

¹ Imposition of tax on heavy trucks and trailers sold at retail, 26 U.S.C. § 4501.

² Internal Revenue Service, Publication 510 (01/2016), Excise Taxes, June 2016, accessed February 8, 2018, <https://www.irs.gov/publications/p510#idm140588875529376>.

³ Heavy Truck, Tractor, and Trailer Retail Federal Excise Tax Repeal Act of 2017, H.R. 2946 – 115th Congress (2017-2018), accessed June 2, 2018, <https://www.congress.gov/bill/115th-congress/house-bill/2946>.

⁴ Edward G. Keating, Chad Pino, and Sara H. Bana, *Understanding and Assessing the Costs of the Federal Retail Excise Tax on the Department of Defense* (Washington, DC: RAND Corporation, 2016), accessed June 2, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1635/RAND_RR1635.pdf.

⁵ John Lewis, “Understanding the Highway Trust Fund,” United States House of Representatives, accessed November 28, 2016, <https://johnlewis.house.gov/legislative-work/issues/transportation/understanding-highway-trust-fund>.

and maintain a resource are allocated to those that use the resource. Gasoline and diesel taxes make up 90 percent of the total revenue for the fund.⁶ FRET constitutes slightly less than 5 percent of the total amount of HTF.⁷

Procedurally, the vehicle OEM—the taxpayer of record at the time a covered vehicle is sold to a third party—is required to pay the tax to the Internal Revenue Service (IRS). When DoD contracts to buy covered vehicles, DoD policy requires that all contracts with vehicle OEMs contain a contract line item in the amount of FRET to reimburse the OEM for the subsequent tax payment by the OEM to the IRS.⁸ DoD is paying the required tax; however, it is doing so by passing the payment burden through to the OEM.

Covered vehicles sold for use outside the United States are not subject to the tax unless they are repatriated.⁹ The policy articulated in IRS Publication 510 also excludes sales to state or local governments, sales to the United Nations for official use, as well as a few other categories, clearly carving out certain categories of vehicle sales covered by FRET.¹⁰

Previous attempts to amend the FRET collection process through legislation have not gained traction as a priority for any of the executive agencies affected by FRET for various governance and policy-making reasons not directly related to DoD. DoD has long had concerns regarding its role in FRET collection and the associated pass-through process which, in other regulatory contexts where the government pays a contractor for charges or fees for which the contractor has no performance obligations, are limited or prohibited.¹¹ As part of the DoD effort to examine FRET’s effects on acquisition and budget priorities, Congress directed DoD to study the FRET process in 2013 with a mandate to do the following:

(1) Assess the benefits and drawbacks of the current process of using contractors as pass-through taxpayers; and

(2) Identify alternatives to the current process to improve efficiency, such as waiving the tax on vehicles acquired by the Department of Defense, or using interagency transfer authorities to aggregate tax payment.¹²

⁶ Tax Policy Center, Key Elements of the U.S. Tax System, “What are the major federal excise taxes, and how much money do they raise?,” accessed February 7, 2018, <http://www.taxpolicycenter.org/briefing-book/what-are-major-federal-excise-taxes-and-how-much-money-do-they-raise>.

⁷ Ibid.

⁸ Edward G. Keating, Chad Pino, and Sara H. Bana, *Understanding and Assessing the Costs of the Federal Retail Excise Tax on the Department of Defense* (Washington, DC: RAND Corporation, 2016), accessed June 2, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1635/RAND_RR1635.pdf.

⁹ Internal Revenue Service, Publication 510 (01/2016), Excise Taxes, June 2016, accessed February 8, 2018, <https://www.irs.gov/publications/p510#idm140588875529376>.

¹⁰ Ibid.

¹¹ See Limitation on Pass-through Charges, FAR 52.215-23.

¹² 2013 NDAA, Report of the Committee on Armed Services House of Representatives on H.R. 4310, 189, accessed June 2, 2018, <https://www.congress.gov/112/crpt/hrpt479/CRPT-112hrpt479.pdf>.

The RAND Corporation, along with the Office of the Undersecretary for Acquisition, Technology, and Logistics, Manufacturing and Industrial Base Policy provided the required assessment in 2016.¹³ The Section 809 Panel used the RAND study to inform its findings and recommendations, along with a Naval Postgraduate School thesis on FRET authored by Harry Hallock, former Army senior acquisition executive, titled, *A DoD Conundrum: The Handling of Federal Retail Excise Tax on the Army's Medium and Heavy Truck Fleet*.¹⁴

Discussion

The Section 809 Panel focused its attention on the increased costs to DoD and vehicle OEM's that result from managing FRET policy, including the contracting and administrative burden required to facilitate the contract pass-through costs and the potential for FRET effects to distort DoD vehicle decisions.

The FRET process creates a loop in which annual appropriations provided by Congress are used by DoD to contractually obligate funds to pay OEMs for the FRET charge. The OEMs then return that money to the U.S. Department of Treasury via revenue taxes, and the Treasury Department reallocates those FRET funds to HTF. OEMs account for their increased internal compliance costs through their indirect rate structures, and they make their FRET payments through their tax disbursements to the IRS.

For contractual purposes, FRET creates added process steps and increases costs for DoD and OEMs that supply vehicles covered by FRET. Each contract for a covered vehicle not otherwise exempt from the tax must contain a line item for FRET to reimburse the OEM to facilitate the payment of the tax back to the Treasury. Generally, such amounts are processed by OEMs through their indirect cost pools and require investment in systems and personnel to perform contract reporting and compliance tasks to manage and administer FRET payments each year. Those contract costs or fees are passed through to the government by vehicle OEMs in the form of increased overhead or indirect rates.¹⁵

In other transactional circumstances involving federal contracting, such facilitation payments would be considered pass-through charges and are narrowly regulated to avoid paying a contractor fees for which there is no corresponding performance obligation. Where applicable, FAR 52.215-23, Limitations on Pass-Through Charges, currently limits pass-through charges (fees and costs) to minimize paying contractors for administrative efforts not associated with a performance obligation, usually in cases for which the contractor adds no or negligible value to a subcontractor's performance. FRET is not a non-value-added pass-through charge as envisioned by the FAR clause, which is concerned more with limiting prime contractor profit on subcontractor efforts. Instead, it is a percentage-based fee, tied to the value of a covered vehicle, to facilitate a tax payment. In the case of FRET, OEMs are not prohibited

¹³ Edward G. Keating, Chad Pino, and Sara H. Bana, *Understanding and Assessing the Costs of the Federal Retail Excise Tax on the Department of Defense* (Washington, DC: RAND Corporation, 2016), accessed June 2, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1635/RAND_RR1635.pdf.

¹⁴ Harry Hallock, *A DoD Conundrum: The Handling of Federal Retail Excise Tax on the Army's Medium and Heavy Truck Fleet* (Monterey, CA: Naval Postgraduate School, June 2001), accessed November 18, 2017, <http://www.dtic.mil/dtic/tr/fulltext/u2/a396521.pdf>.

¹⁵ Edward G. Keating, Chad Pino, and Sara H. Bana, *Understanding and Assessing the Costs of the Federal Retail Excise Tax on the Department of Defense* (Washington, DC: RAND Corporation, 2016), accessed June 2, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1635/RAND_RR1635.pdf.

from including the cost of administering FRET in their indirect accounts, and thus FRET is an added cost paid by DoD to the OEM to do nothing other than facilitate tax payments to HTF.

As Hallock lays out, the transfer of the tax from one federal government account to another is largely a zero-sum game for the taxpayer, but has the unintended consequence of increasing the cost of covered vehicles for DoD and working capital costs for the OEM.¹⁶ The OEM must pay FRET before being reimbursed for it. The delay between outlay to the Treasury and reimbursement for FRET from DoD requires the OEM to cover the value of FRET in a manner similar to an interest free loan, further increasing costs to DoD.¹⁷ These increased capital requirements for the vehicle OEM, which RAND estimates to be about \$595,000 per \$100 million in annual FRET payments, increase indirect costs associated with administrative and compliance tasks with no additional value, and they are ultimately passed on to DoD.¹⁸

Identifying those vehicles that are subject to FRET can also be difficult, due in part to the location reporting requirements and the additional challenge of excluding weight that does not contribute to the highway function of the vehicle.¹⁹ This provision means any additional feature that does not contribute to the highway function, such as a high-pressure water pump or weapon, would be removed from the taxable weight and value. RAND points out, however, that the “determination of which equipment on a vehicle should not be subject to the FRET is an area of uncertainty and contention.”²⁰

Additionally, the exemption for vehicles to be used outside of the continental United States (OCONUS), requires that each service must notify the OEM prior to delivery if the vehicle is to be used OCONUS. This additional step increases the requirements to administratively track where each vehicle will be used.²¹

Most of the vehicles with DoD as the end-user are also primarily driven on military installations, rather than interstate highways. Hallock estimated that a typical Army covered vehicle spends only 35 percent of its lifespan on federal highways, equating to only 25,000 miles over a vehicle’s 20-year lifespan, dramatically less than the approximately 300,000 for commercial operators.²² A DoD usage rate of 35 percent that reflects less than 10 percent of the rate at which commercial vehicle operators use the public roads over 20 years is inconsistent with a user-pay system.

Beyond increased agency and contract costs and limited highway use unaddressed in the FRET rules, FRET drives DoD decision-making in other ways. DoD acquisition personnel are potentially incentivized to avoid FRET to preserve precious appropriated mission funds from being squandered as

¹⁶ Harry Hallock, *A DoD Conundrum: The Handling of Federal Retail Excise Tax on the Army’s Medium and Heavy Truck Fleet* (Monterey, CA: Naval Postgraduate School, June 2001), accessed November 18, 2017, <http://www.dtic.mil/dtic/tr/fulltext/u2/a396521.pdf>.

¹⁷ Edward G. Keating, Chad Pino, and Sara H. Bana, *Understanding and Assessing the Costs of the Federal Retail Excise Tax on the Department of Defense* (Washington, DC: RAND Corporation, 2016), accessed June 2, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1635/RAND_RR1635.pdf.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Harry Hallock, *A DoD Conundrum: The Handling of Federal Retail Excise Tax on the Army’s Medium and Heavy Truck Fleet* (Monterey, CA: Naval Postgraduate School, June 2001), accessed November 18, 2017, <http://www.dtic.mil/dtic/tr/fulltext/u2/a396521.pdf>.

pass-through fees. The decision process could potentially lead to delays in acquiring new FRET-eligible vehicles at certain points of the fiscal year because of the need to conserve funds for other emerging, urgent, mission-related purposes.²³ The prospect of paying FRET could also drive program managers to spread out purchases over time or opt for a smaller fleet to conserve resources in any given fiscal year.²⁴

Alternatively, affected programs may choose a FRET-free vehicle at a lighter weight rather than acquiring a more appropriate, but heavier, vehicle for the mission. FRET might also drive decision-makers towards repairing a damaged vehicle rather than buying a new one, as long as the repair costs are less than 75 percent of a newer, FRET covered vehicle.²⁵ Acquiring the wrong set of mission vehicles due to FRET concerns could ultimately lead to having to buy more vehicles to offset a fleet of misconfigured vehicle weights not suited to the mission.

Making assumptions based on cost breakouts from FY 2015 to FY 2017, DoD estimates that through FY 2026 DoD will pay \$197 million in FRET on Medium Tactical Vehicles and Heavy Tactical Vehicles.²⁶ Although DoD has never accounted for more than 1 percent of the overall HTF contributions, RAND estimates there are some years, especially during market fluctuations when industry is unable or unwilling to upgrade trucks, when DoD purchases from OEMs make up a greater proportion of the applicable truck sales and refurbishments than in other years.²⁷ For example, RAND estimated that in 2008, at the height of the Global Financial Crisis, DoD provided about 25 percent of the truck-related funds for the total HTF through this pass-through process.²⁸

Such a high percentage is disproportionate to the use of public highways by DoD vehicles, and contrary to a user-pay approach of HTF funding. The greatest burden falls on the Army as the primary purchaser of covered vehicles.²⁹ The Marine Corps is the second largest purchaser of covered vehicles.³⁰

There are a few alternatives to payment of FRET that may address some of these challenges. For example a direct payment of applicable taxes for each vehicle from DoD to the HTF or a lump sum payment that would provide a portion of the budget.³¹ With respect to other highway tax exemptions, the federal government is exempt from the federal highway vehicle-use tax imposed by section 4481 of the Internal Revenue Code of 1986 and applied to vehicles weighing more than 55,000 pounds.³² DoD is

²³ USD(AT&L) Manufacturing and Industrial Base Policy, email to Section 809 Panel, June 16, 2017.

²⁴ Edward G. Keating, Chad Pino, and Sara H. Bana, *Understanding and Assessing the Costs of the Federal Retail Excise Tax on the Department of Defense* (Washington, DC: RAND Corporation, 2016), accessed June 2, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1635/RAND_RR1635.pdf.

²⁵ Ibid.

²⁶ USD(AT&L) Manufacturing and Industrial Base Policy, email to Section 809 Panel, June 16, 2017.

²⁷ Edward G. Keating, Chad Pino, and Sara H. Bana, *Understanding and Assessing the Costs of the Federal Retail Excise Tax on the Department of Defense* (Washington, DC: RAND Corporation, 2016), accessed June 2, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1635/RAND_RR1635.pdf.

²⁸ Ibid.

²⁹ Ibid.

³⁰ USD(AT&L) Manufacturing and Industrial Base Policy, email to Section 809 Panel, June 16, 2017.

³¹ Edward G. Keating, Chad Pino, and Sara H. Bana, *Understanding and Assessing the Costs of the Federal Retail Excise Tax on the Department of Defense* (Washington, DC: RAND Corporation, 2016), accessed June 2, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1635/RAND_RR1635.pdf.

³² Federal, State, Local and Foreign Taxes, DoD Financial Management Regulation, Volume 10, Chapter 6 (2009), accessed June 19, 2018, https://comptroller.defense.gov/Portals/45/documents/fmr/archive/10arch/10_06_Sep09.pdf.

also exempt from the excise tax on tires³³ and certain classes of fuel use, including off-highway use of gasoline and road diesel fuels.³⁴ In line with these kinds of exemptions Congress should exempt DoD from payment of FRET.

Conclusions

The Secretary of the Treasury has authority to authorize FRET exemption under Section 4293 of the Internal Revenue Code of 1986, but has yet to do so. Section 4051 is the FRET.

§4293. Exemption for United States and possessions

*The Secretary of the Treasury may authorize exemption from the taxes imposed by section 4041, section 4051, chapter 32 (other than the taxes imposed by sections 4064 and 4121) and subchapter B of chapter 33, as to any particular article, or service or class of articles or services, to be purchased for the exclusive use of the United States, if he determines that the imposition of such taxes with respect to such articles or services, or class of articles or services will cause substantial burden or expense which can be avoided by granting tax exemption and that full benefit of such exemption, if granted, will accrue to the United States.*³⁵

FRET is a non-value-added contract pass-through and cost burden to DoD and vehicle OEMs. It artificially limits decision-makers' consideration of appropriate mission-related vehicle types; it distorts the marketplace for covered vehicles; and it results in an unnecessary work-around to accomplish non-DoD tax-related policy. Congress should enact an exemption from FRET for DoD.

Implementation

Legislative Branch

- Amend Section 4051(a) of the Internal Revenue Code of 1986, adding a paragraph indicating that the tax imposed by paragraph (1) will not apply to items purchased for the exclusive use of the Department of Defense, or if Congress is interested in furthering the reach of the amendment, the United States, effective on the date of enactment.

Executive Branch

- There are no Executive Branch changes required for this recommendation.

Note: Explanatory report language and draft legislative text can be found in the Implementation Details subsection at the end of Section 6.

³³ Internal Revenue Service, Publication 510 (01/2016), Excise Taxes, June 2016, accessed February 8, 2018, <https://www.irs.gov/publications/p510#idm140588875529376>.

³⁴ Federal, State, Local and Foreign Taxes, DoD Financial Management Regulation, Volume 10, Chapter 6 (2009), accessed June 19, 2018, https://comptroller.defense.gov/Portals/45/documents/fmr/archive/10arch/10_06_Sep09.pdf.

³⁵ Exemption for United States and Possessions, 26 U.S.C. § 4293.

Implications for Other Agencies

- IRS will need to adjust required instructions and forms.
- HTF will need to address the loss of revenue.

Recommendation 33: Update the Assignment of Claims processes under FAR Part 32.805.

Problem

FAR Part 32.805, Procedures, specifies outdated procedures for the assignment of claims to contract payments that require a physical impress of the corporate seal of the assignor as well as original documentation related to corporate authority to execute an assignment

Background

The Assignment of Claims Act (31 U.S.C. § 3727, 41 U.S.C. § 6305) was passed in 1940 and provides for an important function in government contract financing. One of the benefits of the assignment of claims policy is to authorize third-party financial institutions to collect on payments made to contractors for performance of a federal contract. Such contractual arrangements between a contractor/assignor and a financing institution are mostly used to facilitate contractors liquidity and fund their operations by allowing the contractor to borrow against future payments.

Assignments are an economically beneficial policy that encourages the growth and continuation of new and existing businesses, and especially useful to encourage small businesses to engage more in federal contracting. FAR Part 32.805 details the processes for the assignment of claims. In some cases the government prohibits the assignment of claims, based on a determination that it is not in the government's interest, but in most cases assignments are accepted as a means of financing. Assignments of claims against contracts have been an accepted practice for many years and are permissible under the FAR as well as the common law going back centuries.

Discussion

The guidance for the assignment of claims process has not been substantively updated since it was initially implemented in 1983.³⁶ Very little has changed in FAR Part 32.805 beyond a few minor updates, such as including registration in the System for Award Management.

Since that time, technology has created new, widely accepted business processes. The regulation requires four hardcopies of the assignment document to be submitted:

*Filing. The assignee shall forward to each party specified in 32.802(e) an original and three copies of the notice of assignment, together with one true copy of the instrument of assignment. The true copy shall be a certified duplicate or photostat copy of the original assignment.*³⁷

³⁶ Comparison to Federal Register, Sept. 19, 1983, accessed April 10, 2018, <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR&browsePath=1983%2F09&isCollapsed=false&leafLevelBrowse=false&yrcord=400>.

³⁷ Assignment of Claims, FAR Part 32.805.

However, in general, today these documents are electronic, and are converted to hard copies solely for the purpose of submitting to the agency in accordance with the FAR.³⁸ To avoid a slow, cumbersome process, some lenders choose to forego the assignments paperwork at the closure of a loan, choosing instead to include a provision in loan documents “which grants the lender the right to require them at any time after the occurrence of an event of default.”³⁹

Conclusions

Technology has improved substantially over time, and business processes have accommodated electronic submission of forms. The need to require original authorization documents and impress of a corporate seal are artifacts of a time when electronic means of conducting business were not available and preserving paper documents was the norm. Allowing for contractors and offerors to submit these forms in an electronic format will facilitate more timely submission and has become an accepted legal practice.

Although 41 U.S.C. § 6305 states that written notice must be filed if an assignment is made, a shift from hardcopy submission to electronic transmission is simply ministerial in scope and does not alter the statutory requirement for a written assignment or require a change to either of the underlying statutes.

Implementation

Legislative Branch

- There are no statutory changes required for this recommendation.

Executive Branch

- Update the assignment of claims procedures in the FAR to reflect modern business practices.

Note: Regulatory revisions can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- This change to the FAR would affect the entire government.

³⁸ Personal Services Council, Submission to the 809 Panel, February 2018.

³⁹ Shulman Rogers, Assignment of Claims Act Documentation, *The Financing Advisor Newsletter*, accessed April 10, 2018, <http://www.shulmanrogers.com/newsletter-56.html>.

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Section 6
Additional Streamlining Recommendations
Implementation Details

Recommendation 32

RECOMMENDED REPORT LANGUAGE

Sec. XXX. Exemption for Department of Defense from Federal Retail Excise Tax.

This section would amend section 4051(a) of the Internal Revenue Code of 1986 to exempt the Department of Defense from application of the Federal Retail Excise Tax (FRET) if the purchased vehicle is for the exclusive use of the Department.

The committee is aware that the greatest burden for collecting FRET is on the Army as the primary purchaser of covered vehicles. The Marine Corps is the second largest user of covered vehicles. This section would address the Department's role in the collection of the FRET and the associated pass through costs.

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DRAFT — FRET EXCLUSION

[NOTE: The draft legislative text below is followed by a “Sections Affected” display, showing the text of the provision of law affected by the draft legislative text.]

1 **SEC. ____.** EXEMPTION FOR [DEPARTMENT OF DEFENSE]/[FEDERAL
2 **GOVERNMENT] FROM FEDERAL RETAIL EXCISE TAX.**

3 (a) IN GENERAL.—Section 4051(a) of the Internal Revenue Code of 1986 is amended by
4 adding at the end the following new paragraph:

5 “(6) The tax imposed by paragraph (1) shall not apply to any article to be
6 purchased for the exclusive use of the [Department of Defense]/[United States].”.

7 (b) EFFECTIVE DATE.—Paragraph (6) of section 4051(a) of the Internal Revenue Code of
8 1986, as added by subsection (a), shall apply to any retail sale after the date of the enactment of
9 this Act.

§4051. Imposition of tax on heavy trucks and trailers sold at retail

(a) IMPOSITION OF TAX.—

(1) IN GENERAL.—There is hereby imposed on the first retail sale of the following articles (including in each case parts or accessories sold on or in connection therewith or with the sale thereof) a tax of 12 percent of the amount for which the article is so sold:

- (A) Automobile truck chassis.
- (B) Automobile truck bodies.
- (C) Truck trailer and semitrailer chassis.
- (D) Truck trailer and semitrailer bodies.
- (E) Tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer.

(2) EXCLUSION FOR TRUCKS WEIGHING 33,000 POUNDS OR LESS.—The tax imposed by paragraph (1) shall not apply to automobile truck chassis and automobile truck bodies, suitable for use with a vehicle which has a gross vehicle weight of 33,000 pounds or less (as determined under regulations prescribed by the Secretary).

(3) EXCLUSION FOR TRAILERS WEIGHING 26,000 POUNDS OR LESS.—The tax imposed by paragraph (1) shall not apply to truck trailer and semitrailer chassis and bodies, suitable for use with a trailer or semitrailer which has a gross vehicle weight of

DRAFT — FRET EXCLUSION

26,000 pounds or less (as determined under regulations prescribed by the Secretary).

(4) EXCLUSION FOR TRACTORS WEIGHING 19,500 POUNDS OR LESS.—The tax imposed by paragraph (1) shall not apply to tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer if—

(A) such tractor has a gross vehicle weight of 19,500 pounds or less (as determined by the Secretary), and

(B) such tractor, in combination with a trailer or semitrailer, has a gross combined weight of 33,000 pounds or less (as determined by the Secretary).

(5) SALE OF TRUCKS, ETC., TREATED AS SALE OF CHASSIS AND BODY.—For purposes of this subsection, a sale of an automobile truck or truck trailer or semitrailer shall be considered to be a sale of a chassis and of a body described in paragraph (1).

(6) The tax imposed by paragraph (1) shall not apply to any article to be purchased for the exclusive use of the [Department of Defense]/[United States].

(b) SEPARATE PURCHASE OF TRUCK OR TRAILER AND PARTS AND ACCESSORIES THEREFOR.—Under regulations prescribed by the Secretary—

(1) IN GENERAL.—If—

(A) the owner, lessee, or operator of any vehicle which contains an article taxable under subsection (a) installs (or causes to be installed) any part or accessory on such vehicle, and

(B) such installation is not later than the date 6 months after the date such vehicle (as it contains such article) was first placed in service, then there is hereby imposed on such installation a tax equal to 12 percent of the price of such part or accessory and its installation.

(2) EXCEPTIONS.—Paragraph (1) shall not apply if—

(A) the part or accessory installed is a replacement part or accessory, or

(B) the aggregate price of the parts and accessories (and their installation) described in paragraph (1) with respect to any vehicle does not exceed \$1,000 (or such other amount or amounts as the Secretary may by regulations prescribe).

(3) INSTALLERS SECONDARILY LIABLE FOR TAX.—The owners of the trade or business installing the parts or accessories shall be secondarily liable for the tax imposed by paragraph (1).

(c) TERMINATION.—On and after October 1, 2022, the taxes imposed by this section shall not apply.

(d) CREDIT AGAINST TAX FOR TIRE TAX.—If—

(1) tires are sold on or in connection with the sale of any article, and

(2) tax is imposed by this subchapter on the sale of such tires,

there shall be allowed as a credit against the tax imposed by this subchapter an amount equal to the tax (if any) imposed by section 4071 on such tires.

Recommendation 33

Draft Regulatory Revision

FAR Part 32 – Contract Financing FAR Subpart 32.805 – Assignment of Claims

32.805 Procedure.

(a) Assignments.

(1) Assignments by corporations shall be—

(i) Executed by an authorized representative;

(ii) Attested by the secretary or the assistant secretary of the corporation; and

~~(iii) Impressed with the corporate seal or accompanied by a true copy of the resolution of the corporation's board of directors authorizing the signing representative to execute the assignment.~~

(2) Assignments by a partnership may be signed by one partner, if the assignment is accompanied by adequate evidence that the signer is a general partner of the partnership and is authorized to execute assignments on behalf of the partnership.

(3) Assignments by an individual shall be signed by that individual and the signature acknowledged before a notary public or other person authorized to administer oaths.

(b) Filing. The assignee shall forward to each party specified in 32.802(e) ~~an original and three copies of~~ the notice of assignment together with ~~one a true copy of the instrument of assignment, submitted electronically or certified copy. The true copy shall be a certified duplicate or photostat copy of the original assignment.~~

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In the more than 60 years since enactment of Title 10 of the U.S. Code, the volume of amendments creating new chapters, sections, and note sections has overwhelmed the current structure of the Code. The abundant note sections have rendered Title 10 difficult to navigate even for experienced acquisition personnel.

RECOMMENDATION

Rec. 34: Repeal certain Title 10 sections and note sections, create a new Part V under Subtitle A of Title 10, and redesignate sections in Subtitles B–D to make room for Part V to support a more logical organization and greater ease of use.

INTRODUCTION

Congress initially directed the Section 809 Panel to “make any recommendations for the amendment or repeal of such *regulations* that the panel considers necessary” to streamline defense acquisition.¹ As the panel began executing its mission, it became apparent that restricting its purview to defense acquisition regulations was too limiting. Regulatory implementation is often directed by statutes. Amendments, and in some cases repeals of certain defense acquisition-related statutes, are necessary to effectively streamline defense acquisition and provide greater transparency in its processes.

Defense acquisition statutes are codified in Title 10 of the U.S. Code; however, the organization of those statutes within the Code has become unwieldy. In the more than 60 years since enactment of Title 10, the volume of amendments creating new chapters, sections, and *note sections* has overwhelmed the current structure of the Code. The acquisition-related statutes that apply to the rest of the federal government were recently organized and codified in Title 41.² No similar effort has been made with regard to Title 10, where the organization of the acquisition-related statutes has become problematic. The work of the Section 809 Panel provides an opportunity to review and reorganize the existing structure of defense acquisition-related statutes for the long-term benefit of the acquisition community and those companies doing business with DoD or are seeking to enter the DoD marketplace.

RECOMMENDATION

Recommendation 34: Repeal certain Title 10 sections and note sections, create a new Part V under Subtitle A of Title 10, and redesignate sections in Subtitles B-D to make room for Part V to support a more logical organization and greater ease of use.

Problem

With passage of the Armed Services Procurement Act of 1947 all of the laws governing DoD acquisition were contained within an organized, logical structure. In the 60 years since Title 10 was enacted, the acquisition-related part of the Code (Part IV, Service, Supply, and Procurement, of Subtitle A, General Military Law), has dramatically expanded, with the addition of new sections. Further disrupting the once organized structure are the myriad *note* sections for numerous provisions, including permanent or temporary requirements as well as specific reporting requirements. This statutory language is included within the Code but are set forth in note sections under existing sections of law. For example, the FY 2018 NDAA included 35 new defense acquisition-related provisions that became note sections. In the last three NDAAs alone, Congress enacted 265 new acquisition-related provisions, with many being included as *notes* or assigned statutory designations such as; 10 U.S.C. § 2313b. The abundant note sections have rendered Title 10 difficult to navigate even for experienced acquisition personnel.

¹ FY 2016 NDAA, § 809(b)(2).

² See Pub. L. No. 113-350 (Jan 4, 2011) and Positive Law Codification, Title 41, U.S. Code at <http://uscode.house.gov/codification/t41/index.html>.

Background

Title 10, enacted into positive law August 10, 1956, details the specific laws governing the Military Services and provides organizational structure for DoD. The title was originally divided into five subtitles, A through E, with defense acquisition statutes primarily found in Subtitle A, General Military Law under Part IV, Service, Supply, and Procurement. In the 1956 codification, the acquisition-related statutes were mainly codified in three chapters: Chapter 137, Procurement Generally (derived from the Armed Services Procurement Act of 1947); Chapter 139, Research and Development; and Chapter 141, Miscellaneous Procurement Provisions. A Subtitle E was added in 1994.

In the past 60 years, the original three chapters have grown dramatically, with Chapter 141 growing from six to 36 sections. Congress created several new chapters, including Chapter 140, Procurement of Commercial Items; Chapter 142, Procurement Technical Assistance Cooperative Agreement Program; Chapter 144, Major Defense Acquisition Programs; Chapter 146, Contracting for Performance of Civilian Commercial or Industrial Type Functions; Chapter 149, Defense Acquisition System; and Chapter 144B, Weapon Systems Development and Related Matters. Title 10, Subtitle A, Part IV now includes 34 chapters. These chapters have generally been inserted where there is room within the existing structure of Part IV of Subtitle A, rather than where they might fit logically or thematically.

Designating new chapters within Part IV of Subtitle A is increasingly problematic. It is now almost always necessary for the section number of a new section to be in the form of a number-and-letter combination (e.g., 2410q or 2466a) rather than the traditional numeric designation. This designation form, though legally sufficient, hinders usability and may lead to confusion of similar citations (e.g., 2304(a) versus 2304a).

There are 20 iterations of Section 2410 (2410, 2410a, 2410b . . . 2410s). In addition to the organization problems created by the growth of the number of actual sections, is the accumulation of almost 350 *notes*. Section 2304, for example, concerns Competition Requirements; however, that section includes 55 *notes* with titles ranging from Matters Relating to Reverse Auctions to Competition for Procurement of Small Arms Supplied to Iraq and Afghanistan. The FY 2018 NDAA resulted in addition of 35 new defense acquisition *notes*.

These provisions cover a wide variety of subjects and are increasingly organized primarily in sequence of enactment rather than by similarity of subject matter. Many defense provisions of law that apply to defense acquisition are not found in Title 10 itself, but are provisions of the annual defense authorization acts or other statutes, which are set forth in the Code as confusing “note” sections. These provisions, especially when they are permanent, are not as useful as they would be if they were provisions of the Code itself.

Discussion

Despite the trend toward electronic research, the current cumbersome statutory structure for acquisition-related statutes hinders the acquisition community, both inside and outside DoD, from easily identifying related sections and appropriate definitions, and prevents understanding of the statutes in their proper context. As indicated above, the structure originally provided for defense acquisition-related statutes has been overwhelmed by the volume of amendments. The Office of the Law Revision Counsel noted “[o]ver time, some areas of law outgrow their original boundaries due to

the enactment of new laws and amendments. . . . As a result, the Code becomes less organized, harder to navigate, and less reflective of the underlying structure of the statutes.”³ In the overview to the Discussion Draft of the Accelerating the Pace of Acquisition Reform Act of 2018, introduced by Representative Mac Thornberry, (R-TX), Chairman of the House Armed Services Committee (HASC), the committee described the acquisition-related statutes in Title 10 as “cumbersome and incoherent.”⁴ The committee further stated that “[a] focused effort is needed to rationalize the body of acquisition law provided to DoD.”⁵ Indeed, the task is not so much to *reorganize* the defense acquisition laws as to *organize* them.

Congress, in the conference report to the FY 2018 NDAA, encouraged such a comprehensive reorganization by noting, in regard to the conference report’s recommended repeal of an obsolete provision: “this first, relatively narrow repeal of an outdated program in title 10 . . . should encourage a future, wider effort to reorganize and optimize the entirety of acquisition law.”⁶ This statement encourages a once-in-a-generation opportunity for reorganization, or organization, of Title 10.

As a starting point, the Section 809 Panel undertook a review of all the *note* sections for possible codification of such notes or their potential repeal. As a result the panel recommended the potential repeal of 100 note sections and three Title 10 sections.

The provisions recommended for repeal (a) required the Department to issue regulations (or directives or guidance, etc.) or (b) have now expired, or (c) are otherwise obsolete. The purpose of repealing these provisions would be to remove provisions from Title 10 that may unnecessarily constrain the Secretary of Defense’s authority, and to reduce the volume of statutory provisions with which those working with defense acquisition statutes must contend. The panel shared its list with DoD to ensure repealing these provisions would do no harm. DoD agreed with the majority, though not all, of the panel’s recommendations. As with the recommendations to repeal various statutory offices included in *Volume 1* of the panel’s *Final Report*, repealing a requirement neither invalidates the policy nor discourages its continuation. Though the repeal allows the Secretary of Defense greater opportunity to make revisions as circumstances warrant, or for other interested parties to revisit and recommend possible changes as well, a risk exists that repeal of a select number of note sections with ongoing policy implications may lead some to mistakenly believe those policies are no longer operative. Consequently, in situations for which DoD has already implemented, or is about to implement, policies consistent with the NDAA sections identified in the notes proposed here for repeal, DoD should, to the maximum extent practicable, issue an affirmative statement or guidance to the organizations affected indicating the policies remain in place.

³ “Editorial Reclassification,” U.S. House of Representatives, Office of Law Revision Counsel, accessed June 2, 2018, <http://uscode.house.gov/editorialreclassification/reclassification.html>.

⁴ House Armed Services Committee, *Accelerating the Pace of Acquisition Reform Act of 2018: Discussion Draft Overview*, 1, accessed June 2, 2018, https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/FY19%20Reform%20Bill%20Summary%20Memo_FINAL%5B1%5D.pdf.

⁵ *Ibid.*

⁶ FY 2018 NDAA, Conference Report to Accompany H.R. 2810, H. Rept. 115-404, 889.

To align with the legislative cycle for consideration of the annual defense authorization bill, the Section 809 Panel submitted its recommendations for potential repeals in transmissions to Congress in February and March. The majority of recommendations were initially incorporated in the legislative discussion draft of the Accelerating the Pace of Acquisition Reform Act of 2018. The FY 2019 NDAA, as approved by HASC, includes most, but not all, of the Section 809 Panel's recommended statutory repeals.⁷

As a next step, the Section 809 Panel is developing a comprehensive restructuring of the Title 10 acquisition-related provisions that would be accomplished through creation of a new Part V, Acquisition within Subtitle A, General Military Matters.⁸ Such a reorganization would require redesignating many existing provisions of law, which would create a short-term inconvenience; similar efforts have proven worthwhile.⁹ In the context of reclassifying certain provisions codified in Title 50, the Office of the Law Revision Counsel noted, "The short-term inconvenience of adjusting to new Code citations is greatly outweighed by the benefit of making much needed long-term improvements in the organizational structure."¹⁰ Enactment of Title 41, Public Contracts, into *positive law* by Pub. L. No. 111-350 is a recent example that is particularly relevant for the acquisition community.

Adding a new Part V at the end of Subtitle A will offer substantial advantages in terms of organizing acquisition statutes and making them proximate to other relevant provisions of Subtitle A. Because there is currently no room for a new Part V between the end of Part IV and the beginning of Subtitle B, the panel's proposal would, entail redesignation of the chapters and sections of subtitles B, C, and D, relating to the three Military Services, so as to make room for the new part V. This proposal presumes that future growth in Title 10 will generally be in subtitle A and that there will be relatively little growth in the military department subtitles. This proposal presents an opportunity to create room for not only a new Part V of Subtitle A on defense acquisition but also for additional growth in subtitle A, as well as for possible reorganization of other subjects within Subtitle A. As a technical matter, the redesignation of chapters and sections of Subtitles B, C, and D could be accomplished in a transparent manner that ensures there are no substantive changes and uses drafting techniques that minimize the number of complex amendatory provisions.

The task of restructuring these statutes would require substantial effort, rather than simply moving each existing section of law into the newly created structure. This effort includes breaking up some long sections of code into more manageable sections and making technical updates. The proposed reorganization and technical updates would restore much of the parallelism between the acquisition-related provisions of Title 10 with the corresponding provisions of Title 41, standardizing the governments *face to industry* for contractors doing business with both DoD and other federal agencies. This effort would achieve what the Packard Commission called for almost 40 year ago: "Congress should work with the Administration to recodify all Federal statutes involving procurement...[s]uch

⁷ See FY 2019 NDAA, H.R. 5515, Sec. 812.

⁸ The framework for this reorganization is also included in the HASC approved FY 2019 NDAA. Ibid at Sec. 801.

⁹ See Ibid at Secs. 806, 807, and 808.

¹⁰ "Editorial Reclassification, Title 50, United States Code, Brief Summary of Changes," U.S. House of Representatives, Office of Law Revision Counsel, accessed June 2, 2018, <http://uscode.house.gov/editorialreclassification/t50/index.html>.

codification should aim not only at consolidation, but more importantly, at simplification and consistency.”¹¹

Conclusions

Organizing the defense acquisition statutes into a restructured, rationalized form would reduce the overcrowding, reflect more clearly the underlying structure of these statutes, and provide substantial benefits in terms of a structure that is more intuitive and easier to navigate. This effort would be especially beneficial for the thousands of attorneys across DoD who advise commanders, program managers, and contracting officers on acquisition authorities. Confusing notes and cumbersome statutory structure can create a barrier to entry for innovative firms unfamiliar with the federal acquisition process, firms DoD seeks to leverage to ensure technological dominance and enhanced lethality across the joint force inside the curve of near-peer competitors and nonstate actors.

This logical restructuring would be achieved by adding a new Part V at the end of Subtitle A and placing all of the defense-acquisition related statutes into that new part. An initial step, aimed at decluttering the code, was a review of all relevant note sections for possible repeal or codification. Subsequently, the Section 809 Panel recommended repealing sections and notes that either required DoD to issue regulations, had expired by their own terms, or were otherwise obsolete. With these recommendations, the Section 809 Panel is not expressing a view on the merits of the policies promoted by these provisions. Rather, in recommending the repeal of the statutory requirement for a regulation, the Section 809 Panel is recommending that the Secretary of Defense be allowed to revise the regulation as circumstances warrant

The Section 809 Panel’s primary recommendation is to create a rational statutory structure. HASC Chairman Mac Thornberry describes this project in the summary to his proposed FY 2019 NDAA as “a historic clarification of the acquisition process.”¹² Future recommendations by the Section 809 Panel will fully address the chapter structure within this new Part V, and restructure some sections to restore the parallelism with current Title 41 provision. This effort is not intended to make substantive changes to the existing acquisition statutes, but would provide a more logical framework within which comprehensive statutory recommendations could be nested. This project ultimately will involve substantial effort on the part of Congress and DoD.

Implementation

Legislative Branch

- Repeal certain Title 10 sections and *notes* as described in the Section 809 Panel’s recommendations (submitted on February 26, 2018, and March 23, 2018) and codify the remaining *notes* in the new Part V.

¹¹ President’s Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report to the President*, June 1986, xxv, accessed June 2, 2018, <https://assets.documentcloud.org/documents/2695411/Packard-Commission.pdf>.

¹² House Armed Services Committee, *National Defense Authorization Act for FY 2019, Chairman’s Mark Summary*, 9, accessed June 2, 2018, https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/Chairman%27s%20Mark%20Summary%20FY19%20NDAA.pdf.

- Create a new Part V under Subtitle A of Title 10, and redesignate sections in Subtitles B-D to make room for Part V.

Executive Branch

- There are no Executive Branch changes required for this recommendation.

Note: Copies of the panel's recommendations, including draft legislative text (submitted on February 26, 2018, and March 23, 2018) can be found in the Implementation Details subsection at the end of Section 7.

Implications for Other Agencies

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

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Section 7
Title 10 Reorganization
Implementation Details

Recommendation 34

Recommendation Packages
Previously Submitted on
February 26, 2018
and
March 23, 2018

Advisory Panel on Streamlining and Codifying Acquisition Regulations

Section 809 Panel Recommendations for Repeal of Certain Title 10 “Note” Sections

February 26, 2018





February 26, 2018

The Honorable Mac Thornberry
Chairman
Committee on Armed Services
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Section 809 panel, as part of its “streamlining” mandate, recommends that the attached list of 71 provisions of law be repealed. These provisions relate to defense acquisition and are carried in the U.S. Code as “note” sections under various provisions of title 10. Also attached is draft legislation to carry out these repeals and a document with the text of the provisions of law proposed for repeal.

The bulk of these provisions are sections from annual National Defense Authorization Acts (NDAAs), but a few are from other laws, such as the Federal Acquisition Streamlining Act of 1994 (FASA) and the Weapon Systems Acquisition Reform Act of 2009 (WSARA).

These provisions either (1) required the Department to issue regulations (directives or guidance, etc.); (2) have now expired by their own terms; or (3) are otherwise obsolete.

The panel shared its list with the Department of Defense (DoD) to ensure that repealing these provisions would do “no harm.” Those items with which DoD had concerns are noted in the attached chart.

The panel would like to note that, with respect to any recommendation in the attachment for repeal of a statutory requirement for issuance of a regulation, the panel is not expressing a view on the merits of the policies covered by the required regulation. Rather, in recommending repeal of the statutory requirement for the regulation, the panel is recommending that the Secretary of Defense be allowed to revise the regulation as circumstances warrant. Repeal of the statutory requirement for the regulation would allow the Secretary to revise, or rescind, the regulation, but would not require it. The decision to retain, or not retain, the regulation would be up to the Secretary.

The panel is continuing to review title 10 “note” provisions with the expectation of recommending repeal of additional items in the future.

The panel is submitting these recommendations at this time, rather than waiting to include them in Volume 2 of the panel's report in June of this year, in order to provide the committees the fullest opportunity to consider them for inclusion in the NDAA for Fiscal Year 2019.

Sincerely,

Michael D. Madsen, Colonel, USAF (ret)
Executive Director
Section 809 Panel

Enclosures:
As stated

cc:
The Honorable Adam Smith
Ranking Member

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
	USC Section	NDAA Cite	Title	Description	NOTES
1					
2	10 USC 195 note	FY98 NDAA, PL 105-85, §387(c), Nov. 18, 1997	Authority to Procure Services From Government Publishing Office	Enacted in 1997 – allowed DOD to obtain printing services directly from GPO rather than the Defense Automated Printing Service	
3	10 USC 2223a note	FY15 NDAA, PL 113-291, §801, Dec 19, 2014	Modular Open Systems Approaches in Acquisition Programs	Enacted in Dec 2014 – required DOD to develop a plan on standards and architectures for open systems; required submission of plan to Congress by 2016. All deadlines have passed.	
4	10 USC 2223a note	FY14 NDAA, PL 113-66, §938, Dec 26, 2013	Supervision of the Acquisition of Cloud Computing Capabilities	Enacted in Dec 2013 – required the SecDef (through AT&L) to supervise and review certain elements of the acquisition of cloud computing capabilities. Implementation deadline has passed.	
5	10 USC 2223a note	FY13 NDAA, PL 112-239, §934, Jan 2, 2013	Competition in Connection with DOD Tactical Datalink systems	Enacted in Jan 2013 – required an inventory (by 2013) of tactical datalinks in use and development, along with an assessment of vulnerabilities; required submission of plan for competition of the datalinks (if feasible) to congressional defense committees in the FY2015 budget submission. All deadlines have passed.	
6	10 USC 2223a note	FY12 NDAA, PL 112-81, §2867, Dec 31, 2011	Data Servers and Centers	Enacted in Dec 2011 – prohibited use of funds for a data server farm or data server centers unless approved by CIO and performance plan was in place; by 2012, required submission of a defense wide plan to congressional defense committees	
7	10 USC 2223a note	FY11 NDAA, PL 111-383, §215, Jan 7, 2011	Demonstration & Pilot Projects on Cybersecurity	Enacted in Jan 2011 – authorized demonstration projects to assess feasibility and advisability of using various business models to identify innovative commercial technologies to address cybersecurity requirements; required annual reports to be submitted to Congress with budget submission	

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
1	USC Section	NDAAs Cite	Title	Description	NOTES
8	10 USC 2223a note	FY10 NDAA, PL 111-84, §804, Oct 28, 2009	Implementation of New Acquisition Process for IT Systems	Enacted in Oct 2009 – required development & implementation of a new acquisition process for IT systems (based on recommendations of DSB Task Force March 2009 report); required submission of report to SASC/HASC within 270 days	
9	10 2223a note	FY08 NDAA, PL 110-181, §881, Jan 28, 2008	Clearinghouse for Rapid Identification & Dissemination of Commercial Info Technologies	Enacted in Jan 2008 – required establishment of a clearinghouse (within 180 days) to assess and set priorities for significant IT needs of DOD using readily available IT (with emphasis on commercial-of-the shelf); required submission of report to congressional defense committees by 2008	
10	10 USC 2302 note	FY17 NDAA, PL 114-328, §814(a), Dec 23, 2016	Procurement of Personal Protective Equipment	Enacted in Dec 2016 – required revision of DFARS (within 90 days) to prohibit reverse auctions and LPTA if quality level would result in casualties; established preference for best value contracting methods	
11	10 USC 2302 note	FY16 NDAA, PL 114-92, §881, Nov 25, 2015	Consideration of Potential Program Cost Increases and Schedule Delays Resulting from Oversight of Defense Acquisition Programs	Enacted in Nov 2015 – broad statement to ensure that policies, procedures & activities of defense acquisition oversight do not result in unnecessary increased costs or schedule delays	
12	10 USC 2302 note	FY13 NDAA, PL 112-239, §804, Jan 2, 2013	DOD Policy on Contractor Profits	Enacted in Jan 2013 – required review of DFARS profit guidelines to ensure appropriate link between contractor profit and contractor performance, and modify such guidelines (if necessary) within 180 days	DoD says, "Bears further scrutiny" (01-11-2018)
13	10 USC 2302 note	FY13 NDAA, PL 112-239, §843, Jan. 2, 2013	Responsibility Within Department of Defense for Operational Contract Support	Enacted in Jan 2013 – required development and issuance of guidance (within one year) regarding chain of authority for policy, planning & execution of operational contract support	

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
1	USC Section	NDAA Cite	Title	Description	NOTES
14	10 USC 2302 note	FY13 NDAA, PL 112–239, §844, Jan. 2, 2013	Data Collection on Contract Support for Future Overseas Contingency Operations Involving Combat Operations	Enacted in Jan 2013 – required DOD, State & USAID to issue guidance (within one year) on data collection of contract support (including total number and value of contracts) for future operations outside the US that involve combat operations; GAO report required and submitted to relevant committees within 2 years	
15	10 USC 2302 note	FY12 NDAA, PL 112-81, §818(g), Dec. 31, 2011	Detection and Avoidance of Counterfeit Electronic Parts: Information Sharing	Enacted in Dec 2011 – required an assessment of DOD acquisition systems and policies to detect and avoid counterfeit electronic parts; required issuance or revision of guidance (within 180 days) after assessment; also required DFARS revision (within 270 days), including contractor and supplier responsibilities. (This section was terminated by P. L. 114–125, §302(b), Feb. 24, 2016, 130 Stat. 150)	
16	10 USC 2302 note	FY11 NDAA, PL 111–383, §127, Jan. 7, 2011	Contracts for Commercial Imaging Satellite Capacities	Enacted in Jan 2011 – required that commercial imaging contracts (after Dec 31, 2010) have an imaging telescope with an aperture not less than 1.5 meters	
17	10 USC 2302 note	FY08 NDAA, P L 110–181, §815(b), Jan. 28, 2008	Sales of Commercial Items to Nongovernmental Entities	Enacted in Jan 2008 – required modification of DFARS (within 180 days) to clarify that terms 'general public' & 'nongovernmental entities' do not include Federal, State, local, or foreign governments	DoD says, "needs more study" (01-11-2018)
18	10 USC 2302 note	FY07 NDAA, PL 109-364, §812, Oct. 17, 2006	Pilot Program on Time-Certain Development in Acquisition of Major Weapon Systems	Enacted in Oct 2006 – allowed DOD to conduct pilot program for selected major weapons systems (focused on disciplined decision making, emphasizing technological maturity & appropriate trade-offs); required submission of annual report to congressional defense committees. Pgm expired 9/30/12	
19	10 USC 2302 note	FY06 NDAA, PL 109–163, §806, Jan. 6, 2006	Congressional Notification of Cancellation of Major Automated Information Systems	Enacted in Jan 2006 – required notification to congressional defense committees not less than 60 days before cancelling (or making a change to) a fielded (or approved to be fielded) major automated information system.	

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
1	USC Section	NDAAs Cite	Title	Description	NOTES
20	10 USC 2302 note	FY06 NDAA, PL 109–163, §817, Jan. 6, 2006	Joint Policy on Contingency Contracting	Enacted in Jan 2006 – required development of joint policy (within one year) for contingency contracting during combat operations and post operations; required submission of interim and final reports to SASC/HASC	
21	10 USC 2302 note	FY05 NDAA, PL 108–375, §141, Oct. 28, 2004	Development Of Deployable Systems To Include Consideration Of Force Protection In Asymmetric Threat Environments	Enacted in Oct 2004 – required revision of DOD regulations, directives and guidance (within 120 days) to assess warfighter survivability and system suitability against asymmetric threats	
22	10 USC 2302 note	FY05 NDAA, PL 108–375, §802, Oct. 28, 2004	Internal Controls for Department of Defense Procurements Through GSA Client Support Centers	Enacted in Oct 28, 2004 – required DOD IG and GSA IG joint review (by March 2005) of policies, procedures and internal controls of GSA client support centers to ensure compliance with DOD procurement requirements	
23	10 USC 2302 note	FY04 NDAA, PL 108–136, §801(b), Nov. 24, 2003	Data Review [Consolidation of Contract Requirements]	Enacted in Nov 2003 – required revision of data collection systems to ensure identification of procurement involving contract consolidations over \$5million	
24	10 USC 2302 note	FY04 NDAA, PL 108–136, §805(a), Nov. 24, 2003	Competitive Award of Contracts for Reconstruction Activities in Iraq	Enacted in Nov 2003 – broad statement requiring DOD to comply with chapter 137 and other applicable procurement laws (including full and open competition) and regulations in awarding contracts for reconstruction activities in Iraq	
25	10 USC 2302 note	FY03 NDAA, PL 107-314, §352, Dec. 2, 2002	Policy Regarding Acquisition Of Information Assurance And Information Assurance-Enabled Information Technology Products	Enacted in Dec 2002 – required SecDef to develop policy (and implement uniformly throughout DOD) to limit acquisition of information assurance technology products to those products that have been evaluated & validated using certain criteria	

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
1	USC Section	NDAAs Cite	Title	Description	NOTES
26	10 USC 2302 note	FY93 NDAA, PL 102-484, §326, Oct. 23, 1992	Elimination of Use of Class I Ozone-Depleting Substances in Certain Military Procurement Contracts	Enacted in Oct 1992 – prohibited inclusion in any contract (after June 1993) of any specification requiring use of Class I Ozone depleting substances; required submission of reports to SASC/HASC for a specified period	
27	10 USC 2302 note	FY90 DOD APPROP, PL 101-165, §9004, Nov. 21, 1989	Equitable Participation of American Small and Minority-Owned Business in Furnishing Of Commodities and Services	Enacted in Nov 1989 – beginning in 1989 (and every year thereafter), required DOD to assist American small and minority businesses furnishing commodities and services (partly by increasing internal resources and making information available)	
28	10 USC 2302 note	FY86 DoD Auth, PL 99-145, §913, Nov. 8, 1985	Minimum Percentage Of Competitive Procurements	Enacted in Nov 1985 – required SecDef to establish a goal for a certain percentage of competitive procurements	
29	10 USC 2304 note	FY09 NDAA, PL 110-417, §802, Oct. 14, 2008	Implementation of Statutory Requirements Regarding the National Technology And Industrial Base	Enacted in Oct 2008 – required SecDef to issue guidance (within 270 days) regarding the national technology and industrial base in the development and implementation of plans for major weapons acquisition programs	
30	10 USC 2304 note	FY08 NDAA, PL 110-181, §821, Jan. 28, 2008	Plan for Restricting Government-Unique Contract Clauses on Commercial Contracts	Enacted in Oct 2008 – required AT&L to develop & implement plan to minimize govt.-unique clauses in commercial contracts	
31	10 USC 2304 note	FY07 NDAA, PL 109-364, §813, Oct. 17, 2006	Panel on Contracting Integrity	Enacted in Oct 2006 – required SecDef to establish a contracting integrity panel & recommend changes to laws, regulations to eliminate areas of vulnerability for waste, fraud & abuse; required submission of annual report to cong. defense committees. Panel ceased operations on 12/31/2011.	

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
1	USC Section	NDAAs Cited	Title	Description	NOTES
32	10 USC 2304 note	FY98 NDAA, PL 105-85, §391, Nov 18, 1997	Warranty Claims Recovery Pilot Program	Enacted in Nov 1997 – authorized SecDef to conduct a pilot program to use commercial sources to improve claims collection under aircraft engine warranties; required report to Congress by 2006 (with recommendation on whether program should be permanent). Expired 9/30/2006	
33	10 USC 2304 note	PL 99-500, §927(b), Oct. 18, 1986 (and PL 99-591; PL 99-661)	Deadline for Prescribing Regulations	Enacted in Oct 1986 – required SecDef to issue regulations (within 180 days) to implement 2304(i), which required regs on negotiation of prices using other than competitive procedures	
34	10 USC 2304 note	FY87 NDAA, PL 99-661, §1222, Nov 14, 1986	One-year Security Guard Prohibition	Enacted in Nov 1986 – prohibited expenditure of funds (before Oct 1987) for security guard functions at any US military installation or facility (with certain exceptions). This was a one-year prohibition. A permanent provision was enacted in 10 USC 2465.	
35	10 USC 2304a note	FY10 NDAA, PL 111-84, §814(b), Oct. 28, 2009	Congressional Intelligence Committees [Task or Delivery Order Contracts]	Enacted in Oct 2009 – required notification to congressional intelligence committees of task or delivery order contracts for intelligence activities (at same time as that provided to SASC/HASC). The requirement for the report to SASC/HASC was repealed by sec. 809(b) of P.L. 112-81.	
36	10 USC 2304b note	FY07 NDAA, PL 109-364, §834, Oct. 17, 2006	Waivers to Extend Task Order Contracts for Advisory and Assistance Services	Enacted in Oct 2006 – allowed extension of task order contracts for technical or engineering services for no more than 10 years (in 5 year options); required submission of report (by April 2007) to SASC/HASC, and a GAO review. Expired 12/31/2011.	
37	10 USC 2306a note	FY99 NDAA, PL 105-261, §803, Oct. 17, 1998	Defense Commercial Pricing Management Improvement	Enacted in Oct 1998 – required revision of FAR to clarify methods and procedures used for determining price reasonableness; also required SecDef to implement procedures on commercial price trend analysis; and exempt commercial items	

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
1	USC Section	NDAAs Cited	Title	Description	NOTES
38	10 USC 2315 note	FY95 NDAA, PL 103-337, §1075, Oct. 5, 1994	Limitation Regarding Telecommunications Requirements	Enacted in Oct 1994 – prohibited expenditure of funds to meet DOD telecommunication requirements through FTS-2000	DoD says, "further scrutiny needed" (01-11-2018).
39	10 USC 2320 note	FY11 NDAA, PL 111-383, §824(a), Jan. 17, 2011	Guidance Relating to Rights in Technical Data	Enacted in Jan 2011 – required SecDef to review (within 180 days) guidance of military departments to ensure consistency with AT&L technical data guidance	
40	10 USC 2324 note	FY95 NDAA, PL 103-337, §818, Oct. 5, 1994	Payment of Restructuring Costs Under Defense Contracts	Enacted in Oct 1994 – required SecDef to prescribe regulations (by Jan 1, 1995) on allowability of restructuring costs; required submission of reports to Congress (in 1995, 1996 & 1997), and a GAO review	
41	10 USC 2326 note	FY10 NDAA, PL 111-84, §812, Oct. 28, 2009	Revision of Defense Supplement Relating to Payment of Costs Prior to Definitization	Enacted in Oct 2009 – required SecDef to revise DFARS (within 180 days) on limitations related to undefinitized contract actions	
42	10 USC 2326 note	PL 99-500, §908, Oct. 18, 1986 (and PL 99-591; PL 99-661)	Limitation on funds for Undefinitized Contractual Actions; Oversight by Inspector General; Waiver Authority	Enacted in Oct 1986 – required SecDef and Secretaries of military departments to determine total funds obligated for contractual actions and undefinitized contractual actions for specified 6-month periods (ending March 31, 1989); required periodic audit by IG (with submission of audit report to Congress)	
43	10 USC 2330 note	FY08 NDAA, PL 110-181, §805, Jan. 28, 2008	Procurement of Commercial Services	Enacted in Jan 2008 – required SecDef to modify DFARS (within 180 days) for procurement of commercial services; modifications would address treatment regarding "of a type" and "time and material" for commercial item acquisitions	

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
1	USC Section	NDAA Cite	Title	Description	NOTES
44	10 USC 2330 note	FY02 NDAA, PL 107-107, §801(d)-(f), Dec. 28, 2001	Requirement for Program Review Structure; Comp Gen Review	Enacted in Dec 2001 – required SecDef to issue and implement policy (within 180 days) on procurement of services and a program review structure similar to procurement of weapons systems; required GAO review	
45	10 USC 2330 note	FY02 NDAA, PL 107-107, §802, Dec. 28, 2001	Performance Goals for Procurement of Services	Enacted in Dec 2001 – established objective for DOD to achieve efficiencies (through goals) in multiple award contracts for procurement of services; required submission of annual report (through 2011) to cong defense committees	
46	10 USC 2358 note	FY03 NDAA, PL 107-314, §1032, Dec 2, 2002	Report on Weapons Capabilities of Defeat Hardened Targets	Enacted in Dec 2002 – required a report (starting in 2009 and submitted every 2 years) by SecDef, SecEnergy & DNI to congressional committees on R&D/ procurement activities to develop weapons & capabilities to defeat hardened and buried targets. Expired in 2013.	
47	10 USC 2358 note	FY03 NDAA, PL 107-314, §241, Dec 2, 2002	Pilot Program for Revitalizing Labs & Test Centers of DOD	Enacted in Dec 2002 – authorized SecDef to conduct pilot program (in coordination with a similar pilot program) to improve efficiency in performance of R&D, test & evaluation functions (including employing/retaining/shaping appropriate workforce); required submission of reports to Congress. Expired.	
48	10 USC 2358 note	FY73 DoD Auth, PL 92-436, §606, Sept. 29, 1972	Campuses Barring Military Recruiters; Cessation of Payments; Notification of Secretary Of Defense	Enacted in Sept 1972 – prohibited use of funds at educational institutions that barred DOD from recruiting for the armed forces. Superseded by 10 USC 983	
49	10 USC 2364 note	FY00 NDAA, PL 106-65, §913, Oct. 5, 1999	Performance Review Process	Enacted in Oct 1999 – required SecDef to develop (within 180 days) a performance review process for rating quality & relevance of work performed at DOD labs	
50	10 USC 2364 note	FY87 NDAA, PL 99-661, §234, Nov 14, 1986	Coordination of Research Activities of DOD	Enacted in Nov 1986 – general statement of findings on need for centralized coordination among research facilities to ensure awareness of emerging technologies and avoid duplication	

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
1	USC Section	NDAAs Cite	Title	Description	NOTES
51	10 USC 2366a note	FY08 NDAA, PL 110-181, §943, Jan 28, 2008	Review of DOD Acquisition Directives	Enacted in Jan 2008 – required SecDef review (within 180 days) of DOD5000.1 & other guidance related to Milestone A approval	
52	10 USC 2366b note	FY09 NDAA, PL 110-417, §1047(d), Oct. 14, 2008	Formal Review Process for Bandwidth Requirements	Enacted in Oct 2008 – required SecDef & DNI to establish review process to ensure bandwidths will meet requirements of major acquisition programs; required annual report to SASC/HASC (ending in 2021)	DoD says, "Keep" (01-11-2018).
53	10 USC 2377 note	FY16 NDAA, PL 114-92, §844(b), Nov. 25, 2015	Incorporation Into Management Certification Training Mandate	Enacted in Nov 2015 – required Joint Chiefs to ensure that market research training is part of management certification training for Joint Capabilities Integration Development System	
54	10 USC 2399 note	FY90 NDAA, PL 101-189, §801, Nov. 29, 1989	Assessment of Risk in Concurrent Development of Major Defense Acquisition Systems	Enacted in Nov 1989 – required SecDef to develop guidelines for concurrency in MDAPs; required report to Congress by 1990	
55	10 USC 2410p note	FY07 NDAA, PL 109-364, §807, Oct 17, 2006	Update of Regulations on Lead System Integrators	Enacted in Oct 2006 – required SecDef to update acquisition regulations (by Dec 31, 2006) related to lead system integrators to conform with recent NDAA amendments	
56	10 USC 2430 note	FY08 NDAA, PL 110-181, §908(d), Jan. 28, 2008	Duties of Principal Military Deputies	Enacted in Jan 2008 – described duties of principal deputies related to MDAPs (trade-offs in cost, schedule & performance)	DoD says, "Keep" (01-11-2018).
57	10 USC 2430 note	FY94 NDAA, PL 103-160, §837, Nov 30, 1993	Efficient Contracting Processes	Enacted in Nov 1993 – required SecDef to waive regulations not required by statute that affect efficiency in contracting	
58	10 USC 2430 note	FY94 NDAA, PL 103-160, §838, Nov 30, 1993	Contract Admin – Performance Based Contract Management	Enacted in Nov 1993 – required SecDef to define payment milestones on basis of quantitative results	

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
1	USC Section	NDAAs Cited	Title	Description	NOTES
59	10 USC 2458 note	FY10 NDAA, PL 111-84, §328, Oct. 28, 2009	Improvement of Inventory Management Practices	Enacted in Oct 2009 – required SecDef to submit report (within 270 days) to congressional defense committees of a plan to improve inventory management practices within DLA & military departments (to reduce storage of items in excess of requirements)	
60	10 USC 2461 note	FY05 NDAA, PL 108-375, §325, Oct 28, 2004	Pilot Program for Purchase of Certain Municipal Services	Enacted in Oct 2004 – authorized military department to conduct pilot program to purchase certain municipal services (e.g., library, refuse collection/disposal, facilities maintenance & repair); required congressional notification before start of any program. Expired on 9/30/2012	
61	10 USC 2461 note	FY04 NDAA, PL 108-136, §336, Nov 24, 2003	Pilot Program for Best Value Source Selection for IT Services	Enacted in Nov 2003 – authorized SecDef to conduct pilot program using best value criterion for selection of IT services (allowing examination of performance by civilian & contractors); required GAO review. Expired on 9/30/2008	
62	10 USC 2461 note	FY96 NDAA, PL 104-106, §353(a), Feb 10, 1996	Private Sector Operation of Certain Payroll, Finance & Accounting	Enacted in Feb 1996 – required SecDef to submit to Congress (by Oct 1996) a plan for private sector performance of DOD payroll functions; required implementation of plan if costs would not exceed costs of performance by federal employees; required report to Congress on other accounting & finance services that could be performed by private sector	
63	10 USC 2461 note	FY96 NDAA, PL 104-106, §356, Feb 10, 1996	Program for Improved Travel Process for Department of Defense	Enacted in Feb 1996 – authorized SecDef to develop a plan & conduct a program to improve DOD travel processes; required report to SASC/HASC within one year. Expired in 1998	
64	10 USC 2500 note	FY93 NDAA, PL 102-484, §4101, Oct 23, 1992	Congressional Findings	Enacted in Oct 1992 – general statement of findings related to collapse of communism & post-Cold War defense build down	

Title 10 "Note" Sections Recommended for Repeal by Section 809 Panel

	A	B	C	D	E
1	USC Section	NDAAs Cite	Title	Description	NOTES
65	10 USC 2501 note	FY09 NDAA, PL 110–417, §256, Oct. 14, 2008	Executive Agent for Printed Circuit Board Technology	Enacted in Oct 2008 – requires SecDef to designate (within 90 days) a senior official to be executive agent for printed circuit board technology (including funding strategies & assessment of vulnerabilities)	DoD says, "may be needed" (01-11-2018).
66	10 USC 2501 note	FY95 NDAA, PL 103–337, §1118, Oct. 5, 1994	Documentation for Awards for Cooperative Agreements or Other Transactions Under Defense Technology Reinvestment Programs	Enacted in Oct 1994 – required explanation (at time of award of cooperative agreement or other transaction) on how award advances & enhances a national security objective	
67	10 USC 2521 note	FY08 NDAA, PL 110–181, §238(b), Jan 28, 2008	Initial Development and Submission of Plan	Enacted in Jan 2008 – required SecDef to develop a 5-year strategic plan for manufacturing technology; required report to SASC/HASC (by 2010)	
68	10 USCS 2521 note	FY04 NDAA, PL 108–136, §823, Nov. 24, 2003	Technical Assistance Relating to Machine Tools	Enacted in Nov 2003 – required SecDef to publish in Federal Register information on govt. contracting for machine tools	
69	10 USC 2533b note	FY11 NDAA, PL 111–383, §823, Jan 7, 2011	Review of Regulatory Definition of Specialty Metals	Enacted in Jan 2011 – required SecDef to review DFARS (within 270 days) to ensure compliance with specialty metals statute	
70	10 USC 2533b note	FY08 NDAA, PL 110–181, §804(h), Jan 28, 2008	Revision of Domestic Nonavailability	Enacted in Jan 2008 – required review (within 180 days) of any domestic nonavailability determination to ensure statutory compliance	
71	10 USC 2533b note	FY07 NDAA, PL 109–364, §842(b), Oct 17, 2006	One Time Waiver of Specialty Metal Domestic Requirement	Enacted in Oct 2006 – allowed acceptance of specialty metal if incorporated into product before Oct 2006 (and contractor has a plan for future compliance); required publication of waiver in FedBizOps. Waiver authority expired in 2010	
72	10 USC 4551 note	FY01 NDAA, PL 106–398, §343, Oct 30, 2000	Arsenal Support Program Initiative	Enacted in Oct 2000 – requires SecArmy to conduct demonstration program to maintain viability of Army arsenals (allowed commercial use of arsenals and loan guarantees). Applies during FY01 thru FY12.	

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

NDAA “Note” Sections for Possible Repeal

[This document sets out the current text of the title 10 “note” sections that are in the package of provisions approved by the Section 809 Panel to be recommended to Congress for repeal.]

[Provisions of law are set forth below by order of title 10 section numbers to which a provision is classified as a “note”. Within provisions classified as “notes” under a particular section of title 10, provisions are set forth in the same order they appear in the Code, in chronological order with the most recent first.]

[The number at the beginning of each item below is keyed to the accompanying spreadsheet and corresponds to the row number on the spreadsheet for that item. (Note that on the spreadsheet Row 1 is a header, so the first item is on Row 2 and accordingly the first item below is numbered as 2.)]

2. Section 387(c) of the National Defense Authorization Act for Fiscal Year 1998, P.L. 105-85 (10 U.S.C. 195 note), provided:

“SEC. 387. COMPETITIVE PROCUREMENT OF PRINTING AND DUPLICATING SERVICES.

(a) [amended sec. 351 of P. L. 104-106]

(b) [amended sec. 351 of P. L. 104-106]

“(c) AUTHORITY TO PROCURE SERVICES FROM GOVERNMENT PRINTING [NOW PUBLISHING] OFFICE.—

Consistent with section 501 of title 44, United States Code, the Secretary of a military department or head of a Defense Agency may contract directly with the Government Printing Office [now Government Publishing Office] for printing and duplication services otherwise available through the Defense Automated Printing Service.”

3. Section 801 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, P.L. 113–291, Dec. 19, 2014 (10 U.S.C. 2223a note), provided:

“SEC. 801. MODULAR OPEN SYSTEMS APPROACHES IN ACQUISITION PROGRAMS.

“(a) PLAN FOR MODULAR OPEN SYSTEMS APPROACH THROUGH DEVELOPMENT AND ADOPTION OF STANDARDS AND ARCHITECTURES.—Not later than January 1, **2016**, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall submit a report to the Committees on Armed Services of the Senate and the House of Representatives detailing a plan to develop standards and define architectures necessary to enable open systems approaches in the key mission areas of the Department of Defense with respect to which the Under Secretary determines that such standards and architectures would be feasible and cost effective.

“(b) CONSIDERATION OF MODULAR OPEN SYSTEMS APPROACHES.—

“(1) REVIEW OF ACQUISITION GUIDANCE.—The Under Secretary of Defense for Acquisition, Technology, and Logistics shall review current acquisition guidance, and modify such guidance as necessary, to-

“(A) ensure that acquisition programs include open systems approaches in the product design and acquisition of information technology systems to the maximum extent practicable; and

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(B) for any information technology system not using an open systems approach, ensure that written justification is provided in the contract file for the system detailing why an open systems approach was not used.

"(2) ELEMENTS.—The review required in paragraph (1) shall-

"(A) consider whether the guidance includes appropriate exceptions for the acquisition of-

"(i) commercial items; and

"(ii) solutions addressing urgent operational needs;

"(B) determine the extent to which open systems approaches should be addressed in analysis of alternatives, acquisition strategies, system engineering plans, and life cycle sustainment plans; and

"(C) ensure that increments of acquisition programs consider the extent to which the increment will implement open systems approaches as a whole.

"(3) DEADLINE FOR REVIEW.—The review required in this subsection shall be completed no later than 180 days after the date of the enactment of this Act [Dec. 19, 2014].

"(c) TREATMENT OF ONGOING AND LEGACY PROGRAMS.—

"(1) REPORT REQUIREMENT.—Not later than one year after the date of the enactment of this Act [Dec. 19, 2014], the Under Secretary of Defense for Acquisition, Technology, and Logistics shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report covering the matters specified in paragraph (2).

"(2) MATTERS COVERED.—Subject to paragraph (3), the report required in this subsection shall-

"(A) identify all information technology systems that are in development, production, or deployed status as of the date of the enactment of this Act, that are or were major defense acquisition programs or major automated information systems, and that are not using an open systems approach;

"(B) identify gaps in standards and architectures necessary to enable open systems approaches in the key mission areas of the Department of Defense, as determined pursuant to the plan submitted under subsection (a); and

"(C) outline a process for potential conversion to an open systems approach for each information technology system identified under subparagraph (A).

"(3) LIMITATIONS.—The report required in this subsection shall not include information technology systems-

"(A) having a planned increment before fiscal year 2021 that will result in conversion to an open systems approach; and

"(B) that will be in operation for fewer than 15 years after the date of the enactment of this Act.

"(d) DEFINITIONS.—In this section:

"(1) INFORMATION TECHNOLOGY.—The term 'information technology' has the meaning given the term in [section 11101\(6\) of title 40, United States Code](#).

"(2) OPEN SYSTEMS APPROACH.—The term 'open systems approach' means, with respect to an information technology system, an integrated business and technical strategy that-

"(A) employs a modular design and uses widely supported and consensus-based standards for key interfaces;

"(B) is subjected to successful validation and verification tests to ensure key interfaces comply with widely supported and consensus-based standards; and

"(C) uses a system architecture that allows components to be added, modified, replaced, removed, or supported by different vendors throughout the lifecycle of the system to afford opportunities for enhanced competition and innovation while yielding-

"(i) significant cost and schedule savings; and

"(ii) increased interoperability."

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

4. Section 938 of the National Defense Authorization Act for Fiscal Year 2014, P. L. 113–66, Dec. 26, 2013 (**10 U.S.C. 2223a note**), provided:

“SEC. 938. SUPERVISION OF THE ACQUISITION OF CLOUD COMPUTING CAPABILITIES.

“(a) SUPERVISION.—

“(1) IN GENERAL.—The Secretary of Defense shall, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics, the Under Secretary of Defense for Intelligence, the Chief Information Officer of the Department of Defense, and the Chairman of the Joint Requirements Oversight Council, supervise the following:

“(A) Review, development, modification, and approval of requirements for cloud computing solutions for data analysis and storage by the Armed Forces and the Defense Agencies, including requirements for cross-domain, enterprise-wide discovery and correlation of data stored in cloud and non-cloud computing databases, relational and non-relational databases, and hybrid databases.

“(B) Review, development, modification, approval, and implementation of plans for the competitive acquisition of cloud computing systems or services to meet requirements described in subparagraph (A), including plans for the transition from current computing systems to systems or services acquired.

“(C) Development and implementation of plans to ensure that the cloud systems or services acquired pursuant to subparagraph (B) are interoperable and universally accessible and usable through attribute-based access controls.

“(D) Integration of plans under subparagraphs (B) and (C) with enterprise-wide plans of the Armed Forces and the Department of Defense for the Joint Information Environment and the Defense Intelligence Information Environment.

“(2) DIRECTION.—The Secretary shall provide direction to the Armed Forces and the Defense Agencies on the matters covered by paragraph (1) by not later than March 15, 2014.

“(b) INTEGRATION WITH INTELLIGENCE COMMUNITY EFFORTS.—The Secretary shall coordinate with the Director of National Intelligence to ensure that activities under this section are integrated with the Intelligence Community Information Technology Enterprise in order to achieve interoperability, information sharing, and other efficiencies.

“(c) LIMITATION.—The requirements of subparagraphs (B), (C), and (D) of subsection (a)(1) shall not apply to a contract for the acquisition of cloud computing capabilities in an amount less than \$1,000,000.

“(d) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to alter or affect the authorities or responsibilities of the Director of National Intelligence under section 102A of the National Security Act of 1947 (50 U.S.C. 3024).”

5. Section 934 of the National Defense Authorization Act for Fiscal Year 2013, P.L. 112–239, Jan. 2, 2013, as amended (**10 U.S.C. 2223a note**), provided:

“SEC. 934. COMPETITION IN CONNECTION WITH DEPARTMENT OF DEFENSE TACTICAL DATA LINK SYSTEMS.

“(a) COMPETITION IN CONNECTION WITH TACTICAL DATA LINK SYSTEMS.—Not later than December 1, 2013, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall-

“(1) develop an inventory of all tactical data link systems in use and in development in the Department of Defense, including interfaces and waveforms and an assessment of vulnerabilities to such systems in anti-access or area-denial environments;

“(2) conduct an analysis of each data link system contained in the inventory under paragraph (1) to determine whether-

“(A) the upgrade, new deployment, or replacement of such system should be open to competition; or

“(B) the data link should be converted to an open architecture, or a different data link standard should be adopted to enable such competition;

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(3) for each data link system for which competition is determined advisable under subparagraph (A) or (B) of paragraph (2), develop a plan to achieve such competition, including a plan to address any policy, legal, programmatic, or technical barriers to such competition; and

"(4) for each data link system for which competition is determined not advisable under paragraph (2), prepare an explanation for such determination.

"(b) EARLIER ACTIONS.—If the Under Secretary completes any portion of the plan described in subsection (a)(3) before December 1, 2013, the Secretary may commence action on such portion of the plan upon completion of such portion, including publication of such portion of the plan.

"(c) REPORT.—At the same time the budget of the President for fiscal year 2015 is submitted to Congress pursuant to section 1105(a) of title 31, United States Code, the Under Secretary shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the plans described in paragraph (3) of subsection (a), including any explanation prepared under paragraph (4) of such subsection."

6. Section 2867 of the National Defense Authorization Act for Fiscal Year 2012, P.L. 112–81, Dec. 31, 2011, as amended (10 U.S.C. 2223a note), provided:

“SEC. 2867. DATA SERVERS AND CENTERS.

"(a) LIMITATIONS ON OBLIGATION OF FUNDS.—

"(1) LIMITATIONS.—

"(A) BEFORE PERFORMANCE PLAN.—During the period beginning on the date of the enactment of this Act [Dec. 31, 2011] and ending on May 1, 2012, a department, agency, or component of the Department of Defense may not obligate funds for a data server farm or data center unless approved by the Chief Information Officer of the Department of Defense or the Chief Information Officer of a component of the Department to whom the Chief Information Officer of the Department has specifically delegated such approval authority.

"(B) UNDER PERFORMANCE PLAN.—After May 1, 2012, a department, agency, or component of the Department may not obligate funds for a data center, or any information systems technology used therein, unless that obligation is in accordance with the performance plan required by subsection (b) and is approved as described in subparagraph (A).

"(2) REQUIREMENTS FOR APPROVALS.—

"(A) BEFORE PERFORMANCE PLAN.—An approval of the obligation of funds may not be granted under paragraph (1)(A) unless the official granting the approval determines, in writing, that existing resources of the agency, component, or element concerned cannot affordably or practically be used or modified to meet the requirements to be met through the obligation of funds.

"(B) UNDER PERFORMANCE PLAN.—An approval of the obligation of funds may not be granted under paragraph (1)(B) unless the official granting the approval determines that—

"(i) existing resources of the Department do not meet the operation requirements to be met through the obligation of funds; and

"(ii) the proposed obligation is in accordance with the performance standards and measures established by the Chief Information Officer of the Department under subsection (b).

"(3) REPORTS.—Not later than 30 days after the end of each calendar quarter, each Chief Information Officer of a component of the Department who grants an approval under paragraph (1) during such calendar quarter shall submit to the Chief Information Officer of the Department a report on the approval or approvals so granted during such calendar quarter.

"(b) PERFORMANCE PLAN FOR REDUCTION OF RESOURCES REQUIRED FOR DATA SERVERS AND CENTERS.—

"(1) COMPONENT PLANS.—

"(A) IN GENERAL.—Not later than January 15, 2012, the Secretaries of the military departments and the heads of the Defense Agencies shall each submit to the Chief Information Officer of the Department a plan for the department or agency concerned to achieve the following:

"(i) A reduction in the square feet of floor space devoted to information systems technologies, attendant support technologies, and operations within data centers.

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(ii) A reduction in the use of all utilities necessary to power and cool information systems technologies and data centers.

"(iii) An increase in multi-organizational utilization of data centers, information systems technologies, and associated resources.

"(iv) A reduction in the investment for capital infrastructure or equipment required to support data centers as measured in cost per megawatt of data storage.

"(v) A reduction in the number of commercial and government developed applications running on data servers and within data centers.

"(vi) A reduction in the number of government and vendor provided full-time equivalent personnel, and in the cost of labor, associated with the operation of data servers and data centers.

"(B) SPECIFICATION OF REQUIRED ELEMENTS.—The Chief Information Officer of the Department shall specify the particular performance standards and measures and implementation elements to be included in the plans submitted under this paragraph, including specific goals and schedules for achieving the matters specified in subparagraph (A).

"(2) DEFENSE-WIDE PLAN.—

"(A) IN GENERAL.—Not later than April 1, 2012, the Chief Information Officer of the Department shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a performance plan for a reduction in the resources required for data centers and information systems technologies Department-wide. The plan shall be based upon and incorporate appropriate elements of the plans submitted under paragraph (1).

"(B) ELEMENTS.—The performance plan required under this paragraph shall include the following:

"(i) A Department-wide performance plan for achieving the matters specified in paragraph (1)(A), including performance standards and measures for data centers and information systems technologies, goals and schedules for achieving such matters, and an estimate of cost savings anticipated through implementation of the plan.

"(ii) A Department-wide strategy for each of the following:

"(I) Desktop, laptop, and mobile device virtualization.

"(II) Transitioning to cloud computing.

"(III) Migration of Defense data and government-provided services from Department-owned and operated data centers to cloud computing services generally available within the private sector that provide a better capability at a lower cost with the same or greater degree of security.

"(IV) Utilization of private sector-managed security services for data centers and cloud computing services.

"(V) A finite set of metrics to accurately and transparently report on data center infrastructure (space, power and cooling): age, cost, capacity, usage, energy efficiency and utilization, accompanied with the aggregate data for each data center site in use by the Department in excess of 100 kilowatts of information technology power demand.

"(VI) Transitioning to just-in-time delivery of Department-owned data center infrastructure (space, power and cooling) through use of modular data center technology and integrated data center infrastructure management software.

"(3) RESPONSIBILITY.—The Chief Information Officer of the Department shall discharge the responsibility for establishing performance standards and measures for data centers and information systems technologies for purposes of this subsection. Such responsibility may not be delegated.

"(c) EXCEPTIONS.—

"(1) INTELLIGENCE COMPONENTS.—The Chief Information Officer of the Department and the Chief Information Officer of the Intelligence Community may jointly exempt from the applicability of this section such intelligence components of the Department of Defense (and the programs and activities thereof) that are funded through the National Intelligence Program (NIP) as the Chief Information Officers consider appropriate.

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(2) RESEARCH, DEVELOPMENT, TEST, AND EVALUATION PROGRAMS.—The Chief Information Officer of the Department may exempt from the applicability of this section research, development, test, and evaluation programs that use authorization of appropriations for the High Performance Computing Modernization Program (Program Element 0603461A) if the Chief Information Officer determines that the exemption is in the best interest of national security."

7. Section 215 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, P.L. 111–383, Jan. 7, 2011 (10 U.S.C. 2223a note), provided:

“SEC. 215. DEMONSTRATION AND PILOT PROJECTS ON CYBERSECURITY.

"(a) DEMONSTRATION PROJECTS ON PROCESSES FOR APPLICATION OF COMMERCIAL TECHNOLOGIES TO CYBERSECURITY REQUIREMENTS.—

"(1) PROJECTS REQUIRED.—The Secretary of Defense and the Secretaries of the military departments shall jointly carry out demonstration projects to assess the feasibility and advisability of using various business models and processes to rapidly and effectively identify innovative commercial technologies and apply such technologies to Department of Defense and other cybersecurity requirements.

"(2) SCOPE OF PROJECTS.—Any demonstration project under paragraph (1) shall be carried out in such a manner as to contribute to the cyber policy review of the President and the Comprehensive National Cybersecurity Initiative.

"(b) PILOT PROGRAMS ON CYBERSECURITY REQUIRED.—The Secretary of Defense shall support or conduct pilot programs on cybersecurity with respect to the following areas:

"(1) Threat sensing and warning for information networks worldwide.

"(2) Managed security services for cybersecurity within the defense industrial base, military departments, and combatant commands.

"(3) Use of private processes and infrastructure to address threats, problems, vulnerabilities, or opportunities in cybersecurity.

"(4) Processes for securing the global supply chain.

"(5) Processes for threat sensing and security of cloud computing infrastructure.

"(c) REPORTS.—

"(1) REPORTS REQUIRED.—Not later than 240 days after the date of the enactment of this Act [Jan. 7, 2011], and annually thereafter at or about the time of the submittal to Congress of the budget of the President for a fiscal year (as submitted pursuant to [section 1105\(a\) of title 31, United States Code](#)), the Secretary of Defense shall, in coordination with the Secretary of Homeland Security, submit to Congress a report on any demonstration projects carried out under subsection (a), and on the pilot projects carried out under subsection (b), during the preceding year.

"(2) ELEMENTS.—Each report under this subsection shall include the following:

"(A) A description and assessment of any activities under the demonstration projects and pilot projects referred to in paragraph (1) during the preceding year.

"(B) For the pilot projects supported or conducted under subsection (b)(2)–

"(i) a quantitative and qualitative assessment of the extent to which managed security services covered by the pilot project could provide effective and affordable cybersecurity capabilities for components of the Department of Defense and for entities in the defense industrial base, and an assessment whether such services could be expanded rapidly to a large scale without exceeding the ability of the Federal Government to manage such expansion; and

"(ii) an assessment of whether managed security services are compatible with the cybersecurity strategy of the Department of Defense with respect to conducting an active, in-depth defense under the direction of United States Cyber Command.

"(C) For the pilot projects supported or conducted under subsection (b)(3)–

"(i) a description of any performance metrics established for purposes of the pilot project, and a description of any processes developed for purposes of accountability and governance under any partnership under the pilot project; and

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(ii) an assessment of the role a partnership such as a partnership under the pilot project would play in the acquisition of cyberspace capabilities by the Department of Defense, including a role with respect to the development and approval of requirements, approval and oversight of acquiring capabilities, test and evaluation of new capabilities, and budgeting for new capabilities.

"(D) For the pilot projects supported or conducted under subsection (b)(4)-

"(i) a framework and taxonomy for evaluating practices that secure the global supply chain, as well as practices for securely operating in an uncertain or compromised supply chain;

"(ii) an assessment of the viability of applying commercial practices for securing the global supply chain; and

"(iii) an assessment of the viability of applying commercial practices for securely operating in an uncertain or compromised supply chain.

"(E) For the pilot projects supported or conducted under subsection (b)(5)-

"(i) an assessment of the capabilities of Federal Government providers to offer secure cloud computing environments; and

"(ii) an assessment of the capabilities of commercial providers to offer secure cloud computing environments to the Federal Government.

"(3) FORM.—Each report under this subsection shall be submitted in unclassified form, but may include a classified annex."

8. Section 804 of the National Defense Authorization Act for Fiscal Year 2010, P.L. 111–84, Oct. 28, 2009 (10 U.S.C. 2223a note), provided:

“SEC. 804. IMPLEMENTATION OF NEW ACQUISITION PROCESS FOR INFORMATION TECHNOLOGY SYSTEMS.

"(a) NEW ACQUISITION PROCESS REQUIRED.—The Secretary of Defense shall develop and implement a new acquisition process for information technology systems. The acquisition process developed and implemented pursuant to this subsection shall, to the extent determined appropriate by the Secretary-

"(1) be based on the recommendations in [chapter 6](#) of the March 2009 report of the Defense Science Board Task Force on Department of Defense Policies and Procedures for the Acquisition of Information Technology; and

"(2) be designed to include-

"(A) early and continual involvement of the user;

"(B) multiple, rapidly executed increments or releases of capability;

"(C) early, successive prototyping to support an evolutionary approach; and

"(D) a modular, open-systems approach.

"(b) REPORT TO CONGRESS.—Not later than 270 days after the date of the enactment of this Act [Oct. 28, 2009], the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the new acquisition process developed pursuant to subsection (a). The report required by this subsection shall, at a minimum-

"(1) describe the new acquisition process;

"(2) provide an explanation for any decision by the Secretary to deviate from the criteria established for such process in paragraphs (1) and (2) of subsection (a);

"(3) provide a schedule for the implementation of the new acquisition process;

"(4) identify the categories of information technology acquisitions to which such process will apply; and

"(5) include the Secretary's recommendations for any legislation that may be required to implement the new acquisition process."

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

9. Section 881 of the National Defense Authorization Act for Fiscal Year 2008, P.L. 110–181, Jan. 28, 2008 (10 U.S.C. 2223a note), provided:

“SEC. 881. CLEARINGHOUSE FOR RAPID IDENTIFICATION AND DISSEMINATION OF COMMERCIAL INFORMATION TECHNOLOGIES.

"(a) REQUIREMENT TO ESTABLISH CLEARINGHOUSE.—Not later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense, acting through the Assistant Secretary of Defense for Networks and Information Integration, shall establish a clearinghouse for identifying, assessing, and disseminating knowledge about readily available information technologies (with an emphasis on commercial off-the-shelf information technologies) that could support the warfighting mission of the Department of Defense.

"(b) RESPONSIBILITIES.—The clearinghouse established pursuant to subsection (a) shall be responsible for the following:

"(1) Developing a process to rapidly assess and set priorities and needs for significant information technology needs of the Department of Defense that could be met by commercial technologies, including a process for-

"(A) aligning priorities and needs with the requirements of the commanders of the combatant command; and

"(B) proposing recommendations to the commanders of the combatant command of feasible technical solutions for further evaluation.

"(2) Identifying and assessing emerging commercial technologies (including commercial off-the-shelf technologies) that could support the warfighting mission of the Department of Defense, including the priorities and needs identified pursuant to paragraph (1).

"(3) Disseminating information about commercial technologies identified pursuant to paragraph (2) to commanders of combatant commands and other potential users of such technologies.

"(4) Identifying gaps in commercial technologies and working to stimulate investment in research and development in the public and private sectors to address those gaps.

"(5) Enhancing internal data and communications systems of the Department of Defense for sharing and retaining information regarding commercial technology priorities and needs, technologies available to meet such priorities and needs, and ongoing research and development directed toward gaps in such technologies.

"(6) Developing mechanisms, including web-based mechanisms, to facilitate communications with industry regarding the priorities and needs of the Department of Defense identified pursuant to paragraph (1) and commercial technologies available to address such priorities and needs.

"(7) Assisting in the development of guides to help small information technology companies with promising technologies to understand and navigate the funding and acquisition processes of the Department of Defense.

"(8) Developing methods to measure how well processes developed by the clearinghouse are being utilized and to collect data on an ongoing basis to assess the benefits of commercial technologies that are procured on the recommendation of the clearinghouse.

"(c) PERSONNEL.—The Secretary of Defense, acting through the Assistant Secretary of Defense for Networks and Information Integration, shall provide for the hiring and support of employees (including detailees from other components of the Department of Defense and from other Federal departments or agencies) to assist in identifying, assessing, and disseminating information regarding commercial technologies under this section.

"(d) REPORT TO CONGRESS.—Not later than one year after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the implementation of this section."

10. Section 814(a) of the National Defense Authorization Act for Fiscal Year 2017, P.L. 114–328, Dec. 23, 2016 (10 U.S.C. 2302 note), provided:

“SEC. 814. PROCUREMENT OF PERSONAL PROTECTIVE EQUIPMENT.

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(a) LIMITATION.—Not later than 90 days after the date of the enactment of this Act [Dec. 23, 2016], the Defense Federal Acquisition Regulation Supplement shall be revised--

"(1) to prohibit the use by the Department of Defense of reverse auctions or lowest price technically acceptable contracting methods for the procurement of personal protective equipment or an aviation critical safety item (as defined in section 2319(g) of this title) if the level of quality or failure of the equipment or item could result in combat casualties; and

"(2) to establish a preference for the use of best value contracting methods for the procurement of such equipment or item."

(b) CONFORMING AMENDMENT.—[repealed sec. 884 of the FY16 NDAA]

11. Section 881 of the National Defense Authorization Act for Fiscal Year 2016, P.L. 114–92, Nov. 25, 2015 (10 U.S.C. 2302 note), provided:

“SEC. 881. CONSIDERATION OF POTENTIAL PROGRAM COST INCREASES AND SCHEDULE DELAYS RESULTING FROM OVERSIGHT OF DEFENSE ACQUISITION PROGRAMS.

"(a) AVOIDANCE OF UNNECESSARY COST INCREASES AND SCHEDULE DELAYS.—The Director of Operational Test and Evaluation, the Deputy Chief Management Officer, the Director of the Defense Contract Management Agency, the Director of the Defense Contract Audit Agency, the Inspector General of the Department of Defense, and the heads of other defense audit, testing, acquisition, and management agencies shall ensure that policies, procedures, and activities implemented by their offices and agencies in connection with defense acquisition program oversight do not result in unnecessary increases in program costs or cost estimates or delays in schedule or schedule estimates.

"(b) CONSIDERATION OF PRIVATE SECTOR BEST PRACTICES.—In considering potential cost increases and schedule delays as a result of oversight efforts pursuant to subsection (a), the officials described in such subsection shall consider private sector best practices with respect to oversight implementation."

12. Section 804 of the National Defense Authorization Act for Fiscal Year 2013, P.L. 112–239, Jan. 2, 2013 (10 U.S.C. 2302 note), provided:

“SEC. 804. DEPARTMENT OF DEFENSE POLICY ON CONTRACTOR PROFITS.

"(a) REVIEW OF GUIDELINES ON PROFITS.—The Secretary of Defense shall review the profit guidelines in the Department of Defense Supplement to the Federal Acquisition Regulation in order to identify any modifications to such guidelines that are necessary to ensure an appropriate link between contractor profit and contractor performance. In conducting the review, the Secretary shall obtain the views of experts and interested parties in Government and the private sector.

"(b) MATTERS TO BE CONSIDERED.—In conducting the review required by subsection (a), the Secretary shall consider, at a minimum, the following:

"(1) Appropriate levels of profit needed to sustain competition in the defense industry, taking into account contractor investment and cash flow.

"(2) Appropriate adjustments to address contract and performance risk assumed by the contractor, taking into account the extent to which such risk is passed on to subcontractors.

"(3) Appropriate incentives for superior performance in delivering quality products and services in a timely and cost-effective manner, taking into account such factors as prime contractor cost reduction, control of overhead costs, subcontractor cost reduction, subcontractor management, and effective competition (including the use of small business) at the subcontract level.

"(c) MODIFICATION OF GUIDELINES.—Not later than 180 days after the date of the enactment of this Act [Jan. 2, 2013], the Secretary shall modify the profit guidelines described in subsection (a) to make such changes as the Secretary determines to be appropriate based on the review conducted pursuant to that subsection."

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

13. Section 843 of the National Defense Authorization Act for Fiscal Year 2013, P.L. 112–239, Jan. 2, 2013 (10 U.S.C. 2302 note), provided:

“SEC. 843. RESPONSIBILITY WITHIN DEPARTMENT OF DEFENSE FOR OPERATIONAL CONTRACT SUPPORT.

"(a) GUIDANCE REQUIRED.—Not later than one year after the date of the enactment of this Act [Jan. 2, 2013], the Secretary of Defense shall develop and issue guidance establishing the chain of authority and responsibility within the Department of Defense for policy, planning, and execution of operational contract support.

"(b) ELEMENTS.—The guidance under subsection (a) shall, at a minimum—

"(1) specify the officials, offices, and components of the Department within the chain of authority and responsibility described in subsection (a);

"(2) identify for each official, office, and component specified under paragraph (1)—

"(A) requirements for policy, planning, and execution of contract support for operational contract support, including, at a minimum, requirements in connection with-

"(i) coordination of functions, authorities, and responsibilities related to operational contract support, including coordination with relevant Federal agencies;

"(ii) assessments of total force data in support of Department force planning scenarios, including the appropriateness of and necessity for the use of contractors for identified functions;

"(iii) determinations of capability requirements for nonacquisition community operational contract support, and identification of resources required for planning, training, and execution to meet such requirements; and

"(iv) determinations of policy regarding the use of contractors by function, and identification of the training exercises that will be required for operational contract support (including an assessment [of] whether or not such exercises will include contractors); and

"(B) roles, authorities, responsibilities, and lines of supervision for the achievement of the requirements identified under subparagraph (A); and

"(3) ensure that the chain of authority and responsibility described in subsection (a) is appropriately aligned with, and appropriately integrated into, the structure of the Department for the conduct of overseas contingency operations, including the military departments, the Joint Staff, and the commanders of the unified combatant commands."

14. Section 844 of the National Defense Authorization Act for Fiscal Year 2013, P.L. 112–239, Jan. 2, 2013 (10 U.S.C. 2302 note), provided:

“SEC. 844. DATA COLLECTION ON CONTRACT SUPPORT FOR FUTURE OVERSEAS CONTINGENCY OPERATIONS INVOLVING COMBAT OPERATIONS.

"(a) IN GENERAL.—Not later than one year after the date of the enactment of this Act [Jan. 2, 2013], the Secretary of Defense, the Secretary of State, and the Administrator of the United States Agency for International Development shall each issue guidance regarding data collection on contract support for future contingency operations outside the United States that involve combat operations.

"(b) ELEMENTS.—The guidance required by subsection (a) shall ensure that the Department of Defense, the Department of State, and the United States Agency for International Development take the steps necessary to ensure that each agency has the capability to collect and report, at a minimum, the following data regarding such contract support:

"(1) The total number of contracts entered into as of the date of any report.

"(2) The total number of such contracts that are active as of such date.

"(3) The total value of contracts entered into as of such date.

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"(4) The total value of such contracts that are active as of such date.

"(5) An identification of the extent to which the contracts entered into as of such date were entered into using competitive procedures.

"(6) The total number of contractor personnel working under contracts entered into as of the end of each calendar quarter during the one-year period ending on such date.

"(7) The total number of contractor personnel performing security functions under contracts entered into as of the end of each calendar quarter during the one-year period ending on such date.

"(8) The total number of contractor personnel killed or wounded under any contracts entered into.

"(c) COMPTROLLER GENERAL REVIEW AND REPORT.—

"(1) REVIEW.—The Comptroller General of the United States shall review the data system or systems established to track contractor data pursuant to subsections (a) and (b). The review shall, with respect to each such data system, at a minimum—

"(A) identify each such data system and assess the resources needed to sustain such system;

"(B) determine if all such data systems are interoperable, use compatible data standards, and meet the requirements of [section 2222 of title 10, United States Code](#); and

"(C) make recommendations on the steps that the Department of Defense, the Department of State, and the United States Agency for International Development should take to ensure that all such data systems—

"(i) meet the requirements of the guidance issued pursuant to subsections (a) and (b);

"(ii) are interoperable, use compatible data standards, and meet the requirements of section 2222 of such title; and

"(iii) are supported by appropriate business processes and rules to ensure the timeliness and reliability of data.

"(2) REPORT.—Not later than two years after the date of the enactment of this Act, the Comptroller General shall submit a report on the review required by paragraph (1) to the following committees:

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

"(B) The Committee on Foreign Relations and the Committee on Homeland Security and Governmental Affairs of the Senate.

"(C) The Committee on Foreign Affairs and the Committee on Oversight and Government Reform of the House of Representatives."

15. Section 818(g) of the National Defense Authorization Act for Fiscal Year 2012, P. L. 112–81 (10 U.S.C. 2302 note), as amended, provides:

“SEC. 818. DETECTION AND AVOIDANCE OF COUNTERFEIT ELECTRONIC PARTS.

"(a) ASSESSMENT OF DEPARTMENT OF DEFENSE POLICIES AND SYSTEMS.—***

"(g) INFORMATION SHARING.—

"(1) IN GENERAL.—If United States Customs and Border Protection suspects a product of being imported in violation of section 42 of the Lanham Act [15 U.S.C. 1124], and subject to any applicable bonding requirements, the Secretary of the Treasury may share information appearing on, and unredacted samples of, products and their packaging and labels, or photographs of such products, packaging, and labels, with the rightholders of the trademarks suspected of being copied or simulated for purposes of determining whether the products are prohibited from importation pursuant to such section.

"(2) SUNSET.—This subsection shall expire on the date of the enactment of the Customs Facilitation and Trade Enforcement Reauthorization Act of 2012.

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"(3) LANHAM ACT DEFINED.—In this subsection, the term 'Lanham Act' means the Act entitled 'An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes', approved July 5, 1946 (commonly referred to as the 'Trademark Act of 1946' or the 'Lanham Act') [15 U.S.C. 1051 et seq.]."

P. L. 114–125, §302(b), Feb. 24, 2016, 130 Stat. 150, provided that: "Notwithstanding paragraph (2) of section 818(g) of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1496; 10 U.S.C. 2302 note) [set out above], paragraph (1) of that section shall have no force or effect on or after the date of the enactment of this Act [Feb. 24, 2016]."

16. Section 127 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, P.L. 111–383, Jan. 7, 2011 (**10 U.S.C. 2302 note**), provided:

“SEC. 127. CONTRACTS FOR COMMERCIAL IMAGING SATELLITE CAPACITIES.

"(a) TELESCOPE REQUIREMENTS UNDER CONTRACTS AFTER 2010.—Except as provided in subsection (b), any contract for additional commercial imaging satellite capability or capacity entered into by the Department of Defense after December 31, 2010, shall require that the imaging telescope providing such capability or capacity under such contract has an aperture of not less than 1.5 meters.

"(b) WAIVER.—The Secretary of Defense may waive the limitation in subsection (a) if-

"(1) the Secretary submits to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] written certification that the waiver is in the national security interests of the United States; and

"(2) a period of 30 days has elapsed following the date on which the certification under paragraph (1) is submitted.

"(c) CONTINUATION OF CURRENT CONTRACTS.—The limitation in subsection (a) may not be construed to prohibit or prevent the Secretary of Defense from continuing or maintaining current commercial imaging satellite capability or capacity in orbit or under contract by December 31, 2010."

17. Section 815(b) of the National Defense Authorization Act for Fiscal Year 2008, P.L. 110–181, Jan. 28, 2008 (**10 U.S.C. 2302 note**), provided:

“SEC. 815. CLARIFICATION OF RULES REGARDING THE PROCUREMENT OF COMMERCIAL ITEMS.

(a) [amended 10 U.S.C. 2379 & 2321(f)]

"(b) SALES OF COMMERCIAL ITEMS TO NONGOVERNMENTAL ENTITIES.—Not later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense shall modify the regulations of the Department of Defense on the procurement of commercial items in order to clarify that the terms 'general public' and 'nongovernmental entities' in such regulations do not include the Federal Government or a State, local, or foreign government."

18. Section 812 of the John Warner National Defense Authorization Act for Fiscal Year 2007, P.L. 109-364, Oct. 17, 2006 (**10 U.S.C. 2302 note**), as amended, provides:

“SEC. 812. PILOT PROGRAM ON TIME-CERTAIN DEVELOPMENT IN ACQUISITION OF MAJOR WEAPON SYSTEMS.

"(a) PILOT PROGRAM AUTHORIZED.—The Secretary of Defense may carry out a pilot program on the use of time-certain development in the acquisition of major weapon systems.

"(b) PURPOSE OF PILOT PROGRAM.—The purpose of the pilot program authorized by subsection (a)

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is to assess the feasibility and advisability of utilizing time-certain development in the acquisition of major weapon systems in order to deliver new capabilities to the warfighter more rapidly through—

- "(1) disciplined decision-making;
- "(2) emphasis on technological maturity; and
- "(3) appropriate trade-offs between—
 - "(A) cost and system performance; and
 - "(B) program schedule.

"(c) INCLUSION OF SYSTEMS IN PILOT PROGRAM.—

"(1) IN GENERAL.—The Secretary of Defense may include a major weapon system in the pilot program only if—

"(A) the major weapon system meets the criteria under paragraph (2) in accordance with that paragraph; and

"(B) the Milestone Decision Authority nominates such program to the Secretary of Defense for inclusion in the program.

"(2) CRITERIA.—For purposes of paragraph (1) a major weapon system meets the criteria under this paragraph only if the Milestone Decision Authority determines, in consultation with the service acquisition executive for the military department carrying out the acquisition program for the system and one or more combatant commanders responsible for fielding the system, that—

"(A) the certification requirements of section 2366b of title 10, United States Code (as amended by section 805 of this Act), have been met, and no waivers have been granted from such requirements;

"(B) a preliminary design has been reviewed using systems engineering, and the system, as so designed, will meet battlefield needs identified by the relevant combatant commanders after appropriate requirements analysis;

"(C) a representative model or prototype of the system, or key subsystems, has been demonstrated in a relevant environment, such as a well-simulated operational environment;

"(D) an independent cost estimate has been conducted and used as the basis for funding requirements for the acquisition program for the system;

"(E) the budget of the military department responsible for carrying out the acquisition program for the system provides the funding necessary to execute the product development and production plan consistent with the requirements identified pursuant to subparagraph (D);

"(F) an appropriately qualified program manager has entered into a performance agreement with the Milestone Decision Authority that establishes expected parameters for the cost, schedule, and performance of the acquisition program for the system, consistent with a business case for such acquisition program;

"(G) the service acquisition executive and the program manager have developed a strategy to ensure stability in program management until, at a minimum, the delivery of the initial operational capability under the acquisition program for the system has occurred;

"(H) the service acquisition executive, the relevant combatant commanders, and the program manager have agreed that no additional requirements that would be inconsistent with the agreed-upon program schedule will be added during the development phase of the acquisition program for the system; and

"(I) a planned initial operational capability will be delivered to the relevant combatant commanders within a defined period of time as prescribed in regulations by the Secretary of Defense.

"(3) TIMING OF DECISION.—The decision whether to include a major weapon system in the pilot program shall be made at the time of milestone approval for the acquisition program for the system.

"(d) LIMITATION ON NUMBER OF WEAPONS SYSTEMS IN PILOT PROGRAM.—The number of major weapon systems included in the pilot program at any time may not exceed six major weapon systems.

"(e) LIMITATION ON COST OF WEAPONS SYSTEMS IN PILOT PROGRAM.—The Secretary of Defense may include a major weapon system in the pilot program only if, at the time a major weapon system is proposed for inclusion, the total cost for system design and development of the weapon system, as set forth in the cost estimate referred to in subsection c)(2)(D), does not exceed \$1,000,000,000 during the period covered by the current future-years defense program.

"(f) SPECIAL FUNDING AUTHORITY.—

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(1) **AUTHORITY FOR RESERVE ACCOUNT.**—Notwithstanding any other provision of law, the Secretary of Defense may establish a special reserve account utilizing funds made available for the major weapon systems included in the pilot program.

"(2) **ELEMENTS.**—The special reserve account may include—

"(A) funds made available for any major weapon system included in the pilot program to cover termination liability;

"(B) funds made available for any major weapon system included in the pilot program for award fees that may be earned by contractors; and

"(C) funds appropriated to the special reserve account.

"(3) **AVAILABILITY OF FUNDS.**—Funds in the special reserve account may be used, in accordance with guidance issued by the Secretary for purposes of this section, for the following purposes:

"(A) To cover termination liability for any major weapon system included in the pilot program.

"(B) To pay award fees that are earned by any contractor for a major weapon system included in the pilot program.

"(C) To address unforeseen contingencies that could prevent a major weapon system included in the pilot program from meeting critical schedule or performance requirements.

"(4) **REPORTS ON USE OF FUNDS.**—Not later than 30 days after the use of funds in the special reserve account for the purpose specified in paragraph (3)(C), the Secretary shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the use of funds in the account for such purpose. The report shall set forth the purposes for which the funds were used and the reasons for the use of the funds for such purposes.

"(5) **RELATIONSHIP TO APPROPRIATIONS.**—Nothing in this subsection may be construed as extending any period of time for which appropriated funds are made available.

"(g) **ADMINISTRATION OF PILOT PROGRAM.**—The Secretary of Defense shall prescribe policies and procedures on the administration of the pilot program. Such policies and procedures shall—

"(1) provide for the use of program status reports based on earned value data to track progress on a major weapon system under the pilot program against baseline estimates applicable to such system at each systems engineering technical review point; and

"(2) grant authority, to the maximum extent practicable, to the program manager for the acquisition program for a major weapon system to make key program decisions and trade-offs, subject to management reviews only if cost or schedule deviations exceed the baselines for such acquisition program by 10 percent or more.

"(h) **REMOVAL OF WEAPONS SYSTEMS FROM PILOT PROGRAM.**—The Secretary of Defense shall remove a major weapon system from the pilot program if—

"(1) the weapon system receives Milestone C approval; or

"(2) the Secretary determines that the weapon system is no longer in substantial compliance with the criteria in subsection (c)(2) or is otherwise no longer appropriate for inclusion in the pilot program.

"(i) **EXPIRATION OF AUTHORITY TO INCLUDE ADDITIONAL SYSTEMS IN PILOT PROGRAM.**—

"(1) **EXPIRATION.**—A major weapon system may not be included in the pilot program after **September 30, 2012.**

"(2) **RETENTION OF SYSTEMS.**—A major weapon system included in the pilot program before the date specified in paragraph (1) in accordance with the requirements of this section may remain in the pilot program after that date.

"(j) **ANNUAL REPORT.**—

"(1) **IN GENERAL.**—Not later than one year after including the first major weapon system in the pilot program, and annually thereafter, the Secretary shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the pilot program, and the major weapon systems included in the pilot program, during the one-year period ending on the date of such report.

"(2) **ELEMENTS.**—Each report under this subsection shall include—

"(A) a description of progress under the pilot program, and on each major weapon system included in the pilot program, during the period covered by such report;

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(B) a description of the use of all funds in the special reserve account established under subsection (f); and

"(C) such other matters as the Secretary considers appropriate.

"(k) MAJOR WEAPON SYSTEM DEFINED.—In this section, the term 'major weapon system' means a weapon system that is treatable as a major system under section 2302(5) of title 10, United States Code."

19. Section 806 of the National Defense Authorization Act for Fiscal Year 2006, P.L. 109–163, Jan. 6, 2006 (10 U.S.C. 2302 note), provided:

“SEC. 806. CONGRESSIONAL NOTIFICATION OF CANCELLATION OF MAJOR AUTOMATED INFORMATION SYSTEMS.

"(a) REPORT REQUIRED.—The Secretary of Defense shall notify the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] not less than 60 days before cancelling a major automated information system program that has been fielded or approved to be fielded, or making a change that will significantly reduce the scope of such a program, of the proposed cancellation or change.

"(b) CONTENT.—Each notification submitted under subsection (a) with respect to a proposed cancellation or change shall include—

"(1) the specific justification for the proposed cancellation or change;

"(2) a description of the impact of the proposed cancellation or change on the ability of the Department to achieve the objectives of the program proposed for cancellation or change;

"(3) a description of the steps that the Department plans to take to achieve those objectives; and

"(4) other information relevant to the change in acquisition strategy.

"(c) DEFINITIONS.—In this section:

"(1) The term 'major automated information system' has the meaning given that term in Department of Defense directive 5000.1.

"(2) The term 'approved to be fielded' means having received Milestone C approval."

20. Section 817 of the National Defense Authorization Act for Fiscal Year 2006, P.L. 109-163 (10 U.S.C. 2302 note), provides:

“SEC. 817. JOINT POLICY ON CONTINGENCY CONTRACTING.

"(a) JOINT POLICY.—

"(1) REQUIREMENT.—Not later than one year after the date of the enactment of this Act [Jan. 6, 2006], the Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, shall develop a joint policy for contingency contracting during combat operations and post-conflict operations.

"(2) MATTERS COVERED.—The joint policy for contingency contracting required by paragraph (1) shall, at a minimum, provide for—

"(A) the designation of a senior commissioned officer in each military department with the responsibility for administering the policy;

"(B) the assignment of a senior commissioned officer with appropriate acquisition experience and qualifications to act as head of contingency contracting during combat operations, post-conflict operations, and contingency operations, who shall report directly to the commander of the combatant command in whose area of responsibility the operations occur;

"(C) an organizational approach to contingency contracting that is designed to ensure that each military department is prepared to conduct contingency contracting during combat operations and post-conflict operations;

"(D) a requirement to provide training (including training under a program to be created by the Defense Acquisition University) to contingency contracting personnel in—

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(i) the use of law, regulations, policies, and directives related to contingency contracting operations;

"(ii) the appropriate use of rapid acquisition methods, including the use of exceptions to competition requirements under section 2304 of title 10, United States Code, sealed bidding, letter contracts, indefinite delivery indefinite quantity task orders, set asides under section 8(a) of the Small Business Act (15 U.S.C. 637(a)), undefinitized contract actions, and other tools available to expedite the delivery of goods and services during combat operations or post-conflict operations;

"(iii) the appropriate use of rapid acquisition authority, commanders' emergency response program funds, and other tools unique to contingency contracting; and

"(iv) instruction on the necessity for the prompt transition from the use of rapid acquisition authority to the use of full and open competition and other methods of contracting that maximize transparency in the acquisition process;

"(E) appropriate steps to ensure that training is maintained for such personnel even when they are not deployed in a contingency operation; and

"(F) such steps as may be needed to ensure jointness and cross-service coordination in the area of contingency contracting.

"(b) REPORTS.—

"(1) INTERIM REPORT.—

"(A) REQUIREMENT.—Not later than 270 days after the date of the enactment of this Act [Jan. 6, 2006], the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives an interim report on contingency contracting.

"(B) MATTERS COVERED.—The report shall include discussions of the following:

"(i) Progress in the development of the joint policy under subsection (a).

"(ii) The ability of the Armed Forces to support contingency contracting.

"(iii) The ability of commanders of combatant commands to request contingency contracting support and the ability of the military departments and the acquisition support agencies to respond to such requests and provide such support, including the availability of rapid acquisition personnel for such support.

"(iv) The ability of the current civilian and military acquisition workforce to deploy to combat theaters of operations and to conduct contracting activities during combat and during post-conflict, reconstruction, or other contingency operations.

"(v) The effect of different periods of deployment on continuity in the acquisition process.

"(2) FINAL REPORT.—Not later than 18 months after the date of the enactment of this Act [Jan. 6, 2006], the Secretary of Defense shall submit to the committees listed in paragraph (1)(A) a final report on contingency contracting, containing a discussion of the implementation of the joint policy developed under subsection (a), including updated discussions of the matters covered in the interim report.

"(c) DEFINITIONS.—In this section:

"(1) CONTINGENCY CONTRACTING PERSONNEL.—The term 'contingency contracting personnel' means members of the Armed Forces and civilian employees of the Department of Defense who are members of the defense acquisition workforce and, as part of their duties, are assigned to provide support to contingency operations (whether deployed or not).

"(2) CONTINGENCY CONTRACTING.—The term 'contingency contracting' means all stages of the process of acquiring property or services by the Department of Defense during a contingency operation.

"(3) CONTINGENCY OPERATION.—The term 'contingency operation' has the meaning provided in section 101(13) of title 10, United States Code.

"(4) ACQUISITION SUPPORT AGENCIES.—The term 'acquisition support agencies' means Defense Agencies and Department of Defense Field Activities that carry out and provide support for acquisition-related activities."

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

21. Section 141 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, P.L. 108–375, Oct. 28, 2004 (**10 U.S.C. 2302 note**) , provided:

“SEC. 141. DEVELOPMENT OF DEPLOYABLE SYSTEMS TO INCLUDE CONSIDERATION OF FORCE PROTECTION IN ASYMMETRIC THREAT ENVIRONMENTS.

"(a) **REQUIREMENT FOR SYSTEMS DEVELOPMENT.**—The Secretary of Defense shall require that the Department of Defense regulations, directives, and guidance governing the acquisition of covered systems be revised to require that-

"(1) an assessment of warfighter survivability and of system suitability against asymmetric threats shall be performed as part of the development of system requirements for any such system; and

"(2) requirements for key performance parameters for force protection and survivability shall be included as part of the documentation of system requirements for any such system.

"(b) **COVERED SYSTEMS.**—In this section, the term 'covered system' means any of the following systems that is expected to be deployed in an asymmetric threat environment:

"(1) Any manned system.

"(2) Any equipment intended to enhance personnel survivability.

"(c) **INAPPLICABILITY OF DEVELOPMENT REQUIREMENT TO SYSTEMS ALREADY THROUGH DEVELOPMENT.**—The revisions pursuant subsection (a) to Department of Defense regulations, directives, and guidance shall not apply to a system that entered low-rate initial production before the date of the enactment of this Act [Oct. 28, 2004].

"(d) **DEADLINE FOR POLICY REVISIONS.**—The revisions required by subsection (a) to Department of Defense regulations, directives, and guidance shall be made not later than 120 days after the date of the enactment of this Act [Oct. 28, 2004]."

22. Section 802 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, P.L. 108–375, Oct. 28, 2004 (**10 U.S.C. 2302 note**), as amended, provided:

“SEC. 802. INTERNAL CONTROLS FOR DEPARTMENT OF DEFENSE PROCUREMENTS THROUGH GSA CLIENT SUPPORT CENTERS.

"(a) **INITIAL INSPECTOR GENERAL REVIEW AND DETERMINATION.**—(1) Not later than March 15, 2005, the Inspector General of the Department of Defense and the Inspector General of the General Services Administration shall jointly—

"(A) review—

"(i) the policies, procedures, and internal controls of each GSA Client Support Center; and

"(ii) the administration of those policies, procedures, and internal controls; and

"(B) for each such Center, determine in writing whether—

"(i) the Center is compliant with defense procurement requirements;

"(ii) the Center is not compliant with defense procurement requirements, but the Center made significant progress during 2004 toward becoming compliant with defense procurement requirements; or

"(iii) neither of the conclusions stated in clauses (i) and (ii) is correct.

"(2) If the Inspectors General determine under paragraph (1) that the conclusion stated in clause (ii) or (iii) of subparagraph (B) of such paragraph is correct in the case of a GSA Client Support Center, those Inspectors General shall, not later than March 15, 2006, jointly—

"(A) conduct a second review regarding that GSA Client Support Center as described in paragraph (1)(A); and

"(B) determine in writing whether that GSA Client Support Center is or is not compliant with defense procurement requirements.

"(b) **COMPLIANCE WITH DEFENSE PROCUREMENT REQUIREMENTS.**—For the purposes of this section, a GSA Client Support Center is compliant with defense procurement requirements if the GSA Client Support Center's policies, procedures, and internal controls, and the manner in which they are administered, are adequate to ensure

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

compliance of that Center with the requirements of laws and regulations that apply to procurements of property and services made directly by the Department of Defense.

"(c) LIMITATIONS ON PROCUREMENTS THROUGH GSA CLIENT SUPPORT CENTERS.—(1) After March 15, 2005, and before March 16, 2006, no official of the Department of Defense may, except as provided in subsection (d) or (e), order, purchase, or otherwise procure property or services in an amount in excess of \$100,000 through any GSA Client Support Center for which a determination described in paragraph (1)(B)(iii) of subsection (a) has been made under that subsection.

"(2) After March 15, 2006, no official of the Department of Defense may, except as provided in subsection (d) or (e), order, purchase, or otherwise procure property or services in an amount in excess of \$100,000 through any GSA Client Support Center that has not been determined under this section as being compliant with defense procurement requirements.

"(d) EXCEPTION FROM APPLICABILITY OF LIMITATIONS.—(1) No limitation applies under subsection (c) with respect to the procurement of property and services from a particular GSA Client Support Center during any period that there is in effect a determination of the Under Secretary of Defense for Acquisition, Technology, and Logistics, made in writing, that it is necessary in the interest of the Department of Defense to continue to procure property and services through that GSA Client Support Center.

"(2) A written determination with respect to a GSA Client Support Center under paragraph (1) is in effect for the period, not in excess of one year, that the Under Secretary of Defense for Acquisition, Technology, and Logistics shall specify in the written determination. The Under Secretary may extend from time to time, for up to one year at a time, the period for which the written determination remains in effect.

"(e) TERMINATION OF APPLICABILITY OF LIMITATIONS.—Subsection (c) shall cease to apply to a GSA Client Support Center on the date on which the Inspector General of the Department of Defense and the Inspector General of the General Services Administration jointly determine that such Center is compliant with defense procurement requirements and notify the Secretary of Defense of that determination.

"(f) GSA CLIENT SUPPORT CENTER DEFINED.—In this section, the term 'GSA Client Support Center' means a Client Support Center of the Federal Acquisition Service of the General Services Administration."

23. Section 801(b) of the National Defense Authorization Act for Fiscal Year 2004, P.L. 108–136, Nov. 24, 2003 (10 U.S.C. 2302 note), provided:

“SEC. 801. CONSOLIDATION OF CONTRACT REQUIREMENTS.

(a) AMENDMENT TO TITLE 10.—[added sec. 2382 to title 10, U.S.C.]

(b) DATE REVIEW.—

"(1) The Secretary of Defense shall revise the data collection systems of the Department of Defense to ensure that such systems are capable of identifying each procurement that involves a consolidation of contract requirements within the department with a total value in excess of \$5,000,000.

"(2) The Secretary shall ensure that appropriate officials of the Department of Defense periodically review the information collected pursuant to paragraph (1) in cooperation with the Small Business Administration—

"(A) to determine the extent of the consolidation of contract requirements in the Department of Defense; and

"(B) to assess the impact of the consolidation of contract requirements on the availability of opportunities for small business concerns to participate in Department of Defense procurements, both as prime contractors and as subcontractors.

"(3) In this subsection:

"(A) The term 'consolidation of contract requirements' has the meaning given that term in [former] section 2382(c)(1) of title 10, United States Code, as added by subsection (a).

"(B) The term 'small business concern' means a business concern that is determined by the Administrator of the Small Business Administration to be a small-business concern by application of the standards prescribed under section 3(a) of the Small Business Act (15 U.S.C. 632(a))."

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

24. Section 805(a) of the National Defense Authorization Act for Fiscal Year 2004, P.L. 108–136, Nov. 24, 2003 (**10 U.S.C. 2302 note**), provided:

“SEC. 805. COMPETITIVE AWARD OF CONTRACTS FOR RECONSTRUCTION ACTIVITIES IN IRAQ.

"(a) COMPETITIVE AWARD OF CONTRACTS.—The Department of Defense shall fully comply with [chapter 137 of title 10, United States Code](#), and other applicable procurement laws and regulations for any contract awarded for reconstruction activities in Iraq, and shall conduct a full and open competition for performing work needed for the reconstruction of the Iraqi oil industry.

(b) REPORT.—[omitted]"

25. Section 352 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, P.L. 107–314, §352, Dec. 2, 2002 (**10 U.S.C. 2302 note**), provided:

“SEC. 352. POLICY REGARDING ACQUISITION OF INFORMATION ASSURANCE AND INFORMATION ASSURANCE-ENABLED INFORMATION TECHNOLOGY PRODUCTS.

"(a) ESTABLISHMENT OF POLICY.—The Secretary of Defense shall establish a policy to limit the acquisition of information assurance and information assurance-enabled information technology products to those products that have been evaluated and validated in accordance with appropriate criteria, schemes, or programs.

"(b) WAIVER.—As part of the policy, the Secretary of Defense shall authorize specified officials of the Department of Defense to waive the limitations of the policy upon a determination in writing that application of the limitations to the acquisition of a particular information assurance or information assurance-enabled information technology product would not be in the national security interest of the United States.

"(c) IMPLEMENTATION.—The Secretary of Defense shall ensure that the policy is uniformly implemented throughout the Department of Defense."

26. Section 326 of the National Defense Authorization Act for Fiscal Year 1993, P.L. 102–484, Oct. 23, 1992 (**10 U.S.C. 2302 note**), as amended, provided:

“SEC. 326. ELIMINATION OF USE OF CLASS I OZONE-DEPLETING SUBSTANCES IN CERTAIN MILITARY PROCUREMENT CONTRACTS.

"(a) ELIMINATION OF USE OF CLASS I OZONE-DEPLETING SUBSTANCES.—(1) No Department of Defense contract awarded after June 1, 1993, may include a specification or standard that requires the use of a class I ozone-depleting substance or that can be met only through the use of such a substance unless the inclusion of the specification or standard in the contract is approved by the senior acquisition official for the procurement covered by the contract. The senior acquisition official may grant the approval only if the senior acquisition official determines (based upon the certification of an appropriate technical representative of the official) that a suitable substitute for the class I ozone-depleting substance is not currently available.

"(2)(A)(i) Not later than 60 days after the completion of the first modification, amendment, or extension after June 1, 1993, of a contract referred to in clause (ii), the senior acquisition official (or the designee of that official) shall carry out an evaluation of the contract in order to determine-

"(I) whether the contract includes a specification or standard that requires the use of a class I ozone-depleting substance or can be met only through the use of such a substance; and

"(II) in the event of a determination that the contract includes such a specification or standard, whether the contract can be carried out through the use of an economically feasible substitute for the ozone-depleting substance or through the use of an economically feasible alternative technology for a technology involving the use of the ozone-depleting substance.

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(ii) A contract referred to in clause (i) is any contract in an amount in excess of \$10,000,000 that-

"(I) was awarded before June 1, 1993; and

"(II) as a result of the modification, amendment, or extension described in clause (i), will expire more than 1 year after the effective date of the modification, amendment, or extension.

"(iii) A contract under evaluation under clause (i) may not be further modified, amended, or extended until the evaluation described in that clause is complete.

"(B) If the acquisition official (or designee) determines that an economically feasible substitute substance or alternative technology is available for use in a contract under evaluation, the appropriate contracting officer shall enter into negotiations to modify the contract to require the use of the substitute substance or alternative technology.

"(C) A determination that a substitute substance or technology is not available for use in a contract under evaluation shall be made in writing by the senior acquisition official (or designee).

"(D) The Secretary of Defense may, consistent with the Federal Acquisition Regulation, adjust the price of a contract modified under subparagraph (B) to take into account the use by the contractor of a substitute substance or alternative technology in the modified contract.

"(3) The senior acquisition official authorized to grant an approval under paragraph (1) and the senior acquisition official and designees authorized to carry out an evaluation and make a determination under paragraph (2) shall be determined under regulations prescribed by the Secretary of Defense. A senior acquisition official may not delegate the authority provided in paragraph (1).

"(4) Each official who grants an approval authorized under paragraph (1) or makes a determination under paragraph (2)(B) shall submit to the Secretary of Defense a report on that approval or determination, as the case may be, as follows:

"(A) Beginning on October 1, 1993, and continuing for 8 calendar quarters thereafter, by submitting a report on the approvals granted or determinations made under such authority during the preceding quarter not later than 30 days after the end of such quarter.

"(B) Beginning on January 1, 1997, and continuing for 4 years thereafter, by submitting a report on the approvals granted or determinations made under such authority during the preceding year not later than 30 days after the end of such year.

"(5) The Secretary shall promptly transmit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives each report submitted to the Secretary under paragraph (4). The Secretary shall transmit the report in classified and unclassified forms.

"(b) COST RECOVERY.—In any case in which a Department of Defense contract is modified or a specification or standard for such a contract is waived at the request of a contractor in order to permit the contractor to use in the performance of the contract a substitute for a class I ozone-depleting substance or an alternative technology for a technology involving the use of a class I ozone-depleting substance, the Secretary of Defense may adjust the price of the contract in a manner consistent with the Federal Acquisition Regulation.

"(c) DEFINITIONS.—In this section:

"(1) The term 'class I ozone-depleting substance' means any substance listed under section 602(a) of the Clean Air Act (42 U.S.C. 7671a(a)).

"(2) The term 'Federal Acquisition Regulation' means the single Government-wide procurement regulation issued under section 1303(a) of title 41, United States Code."

27. Section 9004 of the Department of Defense Appropriations Act, 1990, P.L. 101–165, Nov. 21, 1989 (10 U.S.C. 2302 note), provided:

**“EQUITABLE PARTICIPATION OF AMERICAN SMALL AND MINORITY-OWNED
BUSINESS IN FURNISHING OF COMMODITIES AND SERVICES.**

"SEC. 9004. During the current fiscal year and hereafter, the Secretary of Defense and each purchasing and contracting agency of the Department of Defense shall assist American small and minority-owned business to participate equitably in the furnishing of commodities and services financed with funds appropriated under this Act [see Tables for classification] by increasing, to an optimum level, the resources and number of personnel jointly assigned to promoting both small and minority business involvement in purchases financed with funds appropriated herein, and by making available or causing to be made available to such businesses, information, as

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

far in advance as possible, with respect to purchases proposed to be financed with funds appropriated under this Act, and by assisting small and minority business concerns to participate equitably as subcontractors on contracts financed with funds appropriated herein, and by otherwise advocating and providing small and minority business opportunities to participate in the furnishing of commodities and services financed with funds appropriated by this Act."

28. Section 913 of the Department of Defense Authorization Act, 1986, P.L. 99–145, Nov. 8, 1985 (10 U.S.C. 2302 note), as amended, provided:

“SEC. 913. MINIMUM PERCENTAGE OF COMPETITIVE PROCUREMENTS.

"(a) ANNUAL GOAL.—The Secretary of Defense shall establish for each fiscal year a goal for the percentage of defense procurements to be made during that year (expressed in total dollar value of contracts entered into) that are to be competitive procurements.

"(b) DEFINITION.—For the purposes of this section, the term 'competitive procurements' means procurements made by the Department of Defense through the use of competitive procedures, as defined in [section 2304 of title 10, United States Code](#)."

29. Section 802 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, P.L. 110–417, Oct. 14, 2008 (10 U.S.C. 2304 note) provided:

“SEC. 802. IMPLEMENTATION OF STATUTORY REQUIREMENTS REGARDING THE NATIONAL TECHNOLOGY AND INDUSTRIAL BASE.

"(a) GUIDANCE REQUIRED.—Not later than 270 days after the date of the enactment of this Act [Oct. 14, 2008], the Secretary of Defense shall issue guidance regarding—

"(1) the appropriate application of the authority in [sections 2304\(b\) and 2304\(c\)\(3\)\(A\) of title 10, United States Code](#), in connection with major defense acquisition programs; and

"(2) the appropriate timing and performance of the requirement in [section 2440 of title 10, United States Code](#), to consider the national technology and industrial base in the development and implementation of acquisition plans for each major defense acquisition program.

"(b) DEFINITIONS.—In this section;[:]

"(1) MAJOR DEFENSE ACQUISITION PROGRAM.—The term 'major defense acquisition program' has the meaning provided in [section 2430 of title 10, United States Code](#).

"(2) NATIONAL TECHNOLOGY AND INDUSTRIAL BASE.—The term 'national technology and industrial base' has the meaning provided in [section 2500\(1\) of title 10, United States Code](#)."

30. Section 821 of the National Defense Authorization Act for Fiscal Year 2008, P.L. 110–181, Jan. 28, 2008 (10 U.S.C. 2304 note), as amended, provided:

“SEC. 821. PLAN FOR RESTRICTING GOVERNMENT-UNIQUE CONTRACT CLAUSES ON COMMERCIAL CONTRACTS.

"(a) PLAN.—The Under Secretary of Defense for Acquisition, Technology, and Logistics shall develop and implement a plan to minimize the number of government-unique contract clauses used in commercial contracts by restricting the clauses to the following:

"(1) Government-unique clauses authorized by law or regulation.

"(2) Any additional clauses that are relevant and necessary to a specific contract.

"(b) COMMERCIAL CONTRACT.—In this section:

"(1) The term 'commercial contract' means a contract awarded by the Federal Government for the procurement of a commercial item.

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(2) The term 'commercial item' has the meaning provided by [section 103 of title 41, United States Code](#)."

31. Section 813 of the John Warner National Defense Authorization Act for Fiscal Year 2007, P.L. 109–364, Oct. 17, 2006 (**10 U.S.C. 2304 note**), as amended, provided:

“SEC. 813. PANEL ON CONTRACTING INTEGRITY.

"(a) ESTABLISHMENT.—

"(1) IN GENERAL.—The Secretary of Defense shall establish a panel to be known as the 'Panel on Contracting Integrity'.

"(2) COMPOSITION.—The panel shall be composed of the following:

"(A) A representative of the Under Secretary of Defense for Acquisition, Technology, and Logistics, who shall be the chairman of the panel.

"(B) A representative of the service acquisition executive of each military department.

"(C) A representative of the Inspector General of the Department of Defense.

"(D) A representative of the Inspector General of each military department.

"(E) A representative of each Defense Agency involved with contracting, as determined appropriate by the Secretary of Defense.

"(F) Such other representatives as may be determined appropriate by the Secretary of Defense.

"(b) DUTIES.—In addition to other matters assigned to it by the Secretary of Defense, the panel shall—

"(1) conduct reviews of progress made by the Department of Defense to eliminate areas of vulnerability of the defense contracting system that allow fraud, waste, and abuse to occur;

"(2) review the report by the Comptroller General required by section 841 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109–163; 119 Stat. 3389), relating to areas of vulnerability of Department of Defense contracts to fraud, waste, and abuse; and

"(3) recommend changes in law, regulations, and policy that it determines necessary to eliminate such areas of vulnerability.

"(c) MEETINGS.—The panel shall meet as determined necessary by the Secretary of Defense but not less often than once every six months.

"(d) REPORT.—

"(1) REQUIREMENT.—The panel shall prepare and submit to the Secretary of Defense and the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] an annual report on its activities. The report shall be submitted not later than December 31 of each year and contain a summary of the panel's findings and recommendations for the year covered by the report.

"(2) FIRST REPORT.—The first report under this subsection shall be submitted not later than December 31, 2007, and shall contain an examination of the current structure in the Department of Defense for contracting integrity and recommendations for any changes needed to the system of administrative safeguards and disciplinary actions to ensure accountability at the appropriate level for any violations of appropriate standards of behavior in contracting.

"(3) INTERIM REPORTS.—The panel may submit such interim reports to the congressional defense committees as the Secretary of Defense considers appropriate.

"(e) TERMINATION.—

"(1) IN GENERAL.—Subject to paragraph (2), the panel shall continue to serve until the date that is 18 months after the date on which the Secretary of Defense notifies the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] of an intention to terminate the panel based on a determination that the activities of the panel no longer justify its continuation and that concerns about contracting integrity have been mitigated.

"(2) MINIMUM CONTINUING SERVICE.—The panel shall continue to serve at least until December 31, 2011."

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

32. Section 391 of the National Defense Authorization Act for Fiscal Year 1998, P.L. 105–85, Nov. 18, 1997 (**10 U.S.C. 2304 note**), as amended, provided:

“SEC. 391. WARRANTY CLAIMS RECOVERY PILOT PROGRAM.

"(a) **PILOT PROGRAM REQUIRED.**—The Secretary of Defense may carry out a pilot program to use commercial sources of services to improve the collection of Department of Defense claims under aircraft engine warranties.

"(b) **CONTRACTS.**—Exercising the authority provided in [section 3718 of title 31, United States Code](#), the Secretary of Defense may enter into contracts under the pilot program to provide for the following services:

"(1) Collection services.

"(2) Determination of amounts owed the Department of Defense for repair of aircraft engines for conditions covered by warranties.

"(3) Identification and location of the sources of information that are relevant to collection of Department of Defense claims under aircraft engine warranties, including electronic data bases and document filing systems maintained by the Department of Defense or by the manufacturers and suppliers of the aircraft engines.

"(4) Services to define the elements necessary for an effective training program to enhance and improve the performance of Department of Defense personnel in collecting and organizing documents and other information that are necessary for efficient filing, processing, and collection of Department of Defense claims under aircraft engine warranties.

"(c) **CONTRACTOR FEE.**—Under the authority provided in [section 3718\(d\) of title 31, United States Code](#), a contract entered into under the pilot program shall provide for the contractor to be paid, out of the amount recovered by the contractor under the program, such percentages of the amount recovered as the Secretary of Defense determines appropriate.

"(d) **RETENTION OF RECOVERED FUNDS.**—Subject to any obligation to pay a fee under subsection (c), any amount collected for the Department of Defense under the pilot program for a repair of an aircraft engine for a condition covered by a warranty shall be credited to an appropriation available for repair of aircraft engines for the fiscal year in which collected and shall be available for the same purposes and same period as the appropriation to which credited.

"(e) **REGULATIONS.**—The Secretary of Defense shall prescribe regulations to carry out this section.

"(f) **TERMINATION OF AUTHORITY.**—The pilot program shall terminate on September 30, 2006, and contracts entered into under this section shall terminate not later than that date.

"(g) **REPORTING REQUIREMENT.**—Not later than February 1, 2006, the Secretary of Defense shall submit to Congress a report on the pilot program, including-

"(1) a description of the extent to which commercial firms have been used to provide the services specified in subsection (b) and the type of services procured;

"(2) a description of any problems that have limited the ability of the Secretary to utilize the pilot program to procure such services; and

"(3) the recommendation of the Secretary regarding whether the pilot program should be made permanent or extended beyond September 30, 2006."

33. Section 927(b) of P.L. 99–500, Oct. 18, 1986 (**10 U.S.C. 2304 note**), P.L. 99–591, Oct. 30, 1986, and P.L. 99–661, Nov. 14, 1986, P.L. 100–26, §3(5), Apr. 21, 1987, provided:

“SEC. 927. ALLOCATION OF OVERHEAD TO PARTS TO WHICH CONTRACTOR HAS ADDED LITTLE VALUE

(a) **IN GENERAL.**—[added section 2304(i) to title 10, U.S.C.]

"(b) **DEADLINE.**—The Secretary of Defense shall prescribe the regulations required by section 2304(i) of such title (as added by subsection (a)) not later than 180 days after the date of the enactment of this Act [Oct. 18, 1986]."

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

34. Section 1222(b) of the National Defense Authorization Act for Fiscal Year 1987, P.L. 99–661, Nov. 14, 1986 (**10 U.S.C. 2304 note**) provided:

“SEC. 1222. PROHIBITION ON CONTRACTS FOR PERFORMANCE OF FIREFIGHTING AND SECURITY FUNCTIONS.

(a) *** [added section 2693 to title 10, U.S.C.]

“(b) ONE-YEAR SECURITY-GUARD PROHIBITION .—(1) Except as provided in paragraph (2), funds appropriated to the Department of Defense may not be obligated or expended before October 1, 1987, for the purpose of entering into a contract for the performance of security-guard functions at any military installation or facility.

“(2) The prohibition in paragraph (1) does not apply—

“(A) to a contract to be carried out at a location outside the United States (including its commonwealths, territories, and possessions) at which military personnel would have to be used for the performance of the function described in paragraph (1) at the expense of unit readiness;

“(B) to a contract to be carried out on a Government-owned but privately operated installation;

“(C) to a contract (or the renewal of a contract) for the performance of a function under contract on September 24, 1983; or

“(D) to a contract for the performance of security-guard functions if (i) the requirement for the functions arises after the date of the enactment of this Act [Nov. 14, 1986], and (ii) the Secretary of Defense determines the functions can be performed by contractor personnel without adversely affecting installation security, safety, or readiness.”

35. Section 814(b) of the National Defense Authorization Act for Fiscal Year 2010, P.L. 111–84, Oct. 28, 2009 (**10 U.S.C. 2304a note**), provides:

(b) CONGRESSIONAL INTELLIGENCE COMMITTEES.—In the case of a task or delivery order contract awarded with respect to intelligence activities of the Department of Defense, any notification **provided under [former] subparagraph (B)** of section 2304a(d)(3) of title 10, United States Code, as amended by subsection (a), **shall also be provided at the same time** as notification is provided to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] under that subparagraph—

(1) to the Permanent Select Committee on Intelligence of the House of Representatives insofar as such task or delivery order contract relates to tactical intelligence and intelligence-related activities of the Department; and

(2) to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives insofar as such task or delivery order contract relates to intelligence and intelligence-related activities of the Department other than those specified in paragraph (1).

NOTE: The requirement to provide a notification under subparagraph (B) of section 2304a(d)(3) of title 10, United States Code, terminated with the repeal of that subparagraph by section 809(b) of P. L. 112–81, Dec. 31, 2011, 125 Stat. 1490, so the requirement above to provide the notification at the same time to HPSCI and SSCI would appear to be moot.

36. Section 834 of the John Warner National Defense Authorization Act for Fiscal Year 2007, P.L. 109–364 (**10 U.S.C. 2304b note**), provides:

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

“SEC. 834. WAIVERS TO EXTEND TASK ORDER CONTRACTS FOR ADVISORY AND ASSISTANCE SERVICES.

“(a) DEFENSE CONTRACTS.—

“(1) WAIVER AUTHORITY.—The head of an agency may issue a waiver to extend a task order contract entered into under section 2304b of title 10, United States Code, for a period not exceeding 10 years, through five one-year options, if the head of the agency determines in writing—

“(A) that the contract provides engineering or technical services of such a unique and substantial technical nature that award of a new contract would be harmful to the continuity of the program for which the services are performed;

“(B) that award of a new contract would create a large disruption in services provided to the Department of Defense; and

“(C) that the Department of Defense would, through award of a new contract, endure program risk during critical program stages due to loss of program corporate knowledge of ongoing program activities.

“(2) DELEGATION.—The authority of the head of an agency under paragraph (1) may be delegated only to the senior procurement executive of the agency.

“(3) REPORT.—Not later than April 1, 2007, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on advisory and assistance services. The report shall include the following information:

“(A) The methods used by the Department of Defense to identify a contract as an advisory and assistance services contract, as defined in section 2304b of title 10, United States Code.

“(B) The number of such contracts awarded by the Department during the five-year period preceding the date of the enactment of this Act [Oct. 17, 2006].

“(C) The average annual expenditures by the Department for such contracts.

“(D) The average length of such contracts.

“(E) The number of such contracts recompeted and awarded to the previous award winner.

“(4) PROHIBITION ON USE OF AUTHORITY BY DEPARTMENT OF DEFENSE IF REPORT NOT SUBMITTED.—The head of an agency may not issue a waiver under paragraph (1) if the report required by paragraph (3) is not submitted by the date set forth in that paragraph.

“(b) CIVILIAN AGENCY CONTRACTS.—

“(1) WAIVER AUTHORITY.—The head of an executive agency may issue a waiver to extend a task order contract entered into under section 303I of the Federal Property and Administrative Services Act of 1949 ([former] 41 U.S.C. 253i) [see 41 U.S.C. 4105] for a period not exceeding 10 years, through five one-year options, if the head of the agency determines in writing—

“(A) that the contract provides engineering or technical services of such a unique and substantial technical nature that award of a new contract would be harmful to the continuity of the program for which the services are performed;

“(B) that award of a new contract would create a large disruption in services provided to the executive agency; and

“(C) that the executive agency would, through award of a new contract, endure program risk during critical program stages due to loss of program corporate knowledge of ongoing program activities.

“(2) DELEGATION.—The authority of the head of an executive agency under paragraph (1) may be delegated only to the Chief Acquisition Officer of the agency (or the senior procurement executive in the case of an agency for which a Chief Acquisition Officer has not been appointed or designated under section 16(a) of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 414(a)) [now 41 U.S.C. 1702(a), (b)(1), (2)]).

“(3) REPORT.—Not later than April 1, 2007, the Administrator for Federal Procurement Policy shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Government Reform of the House of Representatives a report on advisory and assistance services. The report shall include the following information:

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(A) The methods used by executive agencies to identify a contract as an advisory and assistance services contract, as defined in section 3031(i) of the Federal Property and Administrative Services Act of 1949 ([former] 41 U.S.C. 253i(i)) [now 41 U.S.C. 4105(a)].

"(B) The number of such contracts awarded by each executive agency during the five-year period preceding the date of the enactment of this Act [Oct. 17, 2006].

"(C) The average annual expenditures by each executive agency for such contracts.

"(D) The average length of such contracts.

"(E) The number of such contracts recompeted and awarded to the previous award winner.

"(4) PROHIBITION ON USE OF AUTHORITY BY EXECUTIVE AGENCIES IF REPORT NOT SUBMITTED.—The head of an executive agency may not issue a waiver under paragraph (1) if the report required by paragraph (3) is not submitted by the date set forth in that paragraph.

"(c) **TERMINATION OF AUTHORITY**.—A waiver may not be issued under this section after December 31, 2011.

"(d) **COMPTROLLER GENERAL REVIEW**.—***

37. Section 803 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, P.L. 105–261, Oct. 17, 1998 (10 U.S.C. 2306a note), as amended, provided:

“SEC. 803. DEFENSE COMMERCIAL PRICING MANAGEMENT IMPROVEMENT.

"(a) MODIFICATION OF PRICING REGULATIONS FOR CERTAIN COMMERCIAL ITEMS EXEMPT FROM COST OR PRICING DATA CERTIFICATION REQUIREMENTS.—(1) The Federal Acquisition Regulation issued in accordance with sections 6 and 25 of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 405, 421) [see 41 U.S.C. 1121, 1303] shall be revised to clarify the procedures and methods to be used for determining the reasonableness of prices of exempt commercial items (as defined in subsection (d)).

"(2) The regulations shall, at a minimum, provide specific guidance on-

"(A) the appropriate application and precedence of such price analysis tools as catalog-based pricing, market-based pricing, historical pricing, parametric pricing, and value analysis;

"(B) the circumstances under which contracting officers should require offerors of exempt commercial items to provide-

"(i) information on prices at which the offeror has previously sold the same or similar items; or

"(ii) other information other than certified cost or pricing data;

"(C) the role and responsibility of Department of Defense support organizations in procedures for determining price reasonableness; and

"(D) the meaning and appropriate application of the term 'purposes other than governmental purposes' in section 4(12) of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 403(12)) [see 41 U.S.C. 103].

"(3) This subsection shall cease to be effective 1 year after the date on which final regulations prescribed pursuant to paragraph (1) take effect.

"(b) **UNIFIED MANAGEMENT OF PROCUREMENT OF EXEMPT COMMERCIAL ITEMS**.—The Secretary of Defense shall develop and implement procedures to ensure that, whenever appropriate, a single item manager or contracting officer is responsible for negotiating and entering into all contracts from a single contractor for the procurement of exempt commercial items or for the procurement of items in a category of exempt commercial items.

"(c) **COMMERCIAL PRICE TREND ANALYSIS**.—(1) The Secretary of Defense shall develop and implement procedures that, to the maximum extent that is practicable and consistent with the efficient operation of the Department of Defense, provide for the collection and analysis of information on price trends for categories of exempt commercial items described in paragraph (2).

"(2) A category of exempt commercial items referred to in paragraph (1) consists of exempt commercial items-

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(A) that are in a single Federal Supply Group or Federal Supply Class, are provided by a single contractor, or are otherwise logically grouped for the purpose of analyzing information on price trends; and

"(B) for which there is a potential for the price paid to be significantly higher (on a percentage basis) than the prices previously paid in procurements of the same or similar items for the Department of Defense, as determined by the head of the procuring Department of Defense agency or the Secretary of the procuring military department on the basis of criteria prescribed by the Secretary of Defense.

"(3) The head of a Department of Defense agency or the Secretary of a military department shall take appropriate action to address any unreasonable escalation in prices being paid for items procured by that agency or military department as identified in an analysis conducted pursuant to paragraph (1).

"(4) Not later than April 1 of each of fiscal years 2000 through 2009, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the analyses of price trends that were conducted by the Secretary of each military department and the Director of the Defense Logistics Agency for categories of exempt commercial items during the preceding fiscal year under the procedures prescribed pursuant to paragraph (1). The report shall include a description of the actions taken by each Secretary and the Director to identify and address any unreasonable price escalation for the categories of items.

"(d) EXEMPT COMMERCIAL ITEMS DEFINED.—For the purposes of this section, the term 'exempt commercial item' means a commercial item that is exempt under subsection (b)(1)(B) of section 2306a of title 10, United States Code, or section 3503(a)(2) of title 41, United States Code, from the requirements for submission of certified cost or pricing data under that section."

38. Section 1075 of the National Defense Authorization Act for Fiscal Year 1995, P.L. 103–337, Oct. 5, 1994 (10 U.S.C. 2315 note) , provided:

“SEC. 1075. LIMITATION REGARDING TELECOMMUNICATIONS REQUIREMENTS.

"(a) LIMITATION.—No funds available to the Department of Defense or any other Executive agency may be expended to provide for meeting Department of Defense telecommunications requirements through the telecommunications procurement known as 'FTS–2000' or through any other Government-wide telecommunications procurement until—

"(1) the Secretary of Defense submits to the Congress a report containing—

"(A) a certification by the Secretary that the FTS–2000 procurement or the other telecommunications procurement will provide assured, secure telecommunications support (including associated telecommunications services) for Department of Defense activities; and

"(B) a description of how the procurement will be implemented and managed to meet defense information infrastructure requirements, including requirements to support deployed forces and intelligence activities; and

"(2) 30 days elapse after the date on which such report is received by the committees.

"(b) DEFINITIONS.—In this section:

"(1) The term 'defense telecommunications requirements' means requirements for telecommunications equipment and services that, if procured by the Department of Defense, would be exempt from the requirements of section 111 of the Federal Property and Administrative Services Act of 1949 ([former] 40 U.S.C. 759) pursuant to [section 2315 of title 10, United States Code](#).

"(2) The term 'Executive agency' has the meaning given such term in [section 105 of title 5, United States Code](#).

"(3) The term 'procurement' has the meaning given such term in section 4 of the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 403) [see [41 U.S.C. 111](#)].

"(c) EFFECT ON OTHER LAW.—Nothing in this section may be construed as modifying or superseding, or as intended to impair or restrict authorities or responsibilities under—

"(1) section 111 of the Federal Property and Administrative Services Act of 1949 ([former] 40 U.S.C. 759); or

"(2) section 620 of Public Law 103–123 [107 Stat. 1264]."

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

39. Section 824(a) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, P.L. 111–383, Jan. 7, 2011 (**10 U.S.C. 2320 note**), provided:

“SEC. 824. GUIDANCE RELATING TO RIGHTS IN TECHNICAL DATA.

"(a) REVIEW OF GUIDANCE.—Not later than 180 days after the date of the enactment of this Act [Jan. 7, 2011], the Secretary of Defense shall review guidance issued by the military departments on the implementation of **section 2320(e) of title 10, United States Code**, to ensure that such guidance is consistent with the guidance issued by the Under Secretary of Defense for Acquisition, Technology, and Logistics and the requirements of this section [amending this section and **section 2321 of this title**]. Such guidance shall be designed to ensure that the United States—

"(1) preserves the option of competition for contracts for the production and sustainment of systems or subsystems that are developed exclusively with Federal funds as defined in accordance with the amendments made by this section; and

"(2) is not required to pay more than once for the same technical data."

40. Section 818 of the National Defense Authorization Act for Fiscal Year 1995, P.L. 103–337, Oct. 5, 1994 (**10 U.S.C. 2324 note**), as amended, provided:

“SEC. 818. PAYMENT OF RESTRUCTURING COSTS UNDER DEFENSE CONTRACTS.

"[(a) Repealed. P. L. 105–85, §804(d), Nov. 18, 1997, 111 Stat. 1834]

"(b) REQUIREMENT FOR REGULATIONS.—Not later than January 1, 1995, the Secretary of Defense shall prescribe regulations on the allowability of restructuring costs associated with business combinations under defense contracts.

"(c) MATTERS TO BE INCLUDED.—At a minimum, the regulations shall-

"(1) include a definition of the term 'restructuring costs'; and

"(2) address the issue of contract novations under such contracts.

"(d) CONSULTATION.—In developing the regulations, the Secretary of Defense shall consult with the Administrator for Federal Procurement Policy.

"(e) REPORT.—Not later than November 13 in each of the years 1995, 1996, and 1997, the Secretary of Defense shall submit to Congress a report on the following:

"(1) A description of the procedures being followed within the Department of Defense for evaluating projected costs and savings under a defense contract resulting from a restructuring of a defense contractor associated with a business combination.

"(2) A list of all defense contractors for which restructuring costs have been allowed by the Department, along with the identities of the firms which those contractors have acquired or with which those contractors have combined since July 21, 1993, that qualify the contractors for such restructuring reimbursement.

"(3) The Department's experience with business combinations for which the Department has agreed to allow restructuring costs since July 21, 1993, including the following:

"(A) The estimated amount of costs associated with each restructuring that have been or will be treated as allowable costs under defense contracts, including the type and amounts of costs that would not have arisen absent the business combination.

"(B) The estimated amount of savings associated with each restructuring that are expected to be achieved on defense contracts.

"(C) The types of documentation relied on to establish that savings associated with each restructuring will exceed costs associated with the restructuring.

"(D) Actual experience on whether savings associated with each restructuring are exceeding costs associated with the restructuring.

"(E) Identification of any programmatic or budgetary disruption in the Department of Defense resulting from contractor restructuring.

"(f) DEFINITION.—In this section, the term 'business combination' includes a merger or acquisition.

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"(g) COMPTROLLER GENERAL REPORTS.—(1) Not later than March 1, 1995, the Comptroller General shall submit to Congress a report on the adequacy of the regulations prescribed under subsection (b) with respect to—

"(A) whether such regulations are consistent with the purposes of this section, other applicable law, and the Federal Acquisition Regulation; and

"(B) whether such regulations establish policies, procedures, and standards to ensure that restructuring costs are paid only when in the best interests of the United States.

"(2) The Comptroller General shall report periodically to Congress on the implementation of the policy of the Department of Defense regarding defense industry restructuring."

41. Section 812 of the National Defense Authorization Act for Fiscal Year 2010, P.L. 111–84, Oct. 28, 2009 (10 U.S.C. 2326 note), provided:

“SEC. 812. REVISION OF DEFENSE SUPPLEMENT RELATING TO PAYMENT OF COSTS PRIOR TO DEFINITIZATION.

"(a) REVISION REQUIRED.—Not later than 180 days after the date of the enactment of this Act [Oct. 28, 2009], the Secretary of Defense shall revise the Defense Supplement to the Federal Acquisition Regulation to ensure that any limitations described in subsection (b) are applicable to all categories of undefinitized contractual actions (including undefinitized task orders and delivery orders).

"(b) LIMITATIONS.—The limitations referred to in subsection (a) are any limitations on the reimbursement of costs and the payment of profits or fees with respect to costs incurred before the definitization of an undefinitized contractual action of the Department of Defense, including—

"(1) such limitations as described in part 52.216-26 of the Federal Acquisition Regulation; and

"(2) any such limitations implementing the requirements of section 809 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 10 U.S.C. 2326 note)."

42. Section 908(a)–(c), (e) of P.L. 99–500, Oct. 18, 1986(10 U.S.C. 2326 note), P.L. 99–591, and P.L. 99–661, Nov. 14, 1986, amended by P.L. 100–26, §§3(5), 5(2), Apr. 21, 1987; P.L. 104–106, §4322(b)(2), Feb. 10, 1996, 110 Stat. 677, provided:

“SEC. 908. LIMITATION ON USE OF FUNDS FOR UNDEFINITIZED CONTRACTUAL ACTIONS; OVERSIGHT BY INSPECTOR GENERAL; WAIVER AUTHORITY.

"(a) LIMITATION ON USE OF FUNDS FOR UNDEFINITIZED CONTRACTUAL ACTIONS.—(1) On the last day of each six-month period described in paragraph (4), the Secretary of Defense (with respect to the Defense Logistics Agency) and the Secretary of each military department shall determine—

"(A) the total amount of funds obligated for contractual actions during the six-month period;

"(B) the total amount of funds obligated during the six-month period for undefinitized contractual actions; and

"(C) the total amount of funds obligated during the six-month period for undefinitized contractual actions that are not definitized on or before the last day of such period.

"(2) On the last day of each six-month period described in paragraph (4), the amount of funds obligated for undefinitized contractual actions entered into by the Secretary of Defense (with respect to the Defense Logistics Agency) or the Secretary of a military department during the six-month period that are not definitized on or before such day may not exceed 10 percent of the amount of funds obligated for all contractual actions entered into by the Secretary during the six-month period.

"(3) If on the last day of a six-month period described in paragraph (4) the total amount of funds obligated for undefinitized contractual actions under the jurisdiction of a Secretary that were entered into during the six-month period exceeds the limit established in paragraph (2), the Secretary—

"(A) shall, not later than the end of the 45-day period beginning on the first day following the six-month period, submit to the defense committees an unclassified report concerning—

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"(i) the amount of funds obligated for contractual actions under the jurisdiction of the Secretary that were entered into during the six-month period with respect to which the report is submitted; and

"(ii) the amount of such funds obligated for undefinitized contractual actions; and

"(B) except with respect to the six-month period described in paragraph (4)(A), may not enter into any additional undefinitized contractual actions until the date on which the Secretary certifies to Congress that such limit is not exceeded by the cumulative amount of funds obligated for undefinitized contractual actions under the jurisdiction of the Secretary that are not definitized on or before such date and were entered into-

"(i) during the six-month period for which such limit was exceeded; or

"(ii) after the end of such six-month period.

"(4) This subsection applies to the following six-month periods:

"(A) The period beginning on October 1, 1986, and ending on March 31, 1987.

"(B) The period beginning on April 1, 1987, and ending on September 30, 1987.

"(C) The period beginning on October 1, 1987, and ending on March 31, 1988.

"(D) The period beginning on April 1, 1988, and ending on September 30, 1988.

"(E) The period beginning on October 1, 1988, and ending on March 31, 1989.

"(b) OVERSIGHT BY INSPECTOR GENERAL.—The Inspector General of the Department of Defense shall-

"(1) periodically conduct an audit of contractual actions under the jurisdiction of the Secretary of Defense (with respect to the Defense Logistics Agency) and the Secretaries of the military departments; and

"(2) after each audit, submit to Congress a report on the management of undefinitized contractual actions by each Secretary, including the amount of contractual actions under the jurisdiction of each Secretary that is represented by undefinitized contractual actions.

"(c) WAIVER AUTHORITY.—The Secretary of Defense may waive the application of subsections (a) and (b) for urgent and compelling considerations relating to national security or public safety if the Secretary notifies the Committees on Armed Services of the Senate and House of Representatives of such waiver before the end of the 30-day period beginning on the date that the waiver is made.

"(e) DEFINITION.—For purposes of this section, the term 'undefinitized contractual action' has the meaning given such term in section 2326(g) [now 2326(i)] of title 10, United States Code (as added by subsection (d)(1))."

43. Section 805 of the National Defense Authorization Act for Fiscal Year 2008, P.L. 110–181, Jan. 28, 2008, (10 U.S.C. 2330 note), as amended, provided:

“SEC. 805. PROCUREMENT OF COMMERCIAL SERVICES.

"(a) REGULATIONS REQUIRED.—Not later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense shall modify the regulations of the Department of Defense for the procurement of commercial services for or on behalf of the Department of Defense.

"(b) APPLICABILITY OF COMMERCIAL PROCEDURES.—

"(1) SERVICES OF A TYPE SOLD IN MARKETPLACE.—The regulations modified pursuant to subsection (a) shall ensure that services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, may be treated as commercial items for purposes of section 2306a of title 10, United States Code (relating to truth in negotiations), only if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such services.

"(2) INFORMATION SUBMITTED.—To the extent necessary to make a determination under paragraph (1), the contracting officer may request the offeror to submit-

"(A) prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers; and

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"(B) if the contracting officer determines that the information described in subparagraph (A) is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.

"(c) TIME-AND-MATERIALS CONTRACTS.—

"(1) COMMERCIAL ITEM ACQUISITIONS.—The regulations modified pursuant to subsection (a) shall ensure that procedures applicable to time-and-materials contracts and labor-hour contracts for commercial item acquisitions may be used only for the following:

"(A) Services procured for support of a commercial item, as described in [section 103\(5\)](#) of title 41, [United States Code](#).

"(B) Emergency repair services.

"(C) Any other commercial services only to the extent that the head of the agency concerned approves a determination in writing by the contracting officer that—

"(i) the services to be acquired are commercial services as defined in [section 103\(6\)](#) of title 41, [United States Code](#);

"(ii) if the services to be acquired are subject to subsection (b), the offeror of the services has submitted sufficient information in accordance with that subsection;

"(iii) such services are commonly sold to the general public through use of time-and-materials or labor-hour contracts; and

"(iv) the use of a time-and-materials or labor-hour contract type is in the best interest of the Government.

"(2) NON-COMMERCIAL ITEM ACQUISITIONS.—Nothing in this subsection shall be construed to preclude the use of procedures applicable to time-and-materials contracts and labor-hour contracts for non-commercial item acquisitions for the acquisition of any category of services."

44. Section 801(d)–(f) of the National Defense Authorization Act for Fiscal Year 2002, [P.L. 107–107, Dec. 28, 2001 \(10 U.S.C. 2330 note\)](#), as amended, provided:

“SEC. 801. MANAGEMENT OF PROCUREMENT SERVICES.

(a) ***

"(d) REQUIREMENT FOR PROGRAM REVIEW STRUCTURE.—(1) Not later than 180 days after the date of the enactment of this Act [Dec. 28, 2001], the Secretary of Defense shall issue and implement a policy that applies to the procurement of services by the Department of Defense a program review structure that is similar to the one developed for and applied to the procurement of weapon systems by the Department of Defense.

"(2) The program review structure for the procurement of services shall, at a minimum, include the following:

"(A) Standards for determining which procurements should be subject to review by either the senior procurement executive of a military department or the senior procurement executive of the Department of Defense under such section, including criteria based on dollar thresholds, program criticality, or other appropriate measures.

"(B) Appropriate key decision points at which those reviews should take place.

"(C) A description of the specific matters that should be reviewed.

"(e) COMPTROLLER GENERAL REVIEW.—Not later than 90 days after the date on which the Secretary issues the policy required by subsection (d) and the Under Secretary of Defense for Acquisition, Technology, and Logistics issues the guidance required by subsection (b)(2) [set out as a note above], the Comptroller General shall submit to the Committees on Armed Services of the Senate and the House of Representatives an assessment of the compliance with the requirements of this section [enacting this section and [section 2330a of this title](#), amending [sections 133 and 2331 of this title](#), and enacting provisions set out as a note under this section] and the amendments made by this section.

"(f) DEFINITIONS.—In this section:

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"(1) The term 'senior procurement executive' means the official designated as the senior procurement executive under [section 1702\(c\) of title 41, United States Code](#).

"(2) The term 'performance-based', with respect to a contract or a task order means that the contract or task order, respectively, includes the use of performance work statements that set forth contract requirements in clear, specific, and objective terms with measurable outcomes."

45. Section 802 of the National Defense Authorization Act for Fiscal Year 2002, P.L. 107–107, Dec. 28, 2001 (10 U.S.C. 2330 note) , as amended, provided:

“SEC. 802. PERFORMANCE GOALS FOR PROCUREMENTS OF SERVICES.

"(a) GOALS.—(1) It shall be an objective of the Department of Defense to achieve efficiencies in procurements of services pursuant to multiple award contracts through the use of—

"(A) performance-based services contracting;

"(B) appropriate competition for task orders under services contracts;

"(C) program review, spending analyses, and improved management of services contracts.

"(2) In furtherance of such objective, the Department of Defense shall have the following goals:

"(A) To increase, as a percentage of all of the individual purchases of services made by or for the Department of Defense under multiple award contracts for a fiscal year (calculated on the basis of dollar value), the volume of the individual purchases of services that are made on a competitive basis and involve receipt of more than one offer from qualified contractors to a percentage as follows:

"(i) For fiscal year 2003, a percentage not less than 40 percent.

"(ii) For fiscal year 2004, a percentage not less than 50 percent.

"(iii) For fiscal year 2011, a percentage not less than 75 percent.

"(B) To increase, as a percentage of all of the individual purchases of services made by or for the Department of Defense under multiple award contracts for a fiscal year (calculated on the basis of dollar value), the use of performance-based purchasing specifying firm fixed prices for the specific tasks to be performed to a percentage as follows:

"(i) For fiscal year 2003, a percentage not less than 25 percent.

"(ii) For fiscal year 2004, a percentage not less than 35 percent.

"(iii) For fiscal year 2005, a percentage not less than 50 percent.

"(iv) For fiscal year 2011, a percentage not less than 70 percent.

"(3) The Secretary of Defense may adjust any percentage goal established in paragraph (2) if the Secretary determines in writing that such a goal is too high and cannot reasonably be achieved. In the event that the Secretary chooses to adjust such a goal, the Secretary shall—

"(A) establish a percentage goal that the Secretary determines would create an appropriate incentive for Department of Defense components to use competitive procedures or performance-based services contracting, as the case may be; and

"(B) submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report containing an explanation of the reasons for the Secretary's determination and a statement of the new goal that the Secretary has established.

"(b) ANNUAL REPORT.—Not later than March 1, 2002, and annually thereafter through March 1, 2011, the Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the progress made toward meeting the objective and goals established in subsection (a). Each report shall include, at a minimum, the following information:

"(1) A summary of the steps taken or planned to be taken in the fiscal year of the report to improve the management of procurements of services.

"(2) A summary of the steps planned to be taken in the following fiscal year to improve the management of procurements of services.

"(3) An estimate of the amount that will be expended by the Department of Defense for procurements of services in the fiscal year of the report.

"(4) An estimate of the amount that will be expended by the Department of Defense for procurements of services in the following fiscal year.

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"(5) Regarding the individual purchases of services that were made by or for the Department of Defense under multiple award contracts in the fiscal year preceding the fiscal year in which the report is required to be submitted, information (determined using the data collection system established under [section 2330a of title 10, United States Code](#)) as follows:

"(A) The percentage (calculated on the basis of dollar value) of such purchases that are purchases that were made on a competitive basis and involved receipt of more than one offer from qualified contractors.

"(B) The percentage (calculated on the basis of dollar value) of such purchases that are performance-based purchases specifying firm fixed prices for the specific tasks to be performed.

"(c) DEFINITIONS.—(1) In this section, the terms 'individual purchase' and 'multiple award contract' have the meanings given such term— in section 803(c) of this Act [[10 U.S.C. 2304 note](#)].

"(2) For the purposes of this section, an individual purchase of services is made on a competitive basis only if it is made pursuant to procedures described in paragraphs (2), (3), and (4) of section 803(b) of this Act [[10 U.S.C. 2304 note](#)]."

46. Section 1032 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, P.L. 107–314, Dec. 2, 2002 ([10 U.S.C. 2358 note](#)), as amended, provided:

“SEC. 1032. REPORT ON WEAPONS AND CAPABILITIES TO DEFEAT HARDENED AND DEEPLY BURIED TARGETS.

"(a) REPORT.—Not later than March 1, 2009, and every two years thereafter, the Secretary of Defense, the Secretary of Energy, and the Director of National Intelligence shall jointly submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives], the Select Committee on Intelligence of the Senate, and the Permanent Select Committee on Intelligence of the House of Representatives a report on the research and development, procurement, and other activities undertaken during the preceding two fiscal years and planned for the current fiscal year and the next fiscal year by the Department of Defense, the Department of Energy, and the intelligence community to develop weapons and capabilities to defeat hardened and deeply buried targets.

"(b) REPORT ELEMENTS.—A report submitted under subsection (a) shall—

"(1) include a discussion of the integration and interoperability of the activities referred to in that subsection that were or will be undertaken during the four-fiscal-year period covered by the report, including a discussion of the relevance of such activities to applicable recommendations by the Chairman of the Joint Chiefs of Staff, assisted under [section 181\(b\) of title 10, United States Code](#), by the Joint Requirements Oversight Council; and

"(2) set forth separately a description of the activities referred to in that subsection, if any, that were or will be undertaken during the four-fiscal-year period covered by the report by each element of—

"(A) the Department of Defense;

"(B) the Department of Energy; and

"(C) the intelligence community.

"(c) DEFINITION.—In this section, the term 'intelligence community' has the meaning given such term in section 3(4) of the National Security Act of 1947 ([50 U.S.C. 401a\(4\)](#)) [now [50 U.S.C. 3003\(4\)](#)].

"(d) TERMINATION.—No report is required under this section after the submission of the report that is due on **March 1, 2013**.

"(e) INTEGRATION ACTIVITIES IN FISCAL YEAR 2003 WITH RESPECT TO RNEP.—The report under subsection (a) that is due on April 1, 2004, shall include, in addition to the elements specified in subsection (b), a description of the integration and interoperability of the research and development, procurement, and other activities undertaken during fiscal year 2003 by the Department of Defense and the Department of Energy with respect to the Robust Nuclear Earth Penetrator."

47. Section 241 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, P.L. 107–314, Dec. 2, 2002 ([10 U.S.C. 2358 note](#)), provided:

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“SEC. 241. PILOT PROGRAMS FOR REVITALIZING LABORATORIES AND TEST AND EVALUATION CENTERS OF DEPARTMENT OF DEFENSE.

"(a) ADDITIONAL PILOT PROGRAM.—(1) The Secretary of Defense may carry out a pilot program to demonstrate improved efficiency in the performance of research, development, test, and evaluation functions of the Department of Defense.

"(2) Under the pilot program, the Secretary of Defense shall provide the director of one science and technology laboratory, and the director of one test and evaluation laboratory, of each military department with authority for the following:

"(A) To use innovative methods of personnel management appropriate for ensuring that the selected laboratories can-

"(i) employ and retain a workforce appropriately balanced between permanent and temporary personnel and among workers with appropriate levels of skills and experience; and

"(ii) effectively shape workforces to ensure that the workforces have the necessary sets of skills and experience to fulfill their organizational missions.

"(B) To develop or expand innovative methods of entering into and expanding cooperative relationships and arrangements with private sector organizations, educational institutions (including primary and secondary schools), and State and local governments to facilitate the training of a future scientific and technical workforce that will contribute significantly to the accomplishment of organizational missions.

"(C) To develop or expand innovative methods of establishing cooperative relationships and arrangements with private sector organizations and educational institutions to promote the establishment of the technological industrial base in areas critical for Department of Defense technological requirements.

"(D) To waive any restrictions not required by law that apply to the demonstration and implementation of methods for achieving the objectives set forth in subparagraphs (A), (B), and (C).

"(3) The Secretary may carry out the pilot program under this subsection at each selected laboratory for a period of three years beginning not later than March 1, 2003.

"(b) RELATIONSHIP TO FISCAL YEARS 1999 AND 2000 REVITALIZATION PILOT PROGRAMS.—The pilot program under this section is in addition to, but may be carried out in conjunction with, the fiscal years 1999 and 2000 revitalization pilot programs.

"(c) REPORTS.—(1) Not later than January 1, 2003, the Secretary shall submit to Congress a report on the experience under the fiscal years 1999 and 2000 revitalization pilot programs in exercising the authorities provided for the administration of those programs. The report shall include a description of-

"(A) barriers to the exercise of the authorities that have been encountered;

"(B) the proposed solutions for overcoming the barriers; and

"(C) the progress made in overcoming the barriers.

"(2) Not later than September 1, 2003, the Secretary of Defense shall submit to Congress a report on the implementation of the pilot program under subsection (a) and the fiscal years 1999 and 2000 revitalization pilot programs. The report shall include, for each such pilot program, the following:

"(A) Each laboratory selected for the pilot program.

"(B) To the extent practicable, a description of the innovative methods that are to be tested at each laboratory.

"(C) The criteria to be used for measuring the success of each method to be tested.

"(3) Not later than 90 days after the expiration of the period for the participation of a laboratory in a pilot program referred to in paragraph (2), the Secretary of Defense shall submit to Congress a final report on the participation of that laboratory in the pilot program. The report shall include the following:

"(A) A description of the methods tested.

"(B) The results of the testing.

"(C) The lessons learned.

"(D) Any proposal for legislation that the Secretary recommends on the basis of the experience at that laboratory under the pilot program.

"(d) EXTENSION OF AUTHORITY FOR OTHER REVITALIZATION PILOT PROGRAMS.—(1) [Amended section 246(a)(4) of P.L. 105–26.]

"(2) [Amended section 245(a)(4) of P.L. 106–65.]

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"(e) PARTNERSHIPS UNDER PILOT PROGRAM.—(1) The Secretary of Defense may authorize one or more laboratories and test centers participating in the pilot program under subsection (a) or in one of the fiscal years 1999 and 2000 revitalization pilot programs to enter into a cooperative arrangement (in this subsection referred to as a 'public-private partnership') with entities in the private sector and institutions of higher education for the performance of work.

"(2) A competitive process shall be used for the selection of entities outside the Government to participate in a public-private partnership.

"(3)(A) Not more than one public-private partnership may be established as a limited liability company.

"(B) An entity participating in a limited liability company as a party to a public-private partnership under the pilot program may contribute funds to the company, accept contributions of funds for the company, and provide materials, services, and use of facilities for research, technology, and infrastructure of the company, if it is determined under regulations prescribed by the Secretary of Defense that doing so will improve the efficiency of the performance of research, test, and evaluation functions of the Department of Defense.

"(f) FISCAL YEARS 1999 AND 2000 REVITALIZATION PILOT PROGRAMS DEFINED.—In this section, the term 'fiscal years 1999 and 2000 revitalization pilot programs' means—

"(1) the pilot programs authorized by section 246 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Public Law 105–261; 112 Stat. 1955; [former] 10 U.S.C. 2358 note); and

"(2) the pilot programs authorized by section 245 of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106–65; 113 Stat. 552; [former] 10 U.S.C. 2358 note)."

48. Section 606 of Public Law 92–436, Sept. 29, 1972 (10 U.S.C. 2358 note), provided:

“SEC. 606. CAMPUSES BARRING MILITARY RECRUITERS; CESSATION OF PAYMENTS; NOTIFICATION OF SECRETARY OF DEFENSE.

"(a) No part of the funds appropriated pursuant to this or any other Act for the Department of Defense or any of the Armed Forces may be used at any institution of higher learning if the Secretary of Defense or his designee determines that recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution from the premises of the institution: except in a case where the Secretary of the service concerned certifies to the Congress in writing that a specific course of instruction is not available at any other institution of higher learning and furnishes to the Congress the reasons why such course of instruction is of vital importance to the security of the United States.

"(b) The prohibition made by subsection (a) of this section as it applies to research and development funds shall not apply if the Secretary of Defense or his designee determines that the expenditure is a continuation or a renewal of a previous program with such institution which is likely to make a significant contribution to the defense effort.

"(c) The Secretaries of the military departments shall furnish to the Secretary of Defense or his designee within 60 days after the date of enactment of this Act [Sept. 29, 1972] and each January 31 and June 30 thereafter the names of any institution of higher learning which the Secretaries determine on such dates are affected by the prohibitions contained in this section."

49. Section 913(b) of the National Defense Authorization Act for Fiscal Year 2000, P.L. 106–65, Oct. 5, 1999 (10 U.S.C. 2364 note), provided:

“SEC. 913. PERFORMANCE REVIEW PROCESS.

"Not later than 180 days after the date of the enactment of this Act [Oct. 5, 1999], the Secretary of Defense shall develop an appropriate performance review process for rating the quality and relevance of work performed by the Department of Defense laboratories. The process shall include customer evaluation and peer review by Department of Defense personnel and appropriate experts from outside the Department of Defense. The process shall provide for rating all laboratories of the Army, Navy, and Air Force on a consistent basis."

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50. Sections 234(a) and (b) of the National Defense Authorization Act for Fiscal Year 1987, P.L. 99–661, Nov. 14, 1986 (**10 U.S.C. 2364 note**), provided:

“SEC. 234. COORDINATION OF RESEARCH ACTIVITIES OF DEPARTMENT OF DEFENSE.

"(a) PURPOSE.—The purpose of this section is to strengthen coordination among Department of Defense research facilities and other organizations in the Department of Defense.

"(b) FINDINGS.—The Congress finds that centralized coordination of the collection and dissemination of technological data among research facilities and other organizations within the Department of Defense is necessary—

"(1) to ensure that personnel of the Department are currently informed about emerging technology for defense systems; and

"(2) to avoid unnecessary and costly duplication of research staffs and projects."

51. Section 943(b) of the National Defense Authorization Act for Fiscal Year 2008, P.L. 110–181, Jan. 28, 2008 (**10 U.S.C. 2366a note**), as amended, provided:

“SEC. 943.

(a) [added section 2366b to title 10, U.S.C.]

"(b) REVIEW OF DEPARTMENT OF DEFENSE ACQUISITION DIRECTIVES.—Not later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense shall review Department of Defense Directive 5000.1 and associated guidance, and the manner in which such directive and guidance have been implemented, and take appropriate steps to ensure that the Department does not commence a technology development program for a major defense acquisition program without Milestone A approval (or Key Decision Point A approval in the case of a space program)."

52. Section 1047(d) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, P.L. 110–417, Oct. 14, 2008 (**10 U.S.C. 2366b note**), as amended, provided:

“SEC. 1047.

(a) ***

(d) FORMAL REVIEW PROCESS FOR BANDWIDTH REQUIREMENTS.—

"(1) IN GENERAL.—The Secretary of Defense and the Director of National Intelligence shall, as part of the Milestone B or Key Decision Point B approval process for any major defense acquisition program or major system acquisition program, establish a formal review process to ensure that-

"(A) the bandwidth requirements needed to support such program are or will be met;

and

"(B) a determination will be made with respect to how to meet the bandwidth requirements for such program.

"(2) REPORTS.—Not later than January 1 of each year, the Secretary of Defense and the Director of National Intelligence shall each submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives], the Select Committee on Intelligence of the Senate, and the Permanent Select Committee on Intelligence of the House of Representatives a report on any determinations made under paragraph (1) with respect to

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meeting the bandwidth requirements for major defense acquisition programs and major system acquisition programs during the preceding fiscal year."

53. Section 844(b) of the National Defense Authorization Act for Fiscal Year 2016, P.L. 114–92, Nov. 25, 2015 (10 U.S.C. 2377 note), provided:

“SEC. 844. MANDATORY REQUIREMENT FOR TRAINING RELATED TO THE CONDUCT OF MARKET RESEARCH.

(a) [added a new subsection (d) [now (e)] to 10 U.S.C. 2377]

"(b) INCORPORATION INTO MANAGEMENT CERTIFICATION TRAINING MANDATE.—The Chairman of the Joint Chiefs of Staff shall ensure that the requirements of section 2377(d) [now 2377(e)] of title 10, United States Code, as added by subsection (a), are incorporated into the requirements management certification training mandate of the Joint Capabilities Integration Development System."

54. Section 801 of the National Defense Authorization Act for Fiscal Year 1990, P.L. 101–189, Nov. 29, 1989 (10 U.S.C. 2399 note), provided:

“SEC. 801. ASSESSMENT OF RISK IN CONCURRENT DEVELOPMENT OF MAJOR DEFENSE ACQUISITION SYSTEMS.

"(a) ESTABLISHMENT OF POLICY.—The Secretary of Defense shall establish guidelines for-

"(1) determining the degree of concurrency that is appropriate for the development of major defense acquisition systems; and

"(2) assessing the degree of risk associated with various degrees of concurrency.

"(b) REPORT ON GUIDELINES.—The Secretary shall submit to Congress a report that describes the guidelines established under subsection (a) and the method used for assessing risk associated with concurrency.

"(c) REPORT ON CONCURRENCY IN MAJOR ACQUISITION PROGRAMS.—(1) The Secretary shall also submit to Congress a report outlining the risk associated with concurrency for each major defense acquisition program that is in either full-scale development or low-rate initial production as of January 1, 1990.

"(2) The report shall include consideration of the following matters with respect to each such program:

"(A) The degree of confidence in the enemy threat assessment for establishing the system's requirements.

"(B) The type of contract involved.

"(C) The degree of stability in program funding.

"(D) The level of maturity of technology involved in the system.

"(E) The availability of adequate test assets, including facilities and ranges.

"(F) The plans for transition from development to production.

"(d) SUBMISSION OF REPORTS.—The reports under subsections (b) and (c) shall be submitted to Congress not later than March 1, 1990.

"(e) DEFINITION.—For purposes of this section, the term 'concurrency' means the degree of overlap between the development and production processes of an acquisition program."

55. Section 807(b) of the John Warner National Defense Authorization Act for Fiscal Year 2007, P.L. 109–364, Oct. 17, 2006 (10 U.S.C. 2410p note), provided:

“SEC. 807. LEAD SYSTEM INTEGRATORS.

(a) [added section 2410p to title 10, U.S.C.]

"(b) UPDATE OF REGULATIONS ON LEAD SYSTEM INTEGRATORS.—Not later than December 31, 2006, the Secretary of Defense shall update the acquisition regulations of the Department of Defense in order to specify fully

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in such regulations the matters with respect to lead system integrators set forth in section 805(b) of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109–163; 119 Stat. 3372) and the amendments made by subsection (a) [enacting section 2410p]."

56. Section 908(d) of the National Defense Authorization Act for Fiscal Year 2008, [P.L. 110–181, Jan. 28, 2008 \(10 U.S.C. 2430 note\)](#), as amended, provided:

“SEC. 908. ASSISTANT SECRETARIES OF THE MILITARY DEPARTMENTS FOR ACQUISITION MATTERS; PRINCIPAL MILITARY DEPUTIES.

(a) [added a new paragraph (5) to 10 U.S.C. 3016(b)]

(b) [added a new paragraph (4) to 10 U.S.C. 5016(b)]

(c) [added a new paragraph (4) to 10 U.S.C. 8016(b)]

"(d) DUTY OF PRINCIPAL MILITARY DEPUTIES TO INFORM SERVICE CHIEFS ON MAJOR DEFENSE ACQUISITION PROGRAMS.—Each Principal Military Deputy to a service acquisition executive shall be responsible for—

"(1) keeping the Chief of Staff of the Armed Force concerned informed of the progress of major defense acquisition programs;

"(2) informing the Chief of Staff on a continuing basis of any developments on major defense acquisition programs, which may require new or revisited trade-offs among cost, schedule, technical feasibility, and performance, including—

"(A) significant cost growth or schedule slippage; and

"(B) requirements creep (as defined in section 2547(c)(1) [now 2547(d)(1)] of [title 10, United States Code](#)); and

"(3) ensuring that the views of the Chief of Staff on cost, schedule, technical feasibility, and performance trade-offs are strongly considered by program managers and program executive officers in all phases of the acquisition process."

57. Section 837 of the National Defense Authorization Act for Fiscal Year 1994, [P.L. 103–160, Nov. 30, 1993 \(10 U.S.C. 2430 note\)](#), as amended, provided:

“SEC. 837. EFFICIENT CONTRACTING PROCESSES.

"The Secretary of Defense shall take any additional actions that the Secretary considers necessary to waive regulations not required by statute that affect the efficiency of the contracting process within the Department of Defense. Such actions shall include, in the Secretary's discretion, developing methods to streamline the procurement process, streamlining the period for entering into contracts, and defining alternative techniques to reduce reliance on military specifications and standards, in contracts for the defense acquisition programs participating in the Defense Acquisition Pilot Program."

58. Section 838 of the National Defense Authorization Act for Fiscal Year 1994, [P.L. 103–160, 30, 1993 \(10 U.S.C. 2430 note\)](#), as amended, provided:

“SEC. 838. CONTRACT ADMINISTRATION: PERFORMANCE BASED CONTRACT MANAGEMENT.

"For at least one participating defense acquisition program for which a determination is made to make payments for work in progress under the authority of [section 2307 of title 10, United States Code](#), the Secretary of Defense should define payment milestones on the basis of quantitative measures of results."

59. Section 828 of the National Defense Authorization Act for Fiscal Year 2010, P.L. 111–84, Oct. 28, 2009 (10 U.S.C. 2458 note), provided:

“SEC. 328. IMPROVEMENT OF INVENTORY MANAGEMENT PRACTICES.

"(a) INVENTORY MANAGEMENT PRACTICES IMPROVEMENT PLAN REQUIRED.—Not later than 270 days after the date of the enactment of this Act [Oct. 28, 2009], the Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a comprehensive plan for improving the inventory management systems of the military departments and the Defense Logistics Agency with the objective of reducing the acquisition and storage of secondary inventory that is excess to requirements.

"(b) ELEMENTS.—The plan under subsection (a) shall include the following:

"(1) A plan for a comprehensive review of demand-forecasting procedures to identify and correct any systematic weaknesses in such procedures, including the development of metrics to identify bias toward over-forecasting and adjust forecasting methods accordingly.

"(2) A plan to accelerate the efforts of the Department of Defense to achieve total asset visibility, including efforts to link wholesale and retail inventory levels through multi-echelon modeling.

"(3) A plan to reduce the average level of on-order secondary inventory that is excess to requirements, including a requirement for the systemic review of such inventory for possible contract termination.

"(4) A plan for the review and validation of methods used by the military departments and the Defense Logistics Agency to establish economic retention requirements.

"(5) A plan for an independent review of methods used by the military departments and the Defense Logistics Agency to establish contingency retention requirements.

"(6) A plan to identify items stored in secondary inventory that require substantial amounts of storage space and shift such items, where practicable, to direct vendor delivery.

"(7) A plan for a comprehensive assessment of inventory items on hand that have no recurring demands, including the development of—

"(A) metrics to track years of no demand for items in stock; and

"(B) procedures for ensuring the systemic review of such items for potential reutilization or disposal.

"(8) A plan to more aggressively pursue disposal reviews and actions on stocks identified for potential reutilization or disposal.

"(c) GAO REPORTS.—

"(1) ASSESSMENT OF PLAN.—Not later than 60 days after the date on which the plan required by subsection (a) is submitted as specified in that subsection, the Comptroller General shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report setting forth an assessment of the extent to which the plan meets the requirements of this section.

"(2) ASSESSMENT OF IMPLEMENTATION.—Not later than 18 months after the date on which the plan required by subsection (a) is submitted, the Comptroller General shall submit to the congressional defense committees a report setting forth an assessment of the extent to which the plan has been effectively implemented by each military department and by the Defense Logistics Agency.

"(d) INVENTORY THAT IS EXCESS TO REQUIREMENTS DEFINED.—In this section, the term 'inventory that is excess to requirements' means inventory that—

"(1) is excess to the approved acquisition objective concerned; and

"(2) is not needed for the purposes of economic retention or contingency retention."

60. Section 325 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, P.L. 108–375, Oct. 28, 2004 (10 U.S.C. 2461 note), as amended, provided:

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“SEC. 325. PILOT PROGRAM FOR PURCHASE OF CERTAIN MUNICIPAL SERVICES FOR MILITARY INSTALLATIONS.

"(a) PILOT PROGRAM AUTHORIZED.—The Secretary of a military department may carry out a pilot program to procure one or more of the municipal services specified in subsection (b) for a military installation under the jurisdiction of the Secretary from a county or municipality in which the installation is located for the purpose of evaluating the efficacy of procuring such services rather than providing them directly.

"(b) SERVICES AUTHORIZED FOR PROCUREMENT.—Only the following services may be procured for a military installation participating in the pilot program:

- "(1) Refuse collection.
- "(2) Refuse disposal.
- "(3) Library services.
- "(4) Recreation services.
- "(5) Facility maintenance and repair.
- "(6) Utilities.

"(c) PARTICIPATING INSTALLATIONS.—Not more than three military installations from each military service may be selected to participate in the pilot program, and only installations located in the United States are eligible for selection.

"(d) CONGRESSIONAL NOTIFICATION.—The Secretary of a military department may not enter into a contract under the pilot program for the procurement of municipal services until the Secretary notifies the congressional defense committees [Committees on Armed Services and Appropriations of Senate and House of Representatives] of the proposed contract and a period of 14 days elapses from the date the notification is received by the committees.

"(e) TERMINATION OF PILOT PROGRAM.—The pilot program shall terminate on **September 30, 2012**. Any contract entered into under the pilot program shall terminate not later than that date."

61. Section 336 of the National Defense Authorization Act for Fiscal Year 2004, [P.L. 108–136, Nov. 24, 2003 \(10 U.S.C. 2461 note\)](#) provided:

“SEC. 336. PILOT PROGRAM FOR BEST-VALUE SOURCE SELECTION FOR PERFORMANCE OF INFORMATION TECHNOLOGY SERVICES.

"(a) AUTHORITY TO USE BEST-VALUE CRITERION.—The Secretary of Defense may carry out a pilot program for the procurement of information technology services for the Department of Defense that uses a best-value criterion in the selection of the source for the performance of the information technology services.

"(b) REQUIRED EXAMINATION UNDER PILOT PROJECT.—Under the pilot program, the Secretary of Defense shall modify the examination otherwise required by section 2461(b)(3)(A) [now 2461(c)(3)(A)] of [title 10, United States Code](#), to be an examination of the performance of an information technology services function by Department of Defense civilian employees and by one or more private contractors to demonstrate whether-

"(1) a change to performance by the private sector will result in the best value to the Government over the life of the contract, as determined in accordance with the competition requirements of Office of Management and Budget Circular A–76; and

"(2) certain benefits exist, in addition to price, that warrant performance of the function by a private sector source at a cost higher than that of performance by Department of Defense civilian employees.

"(c) EXEMPTION FOR PILOT PROGRAM.—[Former] [Section 2462\(a\) of title 10, United States Code](#), does not apply to the procurement of information technology services under the pilot program.

"(d) DURATION OF PILOT PROGRAM.—(1) The authority to carry out the pilot program begins on the date on which the Secretary of Defense submits to Congress the report on the effect of the recent revisions to Office of Management and Budget Circular A–76, as required by section 335 of this Act [set out above], and expires on September 30, 2008.

"(2) The expiration of the pilot program shall not affect the selection of the source for the performance of an information technology services function for the Department of Defense for which the analysis required by

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

section 2461(b)(3) [now 2461(c)(3)] of title 10, United States Code, has been commenced before the expiration date or for which a solicitation has been issued before the expiration date.

"(e) GAO REVIEW.—Not later than February 1, 2008, the Comptroller General shall submit to Congress a report containing-

"(1) a review of the pilot program to assess the extent to which the pilot program is effective and is equitable for the potential public sources and the potential private sources of information technology services for the Department of Defense; and

"(2) any other conclusions of the Comptroller General resulting from the review.

"(f) INFORMATION TECHNOLOGY SERVICE DEFINED.—In this section, the term 'information technology service' means any service performed in the operation or maintenance of information technology (as defined in section 11101 of title 40, United States Code) that is necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or Government personnel)."

62. Section 353(a) of the National Defense Authorization Act for Fiscal Year 1996, P.L. 104–106, Feb. 10, 1996 (10 U.S.C. 2461 note), provided:

“SEC. 353. PAYROLL, FINANCE, AND ACCOUNTING FUNCTIONS OF DEPARTMENT OF DEFENSE.

"(a) PLAN FOR PRIVATE OPERATION OF CERTAIN FUNCTIONS.—(1) Not later than October 1, 1996, the Secretary of Defense shall submit to Congress a plan for the performance by private-sector sources of payroll functions for civilian employees of the Department of Defense other than employees paid from nonappropriated funds.

"(2)(A) The Secretary shall implement the plan referred to in paragraph (1) if the Secretary determines that the cost of performance by private-sector sources of the functions referred to in that paragraph does not exceed the cost of performance of those functions by employees of the Federal Government.

"(B) In computing the total cost of performance of such functions by employees of the Federal Government, the Secretary shall include the following:

"(i) Managerial and administrative costs.

"(ii) Personnel costs, including the cost of providing retirement benefits for such personnel.

"(iii) Costs associated with the provision of facilities and other support by Federal agencies.

"(C) The Defense Contract Audit Agency shall verify the costs computed for the Secretary under this paragraph by others.

"(3) At the same time the Secretary submits the plan required by paragraph (1), the Secretary shall submit to Congress a report on other accounting and finance functions of the Department that are appropriate for performance by private-sector sources."

63. Section 356 of the National Defense Authorization Act for Fiscal Year 1996, P.L. 104–106, Feb. 10, 1996 (10 U.S.C. 2461 note) as amended, provided:

“SEC. 356. PROGRAM FOR IMPROVED TRAVEL PROCESS FOR DEPARTMENT OF DEFENSE.

"(a) IN GENERAL.—(1) The Secretary of Defense shall conduct a program to evaluate options to improve the Department of Defense travel process. To carry out the program, the Secretary shall compare the results of the tests conducted under subsection (b) to determine which travel process tested under such subsection is the better option to effectively manage travel of Department personnel.

"(2) The program shall be conducted at not less than three and not more than six military installations, except that an installation may be the subject of only one test conducted under the program.

"(3) The Secretary shall act through the Under Secretary of Defense (Comptroller) in the performance of the Secretary's responsibilities under this section.

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(b) CONDUCT OF TESTS.—(1) The Secretary shall conduct a test at an installation referred to in subsection (a)(2) under which the Secretary-

"(A) implements the changes proposed to be made with respect to the Department of Defense travel process by the task force on travel management that was established by the Secretary in July 1994;

"(B) manages and uniformly applies that travel process (including the implemented changes) throughout the Department; and

"(C) provides opportunities for private-sector sources to provide travel reservation services and credit card services to facilitate that travel process.

"(2) The Secretary shall conduct a test at an installation referred to in subsection (a)(2) under which the Secretary-

"(A) enters into one or more contracts with a private-sector source pursuant to which the private-sector source manages the Department of Defense travel process (except for functions referred to in subparagraph (B)), provides for responsive, reasonably priced services as part of the travel process, and uniformly applies the travel process throughout the Department; and

"(B) provides for the performance by employees of the Department of only those travel functions, such as travel authorization, that the Secretary considers to be necessary to be performed by such employees.

"(3) Each test required by this subsection shall begin not later than 60 days after the date of the enactment of this Act [Feb. 10, 1996] and end two years after the date on which it began. Each such test shall also be conducted in accordance with the guidelines for travel management issued for the Department by the Under Secretary of Defense (Comptroller).

"(c) EVALUATION CRITERIA.—The Secretary shall establish criteria to evaluate the travel processes tested under subsection (b). The criteria shall, at a minimum, include the extent to which a travel process provides for the following:

"(1) The coordination, at the time of a travel reservation, of travel policy and cost estimates with the mission which necessitates the travel.

"(2) The use of fully integrated travel solutions envisioned by the travel reengineering report of the Department of Defense dated January 1995.

"(3) The coordination of credit card data and travel reservation data with cost estimate data.

"(4) The elimination of the need for multiple travel approvals through the coordination of such data with proposed travel plans.

"(5) A responsive and flexible management information system that enables the Under Secretary of Defense (Comptroller) to monitor travel expenses throughout the year, accurately plan travel budgets for future years, and assess, in the case of travel of an employee on temporary duty, the relationship between the cost of the travel and the value of the travel to the accomplishment of the mission which necessitates the travel.

"(d) PLAN FOR PROGRAM.—Before conducting the program, the Secretary shall develop a plan for the program that addresses the following:

"(1) The purposes of the program, including the achievement of an objective of reducing by at least 50 percent the total cost incurred by the Department annually to manage the Department of Defense travel process.

"(2) The methodology and anticipated cost of the program, including the cost of an arrangement pursuant to which a private-sector source would receive an agreed-upon payment plus an additional negotiated amount that does not exceed 50 percent of the total amount saved in excess of the objective specified in paragraph (1).

"(3) A specific citation to any provision of law, rule, or regulation that, if not waived, would prohibit the conduct of the program or any part of the program.

"(4) The evaluation criteria established pursuant to subsection (c).

"(5) A provision for implementing throughout the Department the travel process determined to be the better option to effectively manage travel of Department personnel on the basis of a final assessment of the results of the program.

"(e) REPORT.—After the first full year of the conduct of the tests required by subsection (b), the Secretary shall submit to the Committee on Armed Services of the Senate and the Committee on National Security of the House of Representatives a report on the implementation of the program. The report shall include an analysis of the evaluation criteria established pursuant to subsection (c)."

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

64. Section 4101 of the National Defense Authorization Act for Fiscal Year 1993, **P.L. 102–484, Oct. 23, 1992 (10 U.S.C. 2500 note)**, provided:

“SEC. 4101. CONGRESSIONAL FINDINGS.

"Congress makes the following findings:

"(1) The collapse of communism in Eastern Europe and the dissolution of the Soviet Union have fundamentally changed the military threat that formed the basis for the national security policy of the United States since the end of World War II.

"(2) The change in the military threat presents a unique opportunity to restructure and reduce the military requirements of the United States.

"(3) As the United States proceeds with the post-Cold War defense build down, the Nation must recognize and address the impact of reduced defense spending on the military personnel, civilian employees, and defense industry workers who have been the foundation of the national defense policies of the United States.

"(4) The defense build down will have a significant impact on communities as procurements are reduced and military installations are closed and realigned.

"(5) Despite the changes in the military threat, the United States must maintain the capability to respond to regional conflicts that threaten the national interests of the United States, and to reconstitute forces in the event of an extended conflict.

"(6) The skills and capabilities of military personnel, civilian employees of the Department of Defense, defense industry workers, and defense industries represent an invaluable national resource that can contribute to the economic growth of the United States and to the long-term vitality of the national technology and industrial base.

"(7) Prompt and vigorous implementation of defense conversion, reinvestment, and transition assistance programs is essential to ensure that the defense build down is structured in a manner that—

"(A) enhances the long-term ability of the United States to maintain a strong and vibrant national technology and industrial base; and

"(B) promotes economic growth."

65. Section 256 of the National Defense Authorization Act for Fiscal Year 2008, **P.L. 110–417, §256, Oct. 14, 2008 (10 U.S.C. 2501 note)** provided:

“SEC. 256. EXECUTIVE AGENT FOR PRINTED CIRCUIT BOARD TECHNOLOGY.

"(a) EXECUTIVE AGENT.—Not later than 90 days after the date of the enactment of this Act [Oct. 14, 2008], the Secretary of Defense shall designate a senior official of the Department of Defense to act as the executive agent for printed circuit board technology.

"(b) ROLES, RESPONSIBILITIES, AND AUTHORITIES.—

"(1) ESTABLISHMENT.—Not later than one year after the date of the enactment of this Act [Oct. 14, 2008], and in accordance with Directive 5101.1, the Secretary of Defense shall prescribe the roles, responsibilities, and authorities of the executive agent designated under subsection (a).

"(2) SPECIFICATION.—The roles and responsibilities of the executive agent designated under subsection (a) shall include each of the following:

"(A) Development and maintenance of a printed circuit board and interconnect technology roadmap that ensures that the Department of Defense has access to the manufacturing capabilities and technical expertise necessary to meet future military requirements regarding such technology.

"(B) Development of recommended funding strategies necessary to meet the requirements of the roadmap developed under subparagraph (A).

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(C) Assessment of the vulnerabilities, trustworthiness, and diversity of the printed circuit board supply chain, including the development of trustworthiness requirements for printed circuit boards used in defense systems, and to develop strategies to address matters that are identified as a result of such assessment.

"(D) Such other roles and responsibilities as the Secretary of Defense considers appropriate.

"(c) SUPPORT WITHIN DEPARTMENT OF DEFENSE.—In accordance with Directive 5101.1, the Secretary of Defense shall ensure that the military departments, Defense Agencies, and other components of the Department of Defense provide the executive agent designated under subsection (a) with the appropriate support and resources needed to perform the roles, responsibilities, and authorities of the executive agent.

"(d) DEFINITIONS.—In this section:

"(1) The term 'Directive 5101.1' means Department of Defense Directive 5101.1, or any successor directive relating to the responsibilities of an executive agent of the Department of Defense.

"(2) The term 'executive agent' has the meaning given the term 'DoD Executive Agent' in Directive 5101.1."

66. Section 1118 of the National Defense Authorization Act for Fiscal Year 1995, [P.L. 103–337, Oct. 5, 1994 \(10 U.S.C. 2501note\)](#), provided:

“SEC. 1118. DOCUMENTATION FOR AWARDS FOR COOPERATIVE AGREEMENTS OR OTHER TRANSACTIONS UNDER DEFENSE TECHNOLOGY REINVESTMENT PROGRAMS.

"At the time of the award for a cooperative agreement or other transaction under a program carried out under chapter 148 of title 10, United States Code, the head of the agency concerned shall include in the file pertaining to such agreement or transaction a brief explanation of the manner in which the award advances and enhances a particular national security objective set forth in section 2501(a) of such title or a particular policy objective set forth in [former] section 2501(b) of such title."

67. Section 238(b) of the National Defense Authorization Act for Fiscal Year 2008, [P.L. 110–181, Jan. 28, 2008 \(10 U.S.C. 2521 note\)](#), provided:

“SEC. 238. STRATEGIC PLAN FOR THE MANUFACTURING TECHNOLOGY PROGRAM.

(a) [amended 10 U.S.C. 2521 to add a new subsection (e)]

“(b) INITIAL DEVELOPMENT AND SUBMISSION OF PLAN.—

"(1) DEVELOPMENT.—The Secretary of Defense shall develop the strategic plan required by subsection (e) [now (f)] of [section 2521 of title 10, United States Code](#) (as added by subsection (a) of this section), so that the plan goes into effect at the beginning of fiscal year 2009.

"(2) SUBMISSION.—Not later than the date on which the budget of the President for fiscal year 2010 is submitted to Congress under [section 1105 of title 31, United States Code](#), the Secretary shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives the plan specified in paragraph (1)."

68. Section 823 of the National Defense Authorization Act for Fiscal Year 2004, [P.L. 108–136, Nov. 24, 2003 \(10 U.S.C. 2521 note\)](#), provided:

“SEC. 823. TECHNICAL ASSISTANCE RELATING TO MACHINE TOOLS.

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(a) TECHNICAL ASSISTANCE.—The Secretary of Defense shall publish in the Federal Register information on Government contracting for purposes of assisting machine tool companies in the United States and entities that use machine tools. The information shall contain, at a minimum, the following:

"(1) An identification of resources with respect to Government contracting regulations, including compliance procedures and information on the availability of counseling.

"(2) An identification of resources for locating opportunities for contracting with the Department of Defense, including information about defense contracts that are expected to be carried out that may require the use of machine tools.

"(b) SCIENCE AND TECHNOLOGY INITIATIVES.—The Secretary of Defense shall incorporate into the Department of Defense science and technology initiatives on manufacturing technology an objective of developing advanced machine tool capabilities. Such technologies shall be used to improve the technological capabilities of the United States domestic machine tool industrial base in meeting national security objectives."

69. Section 823 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, P.L. 111–383, Jan. 7, 2011 (**10 U.S.C. 2533b note**), provided:

“SEC. 823. REVIEW OF REGULATORY DEFINITION RELATING TO PRODUCTION OF SPECIALTY METALS.

"(a) REVIEW REQUIRED.—The Secretary of Defense shall review the regulations specified in subsection (b) to ensure that the definition of the term 'produce' in such regulations complies with the requirements of [section 2533b of title 10, United States Code](#). In carrying out the review, the Secretary shall seek public comment, consider congressional intent, and revise the regulations as the Secretary considers necessary and appropriate.

"(b) REGULATIONS SPECIFIED.—The regulations referred to in subsection (a) are any portion of subpart 252.2 of the defense supplement to the Federal Acquisition Regulation that includes a definition of the term 'produce' for purposes of implementing [section 2533b of title 10, United States Code](#).

"(c) COMPLETION OF REVIEW.—The Secretary shall complete the review required by subsection (a) and any necessary and appropriate revisions to the defense supplement to the Federal Acquisition Regulation not later than 270 days after the date of the enactment of this Act [Jan. 7, 2011]."

70. Section 804(h) of the National Defense Authorization Act for Fiscal Year 2008, P.L. 110–181, Jan. 28, 2008 (**10 U.S.C. 2533b note**), provided:

“SEC. 804. CLARIFICATION OF THE PROTECTION OF STRATEGIC MATERIALS CRITICAL TO NATIONAL SECURITY.

(a) ***

"(h) REVISION OF DOMESTIC NONAVAILABILITY DETERMINATIONS AND RULES.—No later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], any domestic nonavailability determination under [section 2533b of title 10, United States Code](#), including a class deviation, or rules made by the Department of Defense between December 6, 2006, and the date of the enactment of this Act, shall be reviewed and amended, as necessary, to comply with the amendments made by this section [amending this section and enacting provisions set out as a note under this section]. This requirement shall not apply to a domestic nonavailability determination that applies to—

"(1) an individual contract that was entered into before the date of the enactment of this Act; or

"(2) an individual Department of Defense program, except to the extent that such domestic nonavailability determination applies to contracts entered into after the date of the enactment of this Act."

71. Section 842(b) of the John Warner National Defense Authorization Act for Fiscal Year 2007, P.L. 109–364, Oct. 17, 2006 (**10 U.S.C. 2533b note**), provided:

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

“SEC. 842. PROTECTION OF STRATEGIC MATERIALS CRITICAL TO NATIONAL SECURITY.

(a) ***

(b) ONE-TIME WAIVER OF SPECIALTY METALS DOMESTIC SOURCE REQUIREMENT.—

"(1) AUTHORITY.—The Secretary of Defense or the Secretary of a military department may accept specialty metals if such metals were incorporated into items produced, manufactured, or assembled in the United States before the date of the enactment of this Act [Oct. 17, 2006] with respect to which the contracting officer for the contract determines that the contractor is not in compliance with [section 2533b of title 10, United States Code](#) (as added by subsection (a)(1)), if-

"(A) the contracting officer for the contract determines in writing that-

"(i) it would not be practical or economical to remove or replace the specialty metals incorporated in such items or to substitute items containing compliant materials;

"(ii) the prime contractor and subcontractor responsible for providing items containing non-compliant materials have in place an effective plan to ensure compliance with [section 2533b of title 10, United States Code](#) (as so added), with regard to items containing specialty metals if such metals were incorporated into items produced, manufactured, or assembled in the United States after the date of the enactment of this Act [Oct. 17, 2006]; and

"(iii) the non-compliance is not knowing or willful; and

"(B) the Under Secretary of Defense for Acquisition, Technology, and Logistics or the service acquisition executive of the military department concerned approves the determination.

"(2) NOTICE.—Not later than 15 days after a contracting officer makes a determination under paragraph (1)(A) with respect to a contract, the contracting officer shall post a notice on FedBizOps.gov that a waiver has been granted for the contract under this subsection.

"(3) DEFINITION.—In this subsection, the term 'FedBizOps.gov' means the website maintained by the General Services Administration known as FedBizOps.gov (or any successor site).

"(4) TERMINATION OF AUTHORITY.—A contracting officer may exercise the authority under this subsection only with respect to the delivery of items the final acceptance of which takes place after the date of the enactment of this Act [Oct. 17, 2006] and before September 30, 2010."

72. Section 343 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, P.L. 106–398, Oct. 30, 2000 (10 U.S.C. 4551 note), as amended, provided:

“SEC. 343. ARSENAL SUPPORT PROGRAM INITIATIVE.

"(a) DEMONSTRATION PROGRAM REQUIRED.—To help maintain the viability of the Army manufacturing arsenals and the unique capabilities of these arsenals to support the national security interests of the United States, the Secretary of the Army shall carry out a demonstration program under this section during fiscal years 2001 through 2012 at each manufacturing arsenal of the Department of the Army.

"(b) PURPOSES OF DEMONSTRATION PROGRAM.—The purposes of the demonstration program are as follows:

"(1) To provide for the utilization of the existing skilled workforce at the Army manufacturing arsenals by commercial firms.

"(2) To provide for the reemployment and retraining of skilled workers who, as a result of declining workload and reduced Army spending on arsenal production requirements at these Army arsenals, are idled or underemployed.

"(3) To encourage commercial firms, to the maximum extent practicable, to use these Army arsenals for commercial purposes.

"(4) To increase the opportunities for small businesses (including socially and economically disadvantaged small business concerns and new small businesses) to use these Army arsenals for those purposes.

"(5) To maintain in the United States a work force having the skills in manufacturing processes that are necessary to meet industrial emergency planned requirements for national security purposes.

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(6) To demonstrate innovative business practices, to support Department of Defense acquisition reform, and to serve as both a model and a laboratory for future defense conversion initiatives of the Department of Defense.

"(7) To the maximum extent practicable, to allow the operation of these Army arsenals to be rapidly responsive to the forces of free market competition.

"(8) To reduce or eliminate the cost of Government ownership of these Army arsenals, including the costs of operations and maintenance, the costs of environmental remediation, and other costs.

"(9) To reduce the cost of products of the Department of Defense produced at these Army arsenals.

"(10) To leverage private investment at these Army arsenals through long-term facility use contracts, property management contracts, leases, or other agreements that support and advance the demonstration program for the following activities:

"(A) Recapitalization of plant and equipment.

"(B) Environmental remediation.

"(C) Promotion of commercial business ventures.

"(D) Other activities approved by the Secretary of the Army.

"(11) To foster cooperation between the Department of the Army, property managers, commercial interests, and State and local agencies in the implementation of sustainable development strategies and investment in these Army arsenals.

"(c) CONTRACT AUTHORITY.—(1) In the case of each Army manufacturing arsenal, the Secretary of the Army may enter into contracts with commercial firms to authorize the contractors, consistent with [section 4543 of title 10, United States Code](#)—

"(A) to use the arsenal, or a portion of the arsenal, and the skilled workforce at the arsenal to manufacture weapons, weapon components, or related products consistent with the purposes of the program; and

"(B) to enter into subcontracts for the commercial use of the arsenal consistent with such purposes.

"(2) A contract under paragraph (1) shall require the contractor to contribute toward the operation and maintenance of the Army manufacturing arsenal covered by the contract.

"(3) In the event an Army manufacturing arsenal is converted to contractor operation, the Secretary may enter into a contract with the contractor to authorize the contractor, consistent with [section 4543 of title 10, United States Code](#)—

"(A) to use the facility during the period of the program in a manner consistent with the purposes of the program; and

"(B) to enter into subcontracts for the commercial use of the facility consistent with such purposes.

"(d) LOAN GUARANTEES.—(1) Subject to paragraph (2), the Secretary of the Army may guarantee the repayment of any loan made to a commercial firm to fund, in whole or in part, the establishment of a commercial activity at an Army manufacturing arsenal under this section.

"(2) Loan guarantees under this subsection may not be committed except to the extent that appropriations of budget authority to cover their costs are made in advance, as required by [section 504 of the Federal Credit Reform Act of 1990 \(2 U.S.C. 661c\)](#).

"(3) The Secretary of the Army may enter into agreements with the Administrator of the Small Business Administration or the Administrator of the Farmers Home Administration, the Administrator of the Rural Development Administration, or the head of other appropriate agencies of the Department of Agriculture, under which such Administrators may, under this subsection—

"(A) process applications for loan guarantees;

"(B) guarantee repayment of loans; and

"(C) provide any other services to the Secretary of the Army to administer this subsection.

"(4) An Administrator referred to in paragraph (3) may guarantee loans under this section to commercial firms of any size, notwithstanding any limitations on the size of applicants imposed on other loan guarantee programs that the Administrator administers. To the extent practicable, each Administrator shall use the same procedures for processing loan guarantee applications under this subsection as the Administrator uses for processing loan guarantee applications under other loan guarantee programs that the Administrator administers.

[TEXT OF PROVISIONS IN REPEAL PACKAGE]

"(e) LOAN LIMITS.—The maximum amount of loan principal guaranteed during a fiscal year under subsection (d) may not exceed-

"(1) \$20,000,000, with respect to any single borrower; and

"(2) \$320,000,000 with respect to all borrowers.

"(f) TRANSFER OF FUNDS.—The Secretary of the Army may transfer to an Administrator providing services under subsection (d), and the Administrator may accept, such funds as may be necessary to administer loan guarantees under such subsection."

**809 PANEL RECOMMENDATIONS FOR REPEAL OF
CERTAIN TITLE 10 “NOTE” SECTIONS**

[Sections are set out in U.S. Code section order]

1 **SEC. ____.** REPEAL OF CERTAIN DEFENSE ACQUISITION LAWS CLASSIFIED AS
2 **“NOTE” SECTIONS IN THE PUBLICATION OF TITLE 10, UNITED**
3 **STATES CODE, THAT REQUIRED THE ISSUANCE OF REGULATIONS**
4 **OR THAT HAVE EXPIRED OR ARE OTHERWISE OBSOLETE.**

5 The following provisions of law are repealed:

6 (1) Section 387(c) of the National Defense Authorization Act for Fiscal Year
7 1998 (Public Law 105-85; 10 U.S.C. 195 note).

8 (2) Section 801 of the Carl Levin and Howard P. “Buck” McKeon National
9 Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291; 10 U.S.C. 2223a
10 note).

11 (3) Section 938 of the National Defense Authorization Act for Fiscal Year 2014
12 (Public Law 113–66; 10 U.S.C. 2223a note).

13 (4) Section 934 of the National Defense Authorization Act for Fiscal Year 2013
14 (Public Law 112–239; 10 U.S.C. 2223a note).

15 (5) Section 2867 of the National Defense Authorization Act for Fiscal Year 2012
16 (Public Law 112–81; 10 U.S.C. 2223a note).

17 (6) Section 215 of the Ike Skelton National Defense Authorization Act for Fiscal
18 Year 2011 (Public Law 111–383; 10 U.S.C. 2223a note).

SECTION 809 PANEL RECOMMENDATIONS FOR REPEAL OF CERTAIN TITLE 10 NOTE SECTIONS

(7) Section 804 of the National Defense Authorization Act for Fiscal Year 2010
(Public Law 111–84; 10 U.S.C. 2223a note).

(8) Section 881 of the National Defense Authorization Act for Fiscal Year 2008
(Public Law 110–181; 10 U.S.C. 2223a note).

(9) Section 814(a) of the National Defense Authorization Act for Fiscal Year
2017 (Public Law 114–328; 10 U.S.C. 2302 note).

(10) Section 881 of the National Defense Authorization Act for Fiscal Year 2016
(Public Law 114–92; 10 U.S.C. 2302 note).

(11) Section 804 of the National Defense Authorization Act for Fiscal Year 2013
(Public Law 112–239; 10 U.S.C. 2302 note).

(12) Section 843 of the National Defense Authorization Act for Fiscal Year 2013
(Public Law 112–239; 10 U.S.C. 2302 note).

(13) Section 844 of the National Defense Authorization Act for Fiscal Year 2013
(Public Law 112–239; 10 U.S.C. 2302 note).

(14) Section 818(g) of the National Defense Authorization Act for Fiscal Year
2012 (Public Law 112–81; 10 U.S.C. 2302 note).

(15) Section 127 of the Ike Skelton National Defense Authorization Act for Fiscal
Year 2011 (Public Law 111–383; 10 U.S.C. 2302 note).

(16) Section 815(b) of the National Defense Authorization Act for Fiscal Year
2008 (Public Law 110–181; 10 U.S.C. 2302 note).

(17) Section 812 of the John Warner National Defense Authorization Act for
Fiscal Year 2007 (Public Law 109-364; 10 U.S.C. 2302 note).

SECTION 809 PANEL RECOMMENDATIONS FOR REPEAL OF CERTAIN TITLE 10 NOTE SECTIONS

(18) Section 806 of the National Defense Authorization Act for Fiscal Year 2006
(Public Law 109–163; 10 U.S.C. 2302 note).

(19) Section 817 of the National Defense Authorization Act for Fiscal Year 2006
(Public Law 109-163; 10 U.S.C. 2302 note).

(20) Section 141 of the Ronald W. Reagan National Defense Authorization Act
for Fiscal Year 2005 (Public Law 108–375; 10 U.S.C. 2302 note).

(21) Section 802 of the Ronald W. Reagan National Defense Authorization Act
for Fiscal Year 2005 (Public Law 108–375; 10 U.S.C. 2302 note).

(22) Section 801(b) of the National Defense Authorization Act for Fiscal Year
2004 (Public Law 108–136; 10 U.S.C. 2302 note).

(23) Section 805(a) of the National Defense Authorization Act for Fiscal Year
2004 (Public Law 108–136; 10 U.S.C. 2302 note).

(24) Section 352 of the Bob Stump National Defense Authorization Act for Fiscal
Year 2003 (Public Law 107–314; 10 U.S.C. 2302 note).

(25) Section 326 of the National Defense Authorization Act for Fiscal Year 1993
(Public Law 102–484; 10 U.S.C. 2302 note).

(26) Section 9004 of the Department of Defense Appropriations Act, 1990 (Public
Law 101–165; 10 U.S.C. 2302 note).

(27) Section 913 of the Department of Defense Authorization Act, 1986 (Public
Law 99–145; 10 U.S.C. 2302 note).

(28) Section 802 of the Duncan Hunter National Defense Authorization Act for
Fiscal Year 2009 (Public Law 110–417; 10 U.S.C. 2304 note).

SECTION 809 PANEL RECOMMENDATIONS FOR REPEAL OF CERTAIN TITLE 10 NOTE SECTIONS

(29) Section 821 of the National Defense Authorization Act for Fiscal Year 2008
(Public Law 110–181; 10 U.S.C. 2304 note).

(30) Section 813 of the John Warner National Defense Authorization Act for
Fiscal Year 2007 (Public Law 109–364; 10 U.S.C. 2304 note).

(31) Section 391 of the National Defense Authorization Act for Fiscal Year 1998
(Public Law 105–85; 10 U.S.C. 2304 note).

(32) Section 927(b) of Public Laws 99–500, 99–591, and 99–661 (10 U.S.C. 2304
note).

(33) Section 1222(b) of the National Defense Authorization Act for Fiscal Year
1987 (Public Law 99–661; 10 U.S.C. 2304 note).

(34) Section 814(b) of the National Defense Authorization Act for Fiscal Year
2010 (Public Law 111-84; 10 U.S.C. 2304a note).

(35) Section 834 of the John Warner National Defense Authorization Act for
Fiscal Year 2007 (Public Law 109-364; 10 U.S.C. 2304b note).

(36) Section 803 of the Strom Thurmond National Defense Authorization Act for
Fiscal Year 1999 (Public Law 105–261; 10 U.S.C. 2306a note).

(37) Section 1075 of the National Defense Authorization Act for Fiscal Year 1995
(Public Law 103–337; 10 U.S.C. 2315 note).

(38) Section 824(a) of the Ike Skelton National Defense Authorization Act for
Fiscal Year 2011 (Public Law 111–383; 10 U.S.C. 2320 note).

(39) Section 818 of the National Defense Authorization Act for Fiscal Year 1995
(Public Law 103–337; 10 U.S.C. 2324 note).

SECTION 809 PANEL RECOMMENDATIONS FOR REPEAL OF CERTAIN TITLE 10 NOTE SECTIONS

(40) Section 812 of the National Defense Authorization Act for Fiscal Year 2010
(Public Law 111–84; 10 U.S.C. 2326 note).

(41) Sections 908(a), (b), (c), and (e) of Public Laws 99–500, 99–591, and 99–661
(10 U.S.C. 2326 note).

(42) Section 805 of the National Defense Authorization Act for Fiscal Year 2008
(Public Law 110–181; 10 U.S.C. 2330 note).

(43) Sections 801(d), (e), and (f) of the National Defense Authorization Act for
Fiscal Year 2002 (Public Law 107–107; 10 U.S.C. 2330 note).

(44) Section 802 of the National Defense Authorization Act for Fiscal Year 2002
(Public Law 107–107; 10 U.S.C. 2330 note).

(45) Section 1032 of the Bob Stump National Defense Authorization Act for
Fiscal Year 2003 (Public Law 107–314; 10 U.S.C. 2358 note).

(46) Section 241 of the Bob Stump National Defense Authorization Act for Fiscal
Year 2003 (Public Law 107–314; 10 U.S.C. 2358 note).

(47) Section 606 of Public Law 92–436 (10 U.S.C. 2358 note).

(48) Section 913(b) of the National Defense Authorization Act for Fiscal Year
2000 (Public Law 106–65; 10 U.S.C. 2364 note).

(49) Sections 234(a) and (b) of the National Defense Authorization Act for Fiscal
Year 1987 (Public Law 99–661; 10 U.S.C. 2364 note).

(50) Section 943(b) of the National Defense Authorization Act for Fiscal Year
2008 (Public Law 110–181; 10 U.S.C. 2366a note).

(51) Section 1047(d) of the Duncan Hunter National Defense Authorization Act
for Fiscal Year 2009 (Public Law 110–417; 10 U.S.C. 2366b note).

SECTION 809 PANEL RECOMMENDATIONS FOR REPEAL OF CERTAIN TITLE 10 NOTE SECTIONS

(52) Section 844(b) of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92; 10 U.S.C. 2377 note).

(53) Section 801 of the National Defense Authorization Act for Fiscal Year 1990 (Public Law 101–189; 10 U.S.C. 2399 note).

(54) Section 807(b) of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364; 10 U.S.C. 2410p note).

(55) Section 908(d) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 10 U.S.C. 2430 note).

(56) Section 837 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160; 10 U.S.C. 2430 note).

(57) Section 838 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160; 10 U.S.C. 2430 note).

(58) Section 828 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111–84; 10 U.S.C. 2458 note).

(59) Section 325 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108–375; 10 U.S.C. 2461 note).

(60) Section 336 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136; 10 U.S.C. 2461 note).

(61) Section 353(a) of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104–106; 10 U.S.C. 2461 note).

(62) Section 356 of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104–106; 10 U.S.C. 2461 note).

SECTION 809 PANEL RECOMMENDATIONS FOR REPEAL OF CERTAIN TITLE 10 NOTE SECTIONS

(63) Section 4101 of the National Defense Authorization Act for Fiscal Year 1993
(Public Law 102–484; 10 U.S.C. 2500 note).

(64) Section 256 of the National Defense Authorization Act for Fiscal Year 2008
(Public Law 110–417; 10 U.S.C. 2501 note).

(65) Section 1118 of the National Defense Authorization Act for Fiscal Year 1995
(Public Law 103–337; 10 U.S.C. 2501note).

(66) Section 238(b) of the National Defense Authorization Act for Fiscal Year
2008 (Public Law 110–181; 10 U.S.C. 2521 note).

(67) Section 823 of the National Defense Authorization Act for Fiscal Year 2004
(Public Law 108–136; 10 U.S.C. 2521 note).

(68) Section 823 of the Ike Skelton National Defense Authorization Act for Fiscal
Year 2011 (Public Law 111–383; 10 U.S.C. 2533b note).

(69) Section 804(h) of the National Defense Authorization Act for Fiscal Year
2008 (Public Law 110–181; 10 U.S.C. 2533b note).

(70) Section 842(b) of the John Warner National Defense Authorization Act for
Fiscal Year 2007 (Public Law 109–364; 10 U.S.C. 2533b note).

(71) Section 343 of the Floyd D. Spence National Defense Authorization Act for
Fiscal Year 2001 (as enacted into law by Public Law 106–398; 10 U.S.C. 4551 note).

Advisory Panel on Streamlining and Codifying Acquisition Regulations

Section 809 Panel Recommendations #2 for Repeal of Acquisition-Related Provisions of Law

March 23, 2018





March 23, 2018

The Honorable Mac Thornberry
Chairman
Committee on Armed Services
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Section 809 Panel, as part of its “streamlining” mandate, recommends that the provisions of law specified on the attached list be repealed. There are 32 provisions on the list, all of which relate to defense acquisition. Three are sections of title 10, United States Code; the remainder appear in the U.S. Code as “note” sections under various provisions of title 10. Also attached are (1) draft legislation to carry out the proposed repeals, and (2) a document with the current text of the provisions of law proposed for repeal.

This recommendation is a follow-on to a similar recommendation transmitted to the congressional defense committees in late February. That recommendation provided a list of 71 provisions of law proposed for repeal.

As in the case of the February transmittal, the provisions recommended for repeal in this transmittal generally (1) required the Department to issue regulations (directives or guidance, etc.), (2) have now expired by their own terms, or (3) are otherwise obsolete.

The Panel believes that enactment of the repeals recommended in the two lists would be a significant step toward “decluttering” the Code.

As in the case of the February transmittal, the Panel wishes to emphasize that, with respect to any recommendation for repeal of a statutory requirement for issuance of a regulation, the Panel is not expressing a view on the merits of the policies covered by the regulation. Rather, in recommending repeal of the statutory requirement for a regulation, the Panel is recommending that the Secretary of Defense be allowed to revise the regulation as circumstances warrant. Repeal of the statutory requirement for the regulation would allow the Secretary to revise or rescind the regulation, but would not require it; the decision to retain, or not retain, the regulation would be up to the Secretary.

As part of its ongoing work reviewing defense acquisition statutes, the Panel may identify further provisions to recommend to Congress for repeal.

The Panel is submitting these recommendations at this time, rather than waiting to include them in Volume II of the Panel's report in June of this year, in order to provide the committees the fullest opportunity to consider them for inclusion in the National Defense Authorization Act for Fiscal Year 2019.

Sincerely,



David Drabkin
Chair, Section 809 Panel

Attachments:

- (1) Spreadsheet with list of provisions recommended for repeal
- (2) Text of provisions recommended for repeal
- (3) Draft statutory text to carry out the recommended repeals

cc:

The Honorable Adam Smith
Ranking Member

Provisions Recommended for Repeal by Section 809 Panel - 2d Tranche

	A	B	C	D	E
1	10 USC Section	Source Cite	Title	Description	809 Panel Recommendation
2	167a		Unified combatant command for joint warfighting experimentation: acquisition authority	Enacted Nov. 24, 2003; expired Sept. 30, 2010. Authorized SecDef to delegate certain limited acquisition authority to the commander of the unified combatant command that has the mission for joint warfighting experimentation, as assigned by the SecDef; internal inspector general audits required	Repeal
3	2302 note	FY17 NDAA, P.L. 114-328, §854, Dec 23, 2016	Key Performance Parameter Reduction Pilot Program	Enacted in Dec 2016 – allows SecDef to carry out pilot program to reduce performance measurements for an acquisition program (no more than 3); no sunset date	Repeal
4	2302 note	FY13 NDAA, P.L. 112-239, §829, Jan 2, 2013	Extension of Contractor Conflict of Interest Limitations	Enacted in Jan 2013 – required SecDef review guidance (within 180 days) on personal conflict of interest for contractor employees (enacted in 2009) for possible extension (and DFARS revision) related to additional covered functions	Repeal
5	2304 note	FY16 NDAA, P.L. 114-92, §895, Nov 25, 2015	Mitigating Potential Unfair Advantage for Technical Advisors	Enacted in Nov 2015 – required AT&L review of guidance (within 180 days) to mitigate potential unfair competitive advantages of technical advisors	Repeal
6	2313 note	FY12 NDAA, P.L. 112-81, §842, Dec 31, 2011	Additional Access to Contractor and Subcontractor Records in the Central Command Theater of Operations	Enacted in Dec 2011 – required SecDef to revise DFARS to include a clause in all covered contracts to allow examination of records upon written determination of probable extortion or corruption; required flow-down of clause; required submission of reports (for 3 years) to congressional defense committees	Repeal
7	2323		Contract goal for small disadvantaged businesses and certain institutions of higher education	Authority expired 9/30/09. Established a 5% contract goal for contracts/subcontracts with socially & economically disadvantaged firms, historically Black colleges and other special groups; authorized technical and other assistance as well as advance payments.	Repeal

Provisions Recommended for Repeal by Section 809 Panel - 2d Tranche

	A	B	C	D	E
1	10 USC Section	Source Cite	Title	Description	809 Panel Recommendation
8	2330 note	FY17 NDAA, P.L. 114-328, §803(a), 12/23/16	Modernization of Services Acquisition	Enacted in Dec 2016 – required SecDef review and possible revision of DOD instruction 5000.74 (within 180 days) on acquisition of services, considering changes in technology	Repeal
9	2330 note	FY16 NDAA, P.L. 114-92, §882, Nov 25, 2015	Guidance Relating to Oversight & Approval of Services Contracts	Enacted in Nov 2015 – required AT&L to examine (by March 2016) decision authority on services acquisition & issue guidance to improve capabilities	Repeal
10	2330 note	FY12 NDAA, P.L. 112-81, §807, Dec 31, 2011	Defense Science Board Recommendations on Services	Enacted in Dec 2011 – required AT&L to develop a plan (within 180 days) to implement recommendations of DSB to improve services acquisition; required GAO report (by Dec 2011)	Repeal
11	2330 note	FY11 NDAA, P.L. 111-383, §863(a)–(h), Jan. 7, 2011	Requirements for The Acquisition of Services	Enacted in January 2011 – required SecDef to ensure implementation plans are in place by the military departments for proper processes for identifying, assessing and validating requirements for the acquisition of services (for operational commands and supporting requirements); plans must be consistent with joint policy guidance	Repeal
12	2330 note	FY08 NDAA, P.L. 110-181, §808, Jan. 28, 2008	Independent Management Reviews of Contracts for Services	Enacted in January 2008 – required SecDef to issue guidance (within 180 days) to provide independent reviews of services contracts (related to cost/schedule & performance, contracting vehicles, pass throughs, reliance of use of contractors for closely associated inherently governmental work, ETC); required report to congressional defense committees (in 270 days) and a GAO review	Repeal

Provisions Recommended for Repeal by Section 809 Panel - 2d Tranche

	A	B	C	D	E
1	10 USC Section	Source Cite	Title	Description	809 Panel Recommendation
13	2330 note	FY06 NDAA, P.L. 109-163, §812(b)-(c), Jan 6, 2006	Management Structure for the Procurement of Contract Services: Phased Implementation	Enacted in Jan 2006 – required AT&L to implement in phases requirements for services acquisition (including establishing categories & dollar thresholds); required report to SASC & HASC within one year of enactment. Last phase was 2009	Repeal
14	2330a note	FY09 NDAA, P.L. 110-417, §831	Development of Guidance on Personal Services Contracts	Enacted in 2008 -- required SecDef develop guidance (in 270 days) on personal service contracts	Repeal
15	2332		Share-in-savings contracts.	Enacted in Dec 2002; terminated Sept. 2005. Allowed agency head to enter into share-in-savings contracts (up to five years) for information technology to accelerate achievement of mission and to share with contractor any savings on contract performance; provided for cancellation/termination of contract if funds no longer available for contract.	Repeal
16	2401a note	FY2000 DoD Approps Act, §8133, P.L. 106-79, Oct. 25, 1999	Multi-Year Aircraft Lease Pilot Program	Enacted in 1999 - authorized a multiyer pilot program for lease by the AF of operational support aircraft. Limited to six aircraft and provided that no lease could be entered into under the pilot program after Sept 30, 2004.	Repeal
17	2430 note	FY16 NDAA, P.L. 114-92, §825(c)(1), (2), Nov 25, 2015	Designation of Milestone Decision Authority: Implementation	Enacted in Nov 2015 – required SecDef to submit a plan (within 180 days) to congressional defense committees for implementing milestone decision authorities	Repeal
18	2430 note	FY15 NDAA, P.L. 113-291, §1058, Dec 19, 2014	Improving Analytic Support to Systems Acquisition	Enacted in Dec 2014 – required SecDef review & revision of guidance (within 120 days) on analytic support for MDAPs; required briefing to cong defense committees within 180 days	Repeal

Provisions Recommended for Repeal by Section 809 Panel - 2d Tranche

	A	B	C	D	E
1	10 USC Section	Source Cite	Title	Description	809 Panel Recommendation
19	2430 note	1. FY91 NDAA, P.L. 101-510, §809, Nov. 5, 1990 2. FY94 NDAA, P.L. 103-160, §833, Nov. 30, 1993 3. FY94 NDAA, P.L. 103-160, §839, Nov. 30, 1993 4. FY95 NDAA, P.L. 103-337, §819, Oct. 5, 1994 5. FASA, P.L. 103-355, §5064, Oct. 13, 1994 6. FY97 NDAA, P.L. 104-201, §803, Sept 23, 1996	<u>Defense Acquisition Pilot Program (6 sections)</u> 1. Major Defense Acquisition Pilot Program 2. Mission Oriented Program Management 3. Contractor Performance Assessment 4. Defense Acquisition Pilot Program Designations 5. Department of Defense Acquisition Pilot Programs 6. Authority to Waive Certain Requirements of Defense Acquisition Pilot Programs	1. Enacted in Sept 1996 – authorized SecDef to waive certain statutory provisions (including OT&E) for any defense acquisition program in a designated pilot program; required written notification to Congress	Repeal
20	2452 note	FY84 NDAA, P.L. 98-94, §1215, Sept 24, 1983	Regs Relating to Increases in Prices for Spare Parts & Replacement	Enacted in Sept 1983 – required SecDef to issue regulations (within 120 days) to prohibit purchase of parts or equipment that increased in price in excess of certain established percentage thresholds; allowed purchase upon written certification of national security interests; proposed regs required to be submitted to SASC & HASC (within 30 days)	Repeal
21	2458 note	FY99 NDAA, P.L. 105-261, §347, Oct 17, 1998	Best Comm Inventory Practices for Management of Secondary Supply Items	Enacted in Oct 1998 – required Secy of mil depts. to submit (within 180 days) to Congress a schedule for implementing best commercial inventory practices for managing secondary supply items; schedule to be completed within 5 years; required GAO report	Repeal

Provisions Recommended for Repeal by Section 809 Panel - 2d Tranche

	A	B	C	D	E
1	10 USC Section	Source Cite	Title	Description	809 Panel Recommendation
22	2458 note	FY99 NDAA, P.L. 105-261, §349, Oct 17, 1998	Inventory Management of In-Transit Items	Enacted in Oct 1998 – required SecDef to develop & carry out plan to ensure visibility of all in-transit end & secondary items; required GAO report; required submission to Congress of any revision to plans required by subsequent laws	Repeal
23	2458 note	FY98 NDAA, P.L. 105-85, §395, Nov 18, 1997	Inventory Management	Enacted in Nov 1997 – required DLA Director (within 180 days) to develop & submit to Congress a plan to implement best commercial practices for distribution of supplies & equipment consistent with military requirements; required GAO report (by March 1998) on feasibility of expanding the covered list	Repeal
24	2458 note	FY96 NDAA, P.L. 104-106, §352, Feb 10, 1996	Direct Vendor Delivery System for Consumable Inventory Items	Enacted in Feb 1996 – required SecDef (by Sept 30, 1997) to implement a system to deliver directly from vendors certain consumable items in order to reduce maintaining warehouses for the items	Repeal
25	2461 note	FY96 NDAA P.L. 104-106, §353(b), Feb 10, 1996	Payroll, Finance, & Accounting Functions of DoD: Pilot Program for Private Sector Operation of NAFI Functions	Enacted in Feb 1996 – authorized SecDef to carryout pilot program to test performance of private sector to perform payroll, accounting & other financial activities for nonappropriated fund instrumentalities; required evaluation of cost efficiencies (with goal of 25% reduction of total costs)	Repeal
26	2465 note	P.L. 107-56, § 1010, Oct 26, 2001	Temp Authority to Contract with Local & State Govts for Performance of Security Functions at US Military Installations	Enacted in Oct 2001 – allowed DOD to contract with State/Local govts for certain security & fire functions (while military forces are engaged in Operation Enduring Freedom/ 180 days after); required report to SASC & HASC within 1 year on performance	Repeal
27	2504 note	FY12 NDAA, P.L. 112-81, §852, Dec 31, 2011	Strategy for Securing Supply Chain and Industrial Base	Enacted in Dec 2011—required SecDef to include in 2012 annual report to Congress an assessment (tier by tier) of industrial base; required updates for 2013-2015	Repeal

Provisions Recommended for Repeal by Section 809 Panel - 2d Tranche

	A	B	C	D	E
1	10 USC Section	Source Cite	Title	Description	809 Panel Recommendation
28	2540c note	FY01 NDAA, P. L. 106-398, §1081(c), Oct. 30, 2000	Funds For Administrative Expenses Under Defense Export Loan Guarantee Program: Limitation Pending Submission of Report	Enacted in Oct 2000 – prohibited SecDef from exercising authority (related to administrative fees) until report was submitted to Congress on Defense Export Loan Guarantee Program	Repeal

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

Sections Proposed for Repeal — Package #2

This document sets out the text of the sections of law that are proposed for repeal by the Section 809 Panel in its repeal package #2, approved by the Panel on March 20, 2018.

[The number at the beginning of each item below corresponds to the row number for that item on the accompanying spreadsheet. (Note that on the spreadsheet Row 1 is a header, so the first item is on Row 2 and accordingly the first item below is numbered 2.)]

2. Section 167a of title 10, United States Code, provides:

§167a. Unified combatant command for joint warfighting experimentation: acquisition authority

(a) LIMITED ACQUISITION AUTHORITY FOR COMMANDER OF CERTAIN UNIFIED COMBATANT COMMAND.—The Secretary of Defense may delegate to the commander of the unified combatant command referred to in subsection (b) authority of the Secretary under chapter 137 of this title sufficient to enable the commander to develop, acquire, and maintain equipment described in subsection (c). The exercise of authority so delegated is subject to the authority, direction, and control of the Secretary.

(b) COMMAND DESCRIBED.—The commander to whom authority is delegated under subsection (a) is the commander of the unified combatant command that has the mission for joint warfighting experimentation, as assigned by the Secretary of Defense.

(c) EQUIPMENT.—The equipment referred to in subsection (a) is as follows:

(1) Equipment for battle management command, control, communications, and intelligence.

(2) Any other equipment that the commander referred to in subsection (b) determines necessary and appropriate for—

(A) facilitating the use of joint forces in military operations; or

(B) enhancing the interoperability of equipment used by the various components of joint forces.

(d) EXCEPTIONS.—The authority delegated under subsection (a) does not apply to the development or acquisition of a system for which—

(1) the total expenditure for research, development, test, and evaluation is estimated to be \$10,000,000 or more; or

(2) the total expenditure for procurement is estimated to be \$50,000,000 or more.

(e) INTERNAL AUDITS AND INSPECTIONS.—The commander referred to in subsection (b) shall require the inspector general of that command to conduct internal audits and inspections of purchasing and contracting administered by the commander under the authority delegated under subsection (a).

(f) LIMITATION ON AUTHORITY TO MAINTAIN EQUIPMENT.—The authority delegated under subsection (a) to maintain equipment is subject to the availability of funds authorized and appropriated specifically for that purpose.

(g) TERMINATION.—The Secretary may delegate the authority referred to in subsection (a) only during fiscal years 2004 through 2010, and any authority so delegated shall not be in effect after September 30, 2010.

3. Section 854 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, (10 USC 2302 note), provided that:

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

SEC. 854. KEY PERFORMANCE PARAMETER REDUCTION PILOT PROGRAM.

(a) IN GENERAL.—The Secretary of Defense may carry out a pilot program under which the Secretary may identify at least one acquisition program in each military department for reduction of the total number of key performance parameters established for the program, for purposes of determining whether operational and programmatic outcomes of the program are improved by such reduction.

(b) LIMITATION ON KEY PERFORMANCE PARAMETERS.—Any acquisition program identified for the pilot program carried out under subsection (a) shall establish no more than three key performance parameters, each of which shall describe a program-specific performance attribute. Any key performance parameters for such a program that are required by statute shall be treated as key system attributes.

4. Section 829 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, (10 USC 2302 note), provided that:

SEC. 829. EXTENSION OF CONTRACTOR CONFLICT OF INTEREST LIMITATIONS.

(a) ASSESSMENT OF EXTENSION OF LIMITATIONS TO CERTAIN ADDITIONAL FUNCTIONS AND CONTRACTS.—Not later than 180 days after the date of the enactment of this Act [Jan. 2, 2013], the Secretary of Defense shall review the guidance on personal conflicts of interest for contractor employees issued pursuant to section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417; 122 Stat. 4537) in order to determine whether it would be in the best interest of the Department of Defense and the taxpayers to extend such guidance to personal conflicts of interest by contractor personnel performing any of the following:

(1) Functions other than acquisition functions that are closely associated with inherently governmental functions (as that term is defined in section 2383(b)(3) of title 10, United States Code).

(2) Personal services contracts (as that term is defined in section 2330a(g)(5) of title 10, United States Code).

(3) Contracts for staff augmentation services (as that term is defined in section 808(d)(3) of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81; 125 Stat. 1490)).

(b) EXTENSION OF LIMITATIONS.—If the Secretary determines pursuant to the review under subsection (a) that the guidance on personal conflicts of interest should be extended, the Secretary shall revise the Defense Supplement to the Federal Acquisition Regulation to the extent necessary to achieve such extension.

(c) RESULTS OF REVIEW.—Not later than 180 days after the date of the enactment of this Act [Jan. 2, 2013], the Secretary shall document in writing the results of the review conducted under subsection (a), including, at a minimum—

(1) the findings and recommendations of the review; and

(2) the basis for such findings and recommendations.

5. Section 895 of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, (10 USC 2304 note), provided that:

SEC. 895. MITIGATING POTENTIAL UNFAIR COMPETITIVE ADVANTAGE OF TECHNICAL ADVISORS TO ACQUISITION PROGRAMS.

Not later than 180 days after the date of the enactment of this Act [Nov. 25, 2015], the Under Secretary of Defense for Acquisition, Technology, and Logistics shall review, and as necessary revise or issue, policy guidance

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

pertaining to the identification, mitigation, and prevention of potential unfair competitive advantage conferred to technical advisors to acquisition programs.

6. Section 842 of the National Defense Authorization Act for Fiscal Year 2012, [Pub. L. 112–81 \(10 USC 2313 note\)](#), as amended, provided:

“SEC. 842. ADDITIONAL ACCESS TO CONTRACTOR AND SUBCONTRACTOR RECORDS IN THE UNITED STATES CENTRAL COMMAND THEATER OF OPERATIONS.

“(a) DEPARTMENT OF DEFENSE CONTRACTS, GRANTS, AND COOPERATIVE AGREEMENTS.—

“(1) IN GENERAL.—Not later than 30 days after the date of the enactment of this Act [Dec. 31, 2011], the Secretary of Defense shall revise the Department of Defense Supplement to the Federal Acquisition Regulation to require that—

“(A) the clause described in paragraph (2) shall be included in each covered contract, grant, and cooperative agreement of the Department of Defense that is awarded on or after the date of the enactment of this Act; and

“(B) to the maximum extent practicable, each covered contract, grant, and cooperative agreement of the Department that is awarded before the date of the enactment of this Act shall be modified to include the clause described in paragraph (2).

“(2) CLAUSE.—The clause described in this paragraph is a clause authorizing the Secretary, upon a written determination pursuant to paragraph (3), to examine any records of the contractor, the recipient of a grant or cooperative agreement, or any subcontractor or subgrantee under such contract, grant, or cooperative agreement to the extent necessary to ensure that funds available under the contract, grant, or cooperative agreement—

“(A) are not subject to extortion or corruption; and

“(B) are not provided directly or indirectly to persons or entities that are actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation.

“(3) WRITTEN DETERMINATION.—The authority to examine records pursuant to the contract clause described in paragraph (2) may be exercised only upon a written determination by the contracting officer or comparable official responsible for a grant or cooperative agreement, upon a finding by the Commander of the United States Central Command, that there is reason to believe that funds available under the contract, grant, or cooperative agreement concerned may have been subject to extortion or corruption or may have been provided directly or indirectly to persons or entities that are actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation.

“(4) FLOWDOWN.—A clause described in paragraph (2) shall also be required in any subcontract or subgrant under a covered contract, grant, or cooperative agreement if the subcontract or subgrant has an estimated value in excess of \$100,000.

“(b) REPORTS.—Not later than March 1 of each of 2013, 2014, and 2015, the Secretary shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the use of the authority provided by this section in the preceding calendar year. Each report shall identify, for the calendar year covered by such report, each instance in which the Department of Defense exercised the authority provided under this section to examine records, explain the basis for the action taken, and summarize the results of any examination of records so undertaken.[.] Any report under this subsection may be submitted in classified form.

“(c) DEFINITIONS.—In this section:

“(1) The term 'contingency operation' has the meaning given that term in [section 101\(a\)\(13\) of title 10, United States Code](#).

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

"(2) The term 'covered contract, grant, or cooperative agreement' means a contract, grant, or cooperative agreement with an estimated value in excess of \$100,000 that will be performed in the United States Central Command theater of operations in support of a contingency operation.

"(d) **SUNSET**.—

"(1) **IN GENERAL**.—The clause described by subsection (a)(2) shall not be required in any contract, grant, or cooperative agreement that is awarded after the date that is three years after the date of the enactment of the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015 [Dec. 19, 2014].

"(2) **CONTINUING EFFECT OF CLAUSES INCLUDED BEFORE SUNSET**.—Any clause described by subsection (a)(2) that is included in a contract, grant, or cooperative agreement pursuant to this section before the date specified in paragraph (1) shall remain in effect in accordance with its terms."

7. Section 2323 of title 10, United States Code, provides:

§2323. Contract goal for small disadvantaged businesses and certain institutions of higher education

(a) **GOAL**.—(1) Except as provided in subsection (d), a goal of 5 percent of the amount described in subsection (b) shall be the objective of the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration in each fiscal year for the total combined amount obligated for contracts and subcontracts entered into with—

(A) small business concerns, including mass media and advertising firms, owned and controlled by socially and economically disadvantaged individuals (as such term is used in section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and regulations issued under that section), the majority of the earnings of which directly accrue to such individuals, and qualified HUBZone small business concerns (as defined in section 3(p) of the Small Business Act);

(B) historically Black colleges and universities, including any nonprofit research institution that was an integral part of such a college or university before November 14, 1986;

(C) minority institutions (as defined in section 365(3) of the Higher Education Act of 1965 (20 U.S.C. 1067k));

(D) Hispanic-serving institutions (as defined in section 502(a) of the Higher Education Act of 1965 (20 U.S.C. 1101a(a))); and

(E) Native Hawaiian-serving institutions and Alaska Native-serving institutions (as defined in section 317 of the Higher Education Act of 1965).

(2) The head of the agency shall establish a specific goal within the overall 5 percent goal for the award of prime contracts and subcontracts to historically Black colleges and universities, Hispanic-serving institutions, Native Hawaiian-serving institutions and Alaska Native-serving institutions, and minority institutions in order to increase the participation of such colleges and universities and institutions in the program provided for by this section.

(3) The Federal Acquisition Regulation shall provide procedures or guidelines for contracting officers to set goals which agency prime contractors that are required to submit subcontracting plans under section 8(d)(4)(B) of the Small Business Act (15 U.S.C. 637(d)(4)(B)) in furtherance of the agency's program to meet the 5 percent goal specified in paragraph (1) should meet in awarding subcontracts, including subcontracts to minority-owned media, to entities described in that paragraph.

(b) **AMOUNT**.—(1) With respect to the Department of Defense, the requirements of subsection (a) for any fiscal year apply to the combined total of the following amounts:

(A) Funds obligated for contracts entered into with the Department of Defense for such fiscal year for procurement.

(B) Funds obligated for contracts entered into with the Department of Defense for such fiscal year for research, development, test, and evaluation.

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

(C) Funds obligated for contracts entered into with the Department of Defense for such fiscal year for military construction.

(D) Funds obligated for contracts entered into with the Department of Defense for operation and maintenance.

(2) With respect to the Coast Guard, the requirements of subsection (a) for any fiscal year apply to the total value of all prime contract and subcontract awards entered into by the Coast Guard for such fiscal year.

(3) With respect to the National Aeronautics and Space Administration, the requirements of subsection (a) for any fiscal year apply to the total value of all prime contract and subcontract awards entered into by the National Aeronautics and Space Administration for such fiscal year.

(c) TYPES OF ASSISTANCE.—(1) To attain the goal specified in subsection (a)(1), the head of an agency shall provide technical assistance to the entities referred to in that subsection and, in the case of historically Black colleges and universities, Hispanic-serving institutions, Native Hawaiian-serving institutions and Alaska Native-serving institutions, and minority institutions, shall also provide infrastructure assistance.

(2) Technical assistance provided under this section shall include information about the program, advice about agency procurement procedures, instruction in preparation of proposals, and other such assistance as the head of the agency considers appropriate. If the resources of the agency are inadequate to provide such assistance, the head of the agency may enter into contracts with minority private sector entities with experience and expertise in the design, development, and delivery of technical assistance services to eligible individuals, business firms and institutions, acquisition agencies, and prime contractors. Agency contracts with such entities shall be awarded annually, based upon, among other things, the number of minority small business concerns, historically Black colleges and universities, and minority institutions that each such entity brings into the program.

(3) Infrastructure assistance provided by the Department of Defense under this section to historically Black colleges and universities, to Hispanic-serving institutions, to Native Hawaiian-serving institutions and Alaska Native-serving institutions, and to minority institutions may include programs to do the following:

(A) Establish and enhance undergraduate, graduate, and doctoral programs in scientific disciplines critical to the national security functions of the Department of Defense.

(B) Make Department of Defense personnel available to advise and assist faculty at such colleges and universities in the performance of defense research and in scientific disciplines critical to the national security functions of the Department of Defense.

(C) Establish partnerships between defense laboratories and historically Black colleges and universities and minority institutions for the purpose of training students in scientific disciplines critical to the national security functions of the Department of Defense.

(D) Award scholarships, fellowships, and the establishment of cooperative work-education programs in scientific disciplines critical to the national security functions of the Department of Defense.

(E) Attract and retain faculty involved in scientific disciplines critical to the national security functions of the Department of Defense.

(F) Equip and renovate laboratories for the performance of defense research.

(G) Expand and equip Reserve Officer Training Corps activities devoted to scientific disciplines critical to the national security functions of the Department of Defense.

(H) Provide other assistance as the Secretary determines appropriate to strengthen scientific disciplines critical to the national security functions of the Department of Defense or the college infrastructure to support the performance of defense research.

(4) The head of the agency shall, to the maximum extent practical, carry out programs under this section at colleges, universities, and institutions that agree to bear a substantial portion of the cost associated with the programs.

(d) APPLICABILITY.—Subsection (a) does not apply to the Department of Defense—

(1) to the extent to which the Secretary of Defense determines that compelling national security considerations require otherwise; and

(2) if the Secretary notifies Congress of such determination and the reasons for such determination.

(e) COMPETITIVE PROCEDURES AND ADVANCE PAYMENTS.—To attain the goal of subsection (a):

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

(1)(A) The head of the agency shall—

(i) ensure that substantial progress is made in increasing awards of agency contracts to entities described in subsection (a)(1);

(ii) exercise his utmost authority, resourcefulness, and diligence;

(iii) in the case of the Department of Defense, actively monitor and assess the progress of the military departments, Defense Agencies, and prime contractors of the Department of Defense in attaining such goal; and

(iv) in the case of the Coast Guard and the National Aeronautics and Space Administration, actively monitor and assess the progress of the prime contractors of the agency in attaining such goal.

(B) In making the assessment under clauses (iii) and (iv) of subparagraph (A), the head of the agency shall evaluate the extent to which use of the authority provided in paragraphs (2) and (3) and compliance with the requirement in paragraph (4) is effective for facilitating the attainment of the goal.

(2) To the extent practicable and when necessary to facilitate achievement of the 5 percent goal described in subsection (a), the head of an agency shall make advance payments under section 2307 of this title to contractors described in subsection (a). The Federal Acquisition Regulation shall provide guidance to contracting officers for making advance payments to entities described in subsection (a)(1) under such section.

(3)(A) To the extent practicable and when necessary to facilitate achievement of the 5 percent goal described in subsection (a), the head of an agency may, except as provided in subparagraph (B), enter into contracts using less than full and open competitive procedures (including awards under section 8(a) of the Small Business Act) and partial set asides for entities described in subsection (a)(1), but shall pay a price not exceeding fair market cost by more than 10 percent in payment per contract to contractors or subcontractors described in subsection (a). The head of an agency shall adjust the percentage specified in the preceding sentence for any industry category if available information clearly indicates that nondisadvantaged small business concerns in such industry category are generally being denied a reasonable opportunity to compete for contracts because of the use of that percentage in the application of this paragraph.

(B)(i) The Secretary of Defense may not exercise the authority under subparagraph (A) to enter into a contract for a price exceeding fair market cost if the regulations implementing that authority are suspended under clause (ii) with respect to that contract.

(ii) At the beginning of each fiscal year, the Secretary shall determine, on the basis of the most recent data, whether the Department of Defense achieved the 5 percent goal described in subsection (a) during the fiscal year to which the data relates. Upon determining that the Department achieved the goal for the fiscal year to which the data relates, the Secretary shall issue a suspension, in writing, of the regulations that implement the authority under subparagraph (A). Such a suspension shall be in effect for the one-year period beginning 30 days after the date on which the suspension is issued and shall apply with respect to contracts awarded pursuant to solicitations issued during that period.

(iii) For purposes of clause (ii), the term "most recent data" means data relating to the most recent fiscal year for which data are available.

(4) To the extent practicable, the head of an agency shall maximize the number of minority small business concerns, historically Black colleges and universities, and minority institutions participating in the program.

(5) Each head of an agency shall prescribe regulations which provide for the following:

(A) Procedures or guidance for contracting officers to provide incentives for prime contractors referred to in subsection (a)(3) to increase subcontractor awards to entities described in subsection (a)(1).

(B) A requirement that contracting officers emphasize the award of contracts to entities described in subsection (a)(1) in all industry categories, including those categories in which such entities have not traditionally dominated.

(C) Guidance to agency personnel on the relationship among the following programs:

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

(i) The program implementing this section.

(ii) The program established under section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(iii) The small business set-aside program established under section 15(a) of the Small Business Act (15 U.S.C. 644(a)).

(D) With respect to an agency procurement which is reasonably likely to be set aside for entities described in subsection (a)(1), a requirement that (to the maximum extent practicable) the procurement be designated as such a set-aside before the solicitation for the procurement is issued.

(E) Policies and procedures which, to the maximum extent practicable, will ensure that current levels in the number or dollar value of contracts awarded under the program established under section 8(a) of the Small Business Act (15 U.S.C. 637(a)) and under the small business set-aside program established under section 15(a) of the Small Business Act (15 U.S.C. 644(a)) are maintained and that every effort is made to provide new opportunities for contract awards to eligible entities, in order to meet the goal of subsection (a).

(F) Implementation of this section in a manner which will not alter the procurement process under the program established under section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(G) A requirement that one factor used in evaluating the performance of a contracting officer be the ability of the officer to increase contract awards to entities described in subsection (a)(1).

(H) Increased technical assistance to entities described in subsection (a)(1).

(f) **PENALTIES AND REGULATIONS RELATING TO STATUS.**—(1) Whoever for the purpose of securing a contract or subcontract under subsection (a) misrepresents the status of any concern or person as a small business concern owned and controlled by a minority (as described in subsection (a)) or as a qualified HUBZone small business concern (as defined in section 3(p) of the Small Business Act), shall be punished by imprisonment for not more than one year, or a fine under title 18, or both.

(2) The Federal Acquisition Regulation shall prohibit awarding a contract under this section to an entity described in subsection (a)(1) unless the entity agrees to comply with the requirements of section 15(o)(1) of the Small Business Act (15 U.S.C. 644(o)(1)).

(g) **INDUSTRY CATEGORIES.**—(1) To the maximum extent practicable, the head of the agency shall—

(A) ensure that no particular industry category bears a disproportionate share of the contracts awarded to attain the goal established by subsection (a); and

(B) ensure that contracts awarded to attain the goal established by subsection (a) are made across the broadest possible range of industry categories.

(2) Under procedures prescribed by the head of the agency, a person may request the Secretary to determine whether the use of small disadvantaged business set asides by a contracting activity of the agency has caused a particular industry category to bear a disproportionate share of the contracts awarded to attain the goal established for that contracting activity for the purposes of this section. Upon making a determination that a particular industry category is bearing a disproportionate share, the head of the agency shall take appropriate actions to limit the contracting activity's use of set asides in awarding contracts in that particular industry category.

(h) **COMPLIANCE WITH SUBCONTRACTING PLAN REQUIREMENTS.**—(1) The Federal Acquisition Regulation shall contain regulations to ensure that potential contractors submitting sealed bids or competitive proposals to the agency for procurement contracts to be awarded under the program provided for by this section are complying with applicable subcontracting plan requirements of section 8(d) of the Small Business Act (15 U.S.C. 637(d)).

(2) The regulations required by paragraph (1) shall ensure that, with respect to a sealed bid or competitive proposal for which the bidder or offeror is required to negotiate or submit a subcontracting plan under section 8(d) of the Small Business Act (15 U.S.C. 637(d)), the subcontracting plan shall be a factor in evaluating the bid or proposal.

(i) **ANNUAL REPORT.**—(1) Not later than December 15 of each year, the head of the agency shall submit to Congress a report on the progress of the agency toward attaining the goal of subsection (a) during the preceding fiscal year.

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

- (2) The report required under paragraph (1) shall include the following:
- (A) A full explanation of any progress toward attaining the goal of subsection (a).
 - (B) A plan to achieve the goal, if necessary.
- (j) DEFINITIONS.—In this section:
- (1) The term "agency" means the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration.
 - (2) The term "head of an agency" means the Secretary of Defense, the Secretary of Homeland Security, and the Administrator of the National Aeronautics and Space Administration.
- (k) EFFECTIVE DATE.—(1) This section applies in the Department of Defense to each of fiscal years 1987 through **2009**.
- (2) This section applies in the Coast Guard and the National Aeronautics and Space Administration in each of fiscal years 1995 through **2009**.

8. Section 803(a) of the National Defense Authorization Act for Fiscal Year 2017, [Pub. L. 114–328](#), **(10 USC 2330 note)** provided that:

SEC. 803. MODERNIZATION OF SERVICES ACQUISITION.

"(a) REVIEW OF SERVICES ACQUISITION CATEGORIES.—Not later than 180 days after the date of the enactment of this Act [Dec. 23, 2016], the Secretary of Defense shall review and, if necessary, revise Department of Defense Instruction 5000.74, dated January 5, 2016 (in this section referred to as the 'Acquisition of Services Instruction'), and other guidance pertaining to the acquisition of services. In conducting the review, the Secretary shall examine—

"(1) how the acquisition community should consider the changing nature of the technology and professional services markets, particularly the convergence of hardware and services; and

"(2) the services acquisition portfolio groups referenced in the Acquisition of Services Instruction and other guidance in order to ensure the portfolio groups are fully reflective of changes to the technology and professional services market."

9. Section 882 of the National Defense Authorization Act for Fiscal Year 2016, [Pub. L. 114–92](#) **(10 USC 2330 note)**, provided that:

SEC. 882. GUIDANCE RELATING TO OVERSIGHT AND APPROVAL OF SERVICES CONTRACTS.

"Not later than March 1, 2016, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall—

"(1) complete an examination of the decision authority related to acquisition of services; and

"(2) develop and issue guidance to improve capabilities and processes related to requirements development and source selection for, and oversight and management of, services contracts."

10. Section 807 of the National Defense Authorization Act for Fiscal Year 2012, [Pub. L. 112–81](#), **(10 USC 2330 note)** provided that:

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

SEC. 807. DEFENSE SCIENCE BOARD RECOMMENDATIONS ON SERVICES.

"(a) **PLAN FOR IMPLEMENTATION.**—Not later than 180 days after the date of the enactment of this Act [Dec. 31, 2011], the Under Secretary of Defense for Acquisition, Technology, and Logistics shall, acting pursuant to the Under Secretary's responsibility under [section 2330 of title 10, United States Code](#), develop a plan for implementing the recommendations of the Defense Science Board Task Force on Improvements to Service Contracting.

"(b) **ELEMENTS.**—The plan developed pursuant to subsection (a) shall include, to the extent determined appropriate by the Under Secretary for Acquisition, Technology, and Logistics, the following:

"(1) Meaningful incentives to services contractors for high performance at low cost, consistent with the objectives of the Better Buying Power Initiative established by the Under Secretary.

"(2) Improved means of communication between the Government and the services contracting industry in the process of developing requirements for services contracts.

"(3) Clear guidance for defense acquisition personnel on the use of appropriate contract types for particular categories of services contracts.

"(4) Formal certification and training requirements for services acquisition personnel, consistent with the requirements of [sections 1723 and 1724 of title 10, United States Code](#).

"(5) Appropriate emphasis on the recruiting and training of services acquisition personnel, consistent with the strategic workforce plan developed pursuant to [former] [section 115b of title 10, United States Code](#), and the funds available through the Department of Defense Acquisition Workforce Development Fund established pursuant to [section 1705 of title 10, United States Code](#).

"(6) Policies and guidance on career development for services acquisition personnel, consistent with the requirements of [sections 1722a and 1722b of title 10, United States Code](#).

"(7) Actions to ensure that the military departments dedicate portfolio-specific commodity managers to coordinate the procurement of key categories of contract services, as required by [section 2330\(b\)\(3\)\(C\) of title 10, United States Code](#).

"(8) Actions to ensure that the Department of Defense conducts realistic exercises and training that account for services contracting during contingency operations, as required by [section 2333\(e\) of title 10, United States Code](#).

"(c) **COMPTROLLER GENERAL REPORT.**—Not later than 18 months after the date of the enactment of this Act [Dec. 31, 2011], the Comptroller General of the United States shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the following:

"(1) The actions taken by the Under Secretary of Defense for Acquisition, Technology, and Logistics to carry out the requirements of this section.

"(2) The actions taken by the Under Secretary to carry out the requirements of [section 2330 of title 10, United States Code](#).

"(3) The actions taken by the military departments to carry out the requirements of [section 2330 of title 10, United States Code](#).

"(4) The extent to which the actions described in paragraphs (1), (2), and (3) have resulted in the improved acquisition and management of contract services."

11. Section 863(a)–(h) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, [Pub. L. 111–383 \(10 USC 2330 note\)](#), as amended, provided that:

SEC. 863. REQUIREMENTS FOR THE ACQUISITION OF SERVICES.

"(a) **ESTABLISHMENT OF REQUIREMENTS PROCESSES FOR THE ACQUISITION OF SERVICES.**—The Secretary of Defense shall ensure that the military departments and Defense Agencies each establish a process for identifying, assessing, reviewing, and validating requirements for the acquisition of services.

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

"(b) OPERATIONAL REQUIREMENTS.—With regard to requirements for the acquisition of services in support of combatant commands and military operations, the Secretary shall ensure-

"(1) that the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of the Air Force, and the Commandant of the Marine Corps implement and bear chief responsibility for carrying out, within the Armed Force concerned, the process established pursuant to subsection (a) for such Armed Force; and

"(2) that commanders of unified combatant commands and other officers identified or designated as joint qualified officers have an opportunity to participate in the process of each military department to provide input on joint requirements for the acquisition of services.

"(c) SUPPORTING REQUIREMENTS.—With regard to requirements for the acquisition of services not covered by subsection (b), the Secretary shall ensure that the secretaries of the military departments and the heads of the Defense Agencies implement and bear chief responsibility for carrying out, within the military department or Defense Agency concerned, the process established pursuant to subsection (a) for such military department or Defense Agency.

"(d) IMPLEMENTATION PLANS REQUIRED.—The Secretary shall ensure that an implementation plan is developed for each process established pursuant to subsection (a) that addresses, at a minimum, the following:

"(1) The organization of such process.

"(2) The level of command responsibility required for identifying, assessing, reviewing, and validating requirements for the acquisition of services in accordance with the requirements of this section and the categories established under [section 2330\(a\)\(1\)\(C\) of title 10, United States Code](#).

"(3) The composition of positions necessary to operate such process.

"(4) The training required for personnel engaged in such process.

"(5) The relationship between doctrine and such process.

"(6) Methods of obtaining input on joint requirements for the acquisition of services.

"(7) Procedures for coordinating with the acquisition process.

"(8) Considerations relating to opportunities for strategic sourcing.

"(9) Considerations relating to total force management policies and procedures established under [section 129a of title 10, United States Code](#).

"(e) MATTERS REQUIRED IN IMPLEMENTATION PLAN.—Each plan required under subsection (d) shall provide for initial implementation of a process for identifying, assessing, reviewing, and validating requirements for the acquisition of services not later than one year after the date of the enactment of this Act [Jan. 7, 2011] and shall provide for full implementation of such process at the earliest date practicable.

"(f) CONSISTENCY WITH JOINT GUIDANCE.—Whenever, at any time, guidance is issued by the Chairman of the Joint Chiefs of Staff relating to requirements for the acquisition of services in support of combatant commands and military operations, each process established pursuant to subsection (a) shall be revised in accordance with such joint guidance.

"(g) DEFINITION.—The term 'requirements for the acquisition of services' means objectives to be achieved through acquisitions primarily involving the procurement of services.

"(h) REVIEW OF SUPPORTING REQUIREMENTS TO IDENTIFY SAVINGS.—The secretaries of the military departments and the heads of the Defense Agencies shall review and validate each requirement described in subsection (c) with an anticipated cost in excess of \$10,000,000 with the objective of identifying unneeded or low priority requirements that can be reduced or eliminated, with the savings transferred to higher priority objectives. Savings identified and transferred to higher priority objectives through review and revalidation under this subsection shall count toward the savings objectives established in the June 4, 2010, guidance of the Secretary of Defense on improved operational efficiencies and the annual reduction in funding for service support contractors required by the August 16, 2010, guidance of the Secretary of Defense on efficiency initiatives. As provided by the Secretary, cost avoidance shall not count toward these objectives."

12. Section 808 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110–181 (**10 USC 2330 note**), as amended, provided that:

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

SEC. 808. INDEPENDENT MANAGEMENT REVIEWS OF CONTRACTS FOR SERVICES.

"(a) GUIDANCE AND INSTRUCTIONS.—Not later than 180 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense shall issue guidance, with detailed implementation instructions, for the Department of Defense to provide for periodic independent management reviews of contracts for services. The independent management review guidance and instructions issued pursuant to this subsection shall be designed to evaluate, at a minimum-

"(1) contract performance in terms of cost, schedule, and requirements;

"(2) the use of contracting mechanisms, including the use of competition, the contract structure and type, the definition of contract requirements, cost or pricing methods, the award and negotiation of task orders, and management and oversight mechanisms;

"(3) the contractor's use, management, and oversight of subcontractors;

"(4) the staffing of contract management and oversight functions; and

"(5) the extent of any pass-throughs, and excessive pass-through charges (as defined in section 852 of the John Warner National Defense Authorization Act for Fiscal Year 2007 [Pub. L. 109-364, 10 U.S.C. 2324 note]), by the contractor.

"(b) ADDITIONAL SUBJECT OF REVIEW.—In addition to the matters required by subsection (a), the guidance and instructions issued pursuant to subsection (a) shall provide for procedures for the periodic review of contracts under which one contractor provides oversight for services performed by other contractors. In particular, the procedures shall be designed to evaluate, at a minimum-

"(1) the extent of the agency's reliance on the contractor to perform acquisition functions closely associated with inherently governmental functions as defined in section 2383(b)(3) of title 10, United States Code; and

"(2) the financial interest of any prime contractor performing acquisition functions described in paragraph (1) in any contract or subcontract with regard to which the contractor provided advice or recommendations to the agency.

"(c) ELEMENTS.—The guidance and instructions issued pursuant to subsection (a) shall address, at a minimum-

"(1) the contracts subject to independent management reviews, including any applicable thresholds and exceptions;

"(2) the frequency with which independent management reviews shall be conducted;

"(3) the composition of teams designated to perform independent management reviews;

"(4) any phase-in requirements needed to ensure that qualified staff are available to perform independent management reviews;

"(5) procedures for tracking the implementation of recommendations made by independent management review teams; and

"(6) procedures for developing and disseminating lessons learned from independent management reviews.

"(d) REPORTS.—

"(1) Report on guidance and instruction.—Not later than 270 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report setting forth the guidance and instructions issued pursuant to subsection (a).

"(2) GAO report on implementation.—Not later than two years after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the congressional defense committees a report on the implementation of the guidance and instructions issued pursuant to subsection (a)."

13. Section 812(b)-(c) of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163 (10 USC 2330 note), provided that:

SEC. 812. MANAGEMENT STRUCTURE FOR THE PROCUREMENT OF CONTRACT SERVICES.

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

(a) [amended 10 USC 2330]

"(b) **PHASED IMPLEMENTATION.**—The requirements of [section 2330 of title 10, United States Code](#) (as added by subsection (a)), shall be implemented as follows:

"(1) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall-

"(A) establish an initial set of contract services acquisition categories, based on dollar thresholds, by not later than June 1, 2006; and

"(B) issue an initial set of policies, procedures, and best practices guidelines in accordance with [section 2330\(a\)\(1\)\(A\)](#) by not later than October 1, 2006.

"(2) The contract services acquisition categories established by the Under Secretary shall include-

"(A) one or more categories for acquisitions with an estimated value of \$250,000,000 or more;

"(B) one or more categories for acquisitions with an estimated value of at least \$10,000,000 but less than \$250,000,000; and

"(C) one or more categories for acquisitions with an estimated value greater than the simplified acquisition threshold but less than \$10,000,000.

"(3) The senior officials responsible for the management of acquisition of contract services shall assign responsibility to specific individuals in the Department of Defense for the review and approval of procurements in the contract services acquisition categories established by the Under Secretary, as follows:

"(A) Not later than October 1, 2006, for all categories established pursuant to paragraph (2)(A).

"(B) Not later than October 1, 2007, for all categories established pursuant to paragraph (2)(B).

"(C) Not later than October 1, 2009, for all categories established pursuant to paragraph (2)(C).

"(c) **REPORT.**--Not later than one year after the date of the enactment of this Act [Jan. 6, 2006], the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a final report on the implementation of [section 2330 of title 10, United States Code](#), as added by this section."

14. Section 831 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110–417 (**10 USC 2330a note**) provided that:

SEC. 831. DEVELOPMENT OF GUIDANCE ON PERSONAL SERVICES CONTRACTS.

"(a) **GUIDANCE REQUIRED.**—Not later than 270 days after the date of the enactment of this Act [Oct. 14, 2008], the Secretary of Defense shall develop guidance related to personal services contracts to-

"(1) require a clear distinction between employees of the Department of Defense and employees of Department of Defense contractors;

"(2) provide appropriate safeguards with respect to when, where, and to what extent the Secretary may enter into a contract for the procurement of personal services; and

"(3) assess and take steps to mitigate the risk that, as implemented and administered, non-personal services contracts may become personal services contracts.

"(b) **DEFINITION OF PERSONAL SERVICES CONTRACT.**—In this section, the term 'personal services contract' has the meaning given that term in [section 2330a\(g\)\(5\)](#) [former 2330a(h)(5)] of [title 10, United States Code](#)."

15. Section 2332 of title 10, United States Code, provides:

§2332. Share-in-savings contracts

(a) **AUTHORITY TO ENTER INTO SHARE-IN-SAVINGS CONTRACTS.**—(1) The head of an agency may enter into a share-in-savings contract for information technology (as defined in [section 11101\(6\) of title 40](#)) in which the

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
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Government awards a contract to improve mission-related or administrative processes or to accelerate the achievement of its mission and share with the contractor in savings achieved through contract performance.

(2)(A) Except as provided in subparagraph (B), a share-in-savings contract shall be awarded for a period of not more than five years.

(B) A share-in-savings contract may be awarded for a period greater than five years, but not more than 10 years, if the head of the agency determines in writing prior to award of the contract that—

(i) the level of risk to be assumed and the investment to be undertaken by the contractor is likely to inhibit the government from obtaining the needed information technology competitively at a fair and reasonable price if the contract is limited in duration to a period of five years or less; and

(ii) usage of the information technology to be acquired is likely to continue for a period of time sufficient to generate reasonable benefit for the government.

(3) Contracts awarded pursuant to the authority of this section shall, to the maximum extent practicable, be performance-based contracts that identify objective outcomes and contain performance standards that will be used to measure achievement and milestones that must be met before payment is made.

(4) Contracts awarded pursuant to the authority of this section shall include a provision containing a quantifiable baseline that is to be the basis upon which a savings share ratio is established that governs the amount of payment a contractor is to receive under the contract. Before commencement of performance of such a contract, the senior procurement executive of the agency shall determine in writing that the terms of the provision are quantifiable and will likely yield value to the Government.

(5)(A) The head of the agency may retain savings realized through the use of a share-in-savings contract under this section that are in excess of the total amount of savings paid to the contractor under the contract, but may not retain any portion of such savings that is attributable to a decrease in the number of civilian employees of the Federal Government performing the function. Except as provided in subparagraph (B), savings shall be credited to the appropriation or fund against which charges were made to carry out the contract and shall be used for information technology.

(B) Amounts retained by the agency under this subsection shall—

(i) without further appropriation, remain available until expended; and

(ii) be applied first to fund any contingent liabilities associated with share-in-savings procurements that are not fully funded.

(b) CANCELLATION AND TERMINATION.—(1) If funds are not made available for the continuation of a share-in-savings contract entered into under this section in a subsequent fiscal year, the contract shall be canceled or terminated. The costs of cancellation or termination may be paid out of—

(A) appropriations available for the performance of the contract;

(B) appropriations available for acquisition of the information technology procured under the contract, and not otherwise obligated; or

(C) funds subsequently appropriated for payments of costs of cancellation or termination, subject to the limitations in paragraph (3).

(2) The amount payable in the event of cancellation or termination of a share-in-savings contract shall be negotiated with the contractor at the time the contract is entered into.

(3)(A) Subject to subparagraph (B), the head of an agency may enter into share-in-savings contracts under this section in any given fiscal year even if funds are not made specifically available for the full costs of cancellation or termination of the contract if funds are available and sufficient to make payments with respect to the first fiscal year of the contract and the following conditions are met regarding the funding of cancellation and termination liability:

(i) The amount of unfunded contingent liability for the contract does not exceed the lesser of—

(I) 25 percent of the estimated costs of a cancellation or termination; or

(II) \$5,000,000.

(ii) Unfunded contingent liability in excess of \$1,000,000 has been approved by the Director of the Office of Management and Budget or the Director's designee.

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(B) The aggregate number of share-in-savings contracts that may be entered into under subparagraph (A) by all agencies to which this chapter applies in a fiscal year may not exceed 5 in each of fiscal years 2003, 2004, and 2005.

(c) DEFINITIONS.—In this section:

(1) The term "contractor" means a private entity that enters into a contract with an agency.

(2) The term "savings" means-

(A) monetary savings to an agency; or

(B) savings in time or other benefits realized by the agency, including enhanced revenues (other than enhanced revenues from the collection of fees, taxes, debts, claims, or other amounts owed the Federal Government).

(3) The term "share-in-savings contract" means a contract under which-

(A) a contractor provides solutions for-

(i) improving the agency's mission-related or administrative processes; or

(ii) accelerating the achievement of agency missions; and

(B) the head of the agency pays the contractor an amount equal to a portion of the savings derived by the agency from-

(i) any improvements in mission-related or administrative processes that result from implementation of the solution; or

(ii) acceleration of achievement of agency missions.

(d) TERMINATION.—No share-in-savings contracts may be entered into under this section after September 30, 2005.

16. Section 8133 of the Department of Defense Appropriations Act, 2000, Pub. L. 106–79 (**10 USC 2401a note**), provided that:

"Sec. 8133. (a) The Secretary of the Air Force may establish a multi-year pilot program for leasing aircraft for operational support purposes, including transportation for the combatant Commanders in Chief, on such terms and conditions as the Secretary may deem appropriate, consistent with this section.

"(b) Sections 2401 and 2401a of title 10, United States Code, shall not apply to any aircraft lease authorized by this section.

"(c) Under the aircraft lease Pilot Program authorized by this section:

"(1) The Secretary may include terms and conditions in lease agreements that are customary in aircraft leases by a non-Government lessor to a non-Government lessee.

"(2) The term of any individual lease agreement into which the Secretary enters under this section shall not exceed 10 years.

"(3) The Secretary may provide for special payments to a lessor if either the Secretary terminates or cancels the lease prior to the expiration of its term or aircraft are damaged or destroyed prior to the expiration of the term of the lease. Such special payments shall not exceed an amount equal to the value of one year's lease payment under the lease. The amount of special payments shall be subject to negotiation between the Air Force and lessors.

"(4) Notwithstanding any other provision of law, any payments required under a lease under this section, and any payments made pursuant to subsection (3) above may be made from:

"(A) appropriations available for the performance of the lease at the time the lease takes effect;

"(B) appropriations for the operation and maintenance available at the time which the payment is due;

and

"(C) funds appropriated for those payments.

"(5) The Secretary may lease aircraft, on such terms and conditions as the Secretary may deem appropriate, consistent with this section, through an operating lease consistent with OMB Circular A–11.

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

"(6) The Secretary may exchange or sell existing aircraft and apply the exchange allowance or sale proceeds in whole or in part toward the cost of leasing replacement aircraft under this section.

"(7) Lease arrangements authorized by this section may not commence until:

"(A) The Secretary submits a report to the congressional defense committees [Committees on Armed Services and Subcommittees on Defense of the Committees on Appropriations of the Senate and the House of Representatives] outlining the plans for implementing the Pilot Program. The report shall describe the terms and conditions of proposed contracts and the savings in operations and support costs expected to be derived from retiring older aircraft as compared to the expected cost of leasing newer replacement aircraft.

"(B) A period of not less than 30 calendar days has elapsed after submitting the report.

"(8) Not later than 1 year after the date on which the first aircraft is delivered under this Pilot Program, and yearly thereafter on the anniversary of the first delivery, the Secretary shall submit a report to the congressional defense committees describing the status of the Pilot Program. The Report will be based on at least 6 months of experience in operating the Pilot Program.

"(9) No lease of operational support aircraft may be entered into under this section after September 30, 2004.

"(d) The authority granted to the Secretary of the Air Force by this section is separate from and in addition to, and shall not be construed to impair or otherwise affect, the authority of the Secretary to procure transportation or enter into leases under a provision of law other than this section.

"(e) The authority provided under this section may be used to lease not more than a total of six aircraft for the purposes of providing operational support."

17. Section 825(c) of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114–92 (10 USC 2430 note), provided that:

SEC. 825. DESIGNATION OF MILESTONE DECISION AUTHORITY.

(a) [added a new subsection (d) to 10 USC 2430]

(b) [amended 10 USC 133(b)(5)]

“(c) **IMPLEMENTATION.**—

"(1) **IMPLEMENTATION PLAN.**—Not later than 180 days after the date of the enactment of this Act [Nov. 25, 2015], the Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a plan for implementing subsection (d) of section 2430 of title 10, United States Code, as added by subsection (a) of this section.

"(2) **GUIDANCE.**—The Deputy Chief Management Officer of the Department of Defense, in consultation with the Under Secretary of Defense for Acquisition, Technology, and Logistics and the service acquisition executives, shall issue guidance to ensure that by not later than October 1, 2016, the acquisition policy, guidance, and practices of the Department of Defense conform to the requirements of subsection (d) of section 2430 of title 10, United States Code, as added by subsection (a) of this section. The guidance shall be designed to ensure a streamlined decisionmaking and approval process and to minimize any information requests, consistent with the requirement of paragraph (4)(A) of such subsection (d).

“(3) ***”

18. Section 1058 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113–291 (10 USC 2430 note) provided that:

SEC. 1058. IMPROVING ANALYTIC SUPPORT TO SYSTEMS ACQUISITION.

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

"(a) GUIDANCE.—Not later than 120 days after the date of the enactment of this Act [Dec. 19, 2014], the Secretary of Defense shall review and issue or revise guidance to components of the Department of Defense to improve the application of operations research and systems analysis to—

"(1) the requirements process for acquisition of major defense acquisition programs and major automated information systems; and

"(2) the allocation of intelligence, surveillance, and reconnaissance systems to the combatant commands.

"(b) BRIEFING OF CONGRESS.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall brief—

"(1) the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] on any guidance issued or revised under subsection (a); and

"(2) the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives on any guidance issued or revised under subsection (a)(2) relevant to intelligence."

19. DEFENSE ACQUISITION PILOT PROGRAM
(10 USC 2430 NOTE)

(1) Section 809 of the National Defense Authorization Act for Fiscal Year 1991, P. L. 101–510 (10 USC 2430 note), as amended, provided:

“SEC. 809. MAJOR DEFENSE ACQUISITION PILOT PROGRAM.

"(a) AUTHORITY TO CONDUCT PILOT PROGRAM.—The Secretary of Defense may conduct a pilot program for the purpose of determining the potential for increasing the efficiency and effectiveness of the acquisition process in defense acquisition programs.

"(b) DESIGNATION OF PARTICIPATING PROGRAMS.—(1) Subject to paragraph (2), the Secretary may designate defense acquisition programs for participation in the pilot program.

"(2) The Secretary may designate for participation in the pilot program only those defense acquisition programs specifically authorized to be so designated in a law authorizing appropriations for such program enacted after the date of the enactment of this Act [Nov. 5, 1990].

"(c) CONDUCT OF PILOT PROGRAM.—(1) In the case of each defense acquisition program designated for participation in the pilot program, the Secretary-

"(A) shall conduct the program in accordance with standard commercial, industrial practices; and

"(B) may waive or limit the applicability of any provision of law that is specifically authorized to be waived in the law authorizing appropriations referred to in subsection (b)(2) and that prescribes-

"(i) procedures for the procurement of supplies or services;

"(ii) a preference or requirement for acquisition from any source or class of sources;

"(iii) any requirement related to contractor performance;

"(iv) any cost allowability, cost accounting, or auditing requirements; or

"(v) any requirement for the management of, testing to be performed under, evaluation of, or reporting on a defense acquisition program.

"(2) The waiver authority provided in paragraph (1)(B) does not apply to a provision of law if, as determined by the Secretary-

"(A) a purpose of the provision is to ensure the financial integrity of the conduct of a Federal Government program; or

"(B) the provision relates to the authority of the Inspector General of the Department of Defense.

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

"(d) PUBLICATION OF POLICIES AND GUIDELINES.—The Secretary shall publish in the Federal Register a proposed memorandum setting forth policies and guidelines for implementation of the pilot program under this section and provide an opportunity for public comment on the proposed memorandum for a period of 60 days after the date of publication. The Secretary shall publish in the Federal Register any subsequent proposed change to the memorandum and provide an opportunity for public comment on each such proposed change for a period of 60 days after the date of publication.

"(e) NOTIFICATION AND IMPLEMENTATION.—(1) The Secretary shall transmit to the congressional defense committees a written notification of each defense acquisition program proposed to be designated by the Secretary for participation in the pilot program.

"(2) If the Secretary proposes to waive or limit the applicability of any provision of law to a defense acquisition program under the pilot program in accordance with this section, the Secretary shall include in the notification regarding that acquisition program—

"(A) the provision of law proposed to be waived or limited;

"(B) the effects of such provision of law on the acquisition, including specific examples;

"(C) the actions taken to ensure that the waiver or limitation will not reduce the efficiency, integrity, and effectiveness of the acquisition process used for the defense acquisition program; and

"(D) a discussion of the efficiencies or savings, if any, that will result from the waiver or limitation.

"(f) LIMITATION ON WAIVER AUTHORITY.—The applicability of the following requirements of law may not be waived or limited under subsection (c)(1)(B) with respect to a defense acquisition program:

"(1) The requirements of this section.

"(2) The requirements contained in any law enacted on or after the date of the enactment of this Act [Nov. 5, 1990] if that law designates such defense acquisition program as a participant in the pilot program, except to the extent that a waiver of such requirement is specifically authorized for such defense acquisition program in a law enacted on or after such date.

"(g) TERMINATION OF AUTHORITY.—The authority to waive or limit the applicability of any law under this section may not be exercised after **September 30, 1995**."

(2) Section 833 of the National Defense Authorization Act for Fiscal Year 1994, P. L. 103–160 (**10 USC 2430 note**), as amended, provided:

“SEC. 833. MISSION ORIENTED PROGRAM MANAGEMENT.

"(a) MISSION-ORIENTED PROGRAM MANAGEMENT.—In the exercise of the authority provided in section 809 of the National Defense Authorization Act for Fiscal Year 1991 [Pub. L. 101–510] (**10 U.S.C. 2430 note**), the Secretary of Defense should propose for one or more of the defense acquisition programs covered by the Defense Acquisition Pilot Program to utilize the concept of mission-oriented program management.

"(b) POLICIES AND PROCEDURES.—In the case of each defense acquisition program covered by the Defense Acquisition Pilot Program, the Secretary of Defense should prescribe policies and procedures for the interaction of the program manager and the commander of the operational command (or a representative) responsible for the requirement for the equipment acquired, and for the interaction with the commanders of the unified and specified combatant commands. Such policies and procedures should include provisions for enabling the user commands to participate in acceptance testing."

(3) Section 839 of the National Defense Authorization Act for Fiscal Year 1994, P. L. 103–160, (**10 USC 2430 note**), provided:

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

“SEC. 839. CONTRACTOR PERFORMANCE ASSESSMENT.

"(a) COLLECTION AND ANALYSIS OF PERFORMANCE INFORMATION.—The Secretary of Defense shall collect and analyze information on contractor performance under the Defense Acquisition Pilot Program.

"(b) INFORMATION TO BE INCLUDED.—Information collected under subsection (a) shall include the history of the performance of each contractor under the Defense Acquisition Pilot Program contracts and, for each such contract performed by the contractor, a technical evaluation of the contractor's performance prepared by the program manager responsible for the contract."

(4) Section 819 of the National Defense Authorization Act for Fiscal Year 1995, P. L. 103–337, (10 USC 2430 note), provided:

“SEC. 819. DEFENSE ACQUISITION PILOT PROGRAM DESIGNATIONS.

"The Secretary of Defense is authorized to designate the following defense acquisition programs for participation, to the extent provided in the Federal Acquisition Streamlining Act of 1994 in the defense acquisition pilot program authorized by section 809 of the National Defense Authorization Act for Fiscal Year 1991 (10 U.S.C. 2430 note):

"(1) The Fire Support Combined Arms Tactical Trainer program.

"(2) The Joint Direct Attack Munition program.

"(3) The Joint Primary Aircraft Training System.

"(4) Commercial-derivative aircraft.

"(5) Commercial-derivative engine."

(5) Section 5064 of the Federal Acquisition Streamlining Act of 1994, P. L. 103–355, (10 USC 2430 note), as amended, provided:

“SEC. 5064. DEPARTMENT OF DEFENSE ACQUISITION PILOT PROGRAMS.

"(a) IN GENERAL.—The Secretary of Defense is authorized to designate the following defense acquisition programs for participation in the defense acquisition pilot program authorized by section 809 of the National Defense Authorization Act for Fiscal Year 1991 [Pub. L. 101–510] (10 U.S.C. 2430 note):

"(1) FIRE SUPPORT COMBINED ARMS TACTICAL TRAINER (FSCATT).—The Fire Support Combined Arms Tactical Trainer program with respect to all contracts directly related to the procurement of a training simulation system (including related hardware, software, and subsystems) to perform collective training of field artillery gunnery team components, with development of software as required to generate the training exercises and component interfaces.

"(2) JOINT DIRECT ATTACK MUNITION (JDAM I).—The Joint Direct Attack Munition program with respect to all contracts directly related to the development and procurement of a strap-on guidance kit, using an inertially guided, Global Positioning System updated guidance kit to enhance the delivery accuracy of 500-pound, 1000-pound, and 2000-pound bombs in inventory.

"(3) JOINT PRIMARY AIRCRAFT TRAINING SYSTEM (JPATS).—The Joint Primary Aircraft Training System (JPATS) with respect to all contracts directly related to the acquisition of a new primary trainer aircraft to fulfill Air Force and Navy joint undergraduate aviation training requirements, and an associated ground-based training system consisting of air crew training devices (simulators), courseware, a Training Management System, and contractor support for the life of the system.

"(4) COMMERCIAL-DERIVATIVE AIRCRAFT (CDA).—

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"(A) All contracts directly related to the acquisition or upgrading of commercial-derivative aircraft for use in meeting airlift and tanker requirements and the air vehicle component for airborne warning and control systems.

"(B) For purposes of this paragraph, the term 'commercial-derivative aircraft' means any of the following:

"(i) Any aircraft (including spare parts, support services, support equipment, technical manuals, and data related thereto) that is or was of a type customarily used in the course of normal business operations for other than Federal Government purposes, that has been issued a type certificate by the Administrator of the Federal Aviation Administration, and that has been sold or leased for use in the commercial marketplace or that has been offered for sale or lease for use in the commercial marketplace.

"(ii) Any aircraft that, but for modifications of a type customarily available in the commercial marketplace, or minor modifications made to meet Federal Government requirements, would satisfy or would have satisfied the criteria in subclause (I).

"(iii) For purposes of a potential complement or alternative to the C-17 program, any nondevelopmental airlift aircraft, other than the C-17 or any aircraft derived from the C-17, shall be considered a commercial-derivative aircraft.

"(5) COMMERCIAL-DERIVATIVE ENGINE (CDE).—The commercial derivative engine program with respect to all contracts directly related to the acquisition of (A) commercial derivative engines (including spare engines and upgrades), logistics support equipment, technical orders, management data, and spare parts, and (B) commercially derived engines for use in supporting the purchase of commercial-derivative aircraft for use in airlift and tanker requirements (including engine replacement and upgrades) and the air vehicle component for airborne warning and control systems. For purposes of a potential complement or alternative to the C-17 program, any nondevelopmental airlift aircraft engine shall be considered a commercial-derivative engine.

"(b) PILOT PROGRAM IMPLEMENTATION.—(1) [Amended section 833 of P. L. 103-160, set out above]

"(2) [Amended section 837 of P. L. 103-160]

"(3) [Amended section 838 of P. L. 103-160]

"(4) Not later than 45 days after the date of the enactment of the Federal Acquisition Streamlining Act of 1994 [Oct. 13, 1994], the Secretary of Defense shall identify for each defense acquisition program participating in the pilot program quantitative measures and goals for reducing acquisition management costs.

"(5) For each defense acquisition program participating in the pilot program, the Secretary of Defense shall establish a review process that provides senior acquisition officials with reports on the minimum necessary data items required to ensure the appropriate expenditure of funds appropriated for the program and that-

"(A) contain essential information on program results at appropriate intervals, including the criteria to be used in measuring the success of the program; and

"(B) reduce data requirements from the current program review reporting requirements.

"(c) SPECIAL AUTHORITY.—The authority delegated under subsection (a) may include authority for the Secretary of Defense-

"(1) to apply any amendment or repeal of a provision of law made in this Act to the pilot programs before the effective date of such amendment or repeal; and

"(2) to apply to a procurement of items other than commercial items under such programs-

"(A) any authority provided in this Act (or in an amendment made by a provision of this Act) to waive a provision of law in the case of commercial items, and

"(B) any exception applicable under this Act (or an amendment made by a provision of this 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.

"(d) APPLICABILITY.—(1) Subsection (c) applies with respect to-

"(A) a contract that is awarded or modified during the period described in paragraph (2); and

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"(B) a contract that is awarded before the beginning of such period and is to be performed (or may be performed), in whole or in part, during such period.

"(2) The period referred to in paragraph (1) is the period that begins on October 13, 1994, and ends on **October 1, 2007**.

"(e) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as authorizing the appropriation or obligation of funds for the programs designated for participation in the defense acquisition pilot program under the authority of subsection (a)."

(6) Section 803 of the National Defense Authorization Act for Fiscal Year 1997, [P. L. 104–201](#), (**10 USC 2430 note**), as amended, provided:

“SEC. 803. AUTHORITY TO WAIVE CERTAIN REQUIREMENTS OF DEFENSE ACQUISITION PILOT PROGRAMS.

"(a) AUTHORITY.—The Secretary of Defense may waive [sections 2399, 2432, and 2433 of title 10, United States Code](#), in accordance with this section for any defense acquisition program designated by the Secretary of Defense for participation in the defense acquisition pilot program authorized by section **809** of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510; [10 U.S.C. 2430 note](#)).

"(b) OPERATIONAL TEST AND EVALUATION.—The Secretary of Defense may waive the requirements for operational test and evaluation for such a defense acquisition program as set forth in [section 2399 of title 10, United States Code](#), if the Secretary-

"(1) determines (without delegation) that such test would be unreasonably expensive or impractical;

"(2) develops a suitable alternate operational test program for the system concerned;

"(3) describes in the test and evaluation master plan, as approved by the Director of Operational Test and Evaluation, the method of evaluation that will be used to evaluate whether the system will be effective and suitable for combat; and

"(4) submits to the congressional defense committees [Committees on Armed Services and on Appropriations of the Senate and House of Representatives] a report containing the determination that was made under paragraph (1), a justification for that determination, and a copy of the plan required by paragraph (3).

"(c) SELECTED ACQUISITION REPORTS.—The Secretary of Defense may waive the requirements of [sections 2432 and 2433 of title 10, United States Code](#), for such a defense acquisition program if the Secretary provides a single annual report to Congress at the end of each fiscal year that describes the status of the program in relation to the baseline description for the program established under section 2435 of such title."

20. Section 1215 of the National Defense Authorization Act for Fiscal Year 1984, [Pub. L. 98–94](#) (**10 USC 2452 note**), as amended, provided that:

SEC. 1215. REGULATIONS RELATING TO INCREASES IN PRICES FOR SPARE PARTS AND REPLACEMENT.

"(a) Not later than 120 days after the date of the enactment of this Act [Sept. 24, 1983], the Secretary of Defense shall issue regulations which—

"(1) except as provided in clause (2), prohibit the purchase of any spare part or replacement equipment when the price of such part or equipment, since a time in the past specified by the Secretary (in terms of days or

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months) or since the most recent purchase of such part or equipment by the Department of Defense, has increased in price by a percentage in excess of a percentage threshold specified by the Secretary in such regulations, and

"(2) permit the purchase of such spare part or equipment (notwithstanding the prohibition contained in clause (1)) if the contracting officer for such part or equipment certifies in writing to the head of the procuring activity before the purchase is made that—

"(A) such officer has evaluated the price of such part or equipment and concluded that the increase in the price of such part or equipment is fair and reasonable, or

"(B) the national security interests of the United States require that such part or equipment be purchased despite the increase in price of such part or equipment.

"(b)(1) The Secretary shall publish the regulations issued under this section in the Federal Register.

"(2) The Secretary may provide in such regulations for the waiver of the prohibition in subsection (a)(1) and compliance with the requirements of subsection (a)(2) in the case of a purchase of any spare part or replacement equipment made or to be made through competitive procedures.

"(c) Not less than 30 days before the Secretary publishes such regulations in accordance with subsection (b), the Secretary shall submit the text of the proposed regulations to the Committees on Armed Services of the Senate and House of Representatives."

21. Section 347 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, [Pub. L. 105–261](#) (10 USC 2458 note), provided that:

SEC. 347. BEST COMMERCIAL INVENTORY PRACTICES FOR MANAGEMENT OF SECONDARY SUPPLY ITEMS.

"(a) DEVELOPMENT AND SUBMISSION OF SCHEDULE.—Not later than 180 days after the date of the enactment of this Act [Oct. 17, 1998], the Secretary of each military department shall submit to Congress a schedule for implementing within the military department, for secondary supply items managed by that military department, inventory practices identified by the Secretary as being the best commercial inventory practices for the acquisition and distribution of such supply items consistent with military requirements. The schedule shall provide for the implementation of such practices to be completed not later than five years after the date of the enactment of this Act.

"(b) DEFINITION.—For purposes of this section, the term 'best commercial inventory practice' includes cellular repair processes, use of third-party logistics providers, and any other practice that the Secretary of the military department determines will enable the military department to reduce inventory levels while improving the responsiveness of the supply system to user needs.

"(c) GAO REPORTS ON MILITARY DEPARTMENT AND DEFENSE LOGISTICS AGENCY SCHEDULES.—(1) Not later than 240 days after the date of the enactment of this Act, the Comptroller General shall submit to Congress a report evaluating the extent to which the Secretary of each military department has complied with the requirements of this section.

"(2) Not later than 18 months after the date on which the Director of the Defense Logistics Agency submits to Congress a schedule for implementing best commercial inventory practices under section 395 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105–85; 111 Stat. 1718; 10 U.S.C. 2458 note), the Comptroller General shall submit to Congress an evaluation of the extent to which best commercial inventory practices are being implemented in the Defense Logistics Agency in accordance with that schedule."

22. Section 349 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, [Pub. L. 105–261](#) (10 USC 2458 note), as amended, provided that:

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SEC. 349. INVENTORY MANAGEMENT OF IN-TRANSIT ITEMS.

"(a) REQUIREMENT FOR PLAN.—The Secretary of Defense shall prescribe and carry out a comprehensive plan to ensure visibility over all in-transit end items and secondary items.

"(b) END ITEMS.—The plan required by subsection (a) shall address the specific mechanisms to be used to enable the Department of Defense to identify at any time the quantity and location of all end items.

"(c) SECONDARY ITEMS.—The plan required by subsection (a) shall address the following problems with Department of Defense management of inventories of in-transit secondary items:

"(1) The vulnerability of in-transit secondary items to loss through fraud, waste, and abuse.

"(2) Loss of oversight of in-transit secondary items, including any loss of oversight when items are being transported by commercial carriers.

"(3) Loss of accountability for in-transit secondary items due to either a delay of delivery of the items or a lack of notification of a delivery of the items.

"(d) CONTENT OF PLAN.—The plan shall include for subsection (b) and for each of the problems described in subsection (c) the following information:

"(1) The actions to be taken by the Department, including specific actions to address underlying weaknesses in the controls over items being shipped.

"(2) Statements of objectives.

"(3) Performance measures and schedules.

"(4) An identification of any resources necessary for implementing the required actions, together with an estimate of the annual costs.

"(5) The key management elements for monitoring, and for measuring the progress achieved in, the implementation of the plan, including-

"(A) the assignment of oversight responsibility for each action identified pursuant to paragraph (1);

"(B) a description of the resources required for oversight; and

"(C) an estimate of the annual cost of oversight.

"(e) GAO REVIEWS.—(1) Not later than 60 days after the date on which the Secretary of Defense submits the initial plan to Congress, the Comptroller General shall review the plan and submit to Congress any comments that the Comptroller General considers appropriate regarding the plan.

"(2) The Comptroller General shall monitor any implementation of the plan and, not later than 1 year after the date referred to in paragraph (1), submit to Congress an assessment of the extent to which the plan has been implemented.

"(f) SUBMISSIONS TO CONGRESS.—The Secretary shall submit to Congress any revisions made to the plan that are required by any law enacted after October 17, 1998. The revisions so made shall be submitted not later than 180 days after the date of the enactment of the law requiring the revisions."

23. Section 395 of the National Defense Authorization Act for Fiscal Year 1998, [Pub. L. 105–85](#) (10 USC 2458 note) provided that:

SEC. 395. INVENTORY MANAGEMENT.

"(a) DEVELOPMENT AND SUBMISSION OF SCHEDULE.—Not later than 180 days after the date of the enactment of this Act [Nov. 18, 1997], the Director of the Defense Logistics Agency shall develop and submit to Congress a schedule for implementing within the agency, for the supplies and equipment described in subsection (b), inventory practices identified by the Director as being the best commercial inventory practices for the acquisition and distribution of such supplies and equipment consistent with military requirements. The schedule shall provide for the implementation of such practices to be completed not later than three years after the date of the enactment of this Act.

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"(b) COVERED SUPPLIES AND EQUIPMENT.—Subsection (a) shall apply to the following types of supplies and equipment for the Department of Defense:

- "(1) Medical and pharmaceutical.
- "(2) Subsistence.
- "(3) Clothing and textiles.
- "(4) Commercially available electronics.
- "(5) Construction.
- "(6) Industrial.
- "(7) Automotive.
- "(8) Fuel.
- "(9) Facilities maintenance.

"(c) DEFINITION.—For purposes of this section, the term 'best commercial inventory practice' includes a so-called prime vendor arrangement and any other practice that the Director determines will enable the Defense Logistics Agency to reduce inventory levels and holding costs while improving the responsiveness of the supply system to user needs.

"(d) REPORT ON EXPANSION OF COVERED SUPPLIES AND EQUIPMENT.—Not later than March 1, 1998, the Comptroller General shall submit to Congress a report evaluating the feasibility of expanding the list of covered supplies and equipment under subsection (b) to include repairable items."

24. Section 352 of the National Defense Authorization Act for Fiscal Year 1996, [Pub. L. 104–106](#), (10 USC 2458 note) provided that:

SEC. 352. DIRECT VENDOR DELIVERY SYSTEM FOR CONSUMABLE INVENTORY ITEMS.

"(a) IMPLEMENTATION OF DIRECT VENDOR DELIVERY SYSTEM.—Not later than September 30, 1997, the Secretary of Defense shall, to the maximum extent practicable, implement a system under which consumable inventory items referred to in subsection (b) are delivered to military installations throughout the United States directly by the vendors of those items. The purpose for implementing the system is to reduce the expense and necessity of maintaining extensive warehouses for those items within the Department of Defense.

"(b) COVERED ITEMS.—The items referred to in subsection (a) are the following:

- "(1) Food and clothing.
- "(2) Medical and pharmaceutical supplies.
- "(3) Automotive, electrical, fuel, and construction supplies.
- "(4) Other consumable inventory items the Secretary considers appropriate."

25. Section 353(b) of the National Defense Authorization Act for Fiscal Year 1996, [Pub. L. 104–106](#) (10 USC 2461 note) provided that:

SEC. 353. PAYROLL, FINANCE, AND ACCOUNTING FUNCTIONS OF THE DEPARTMENT OF DEFENSE.

(a) ***

“(b) PILOT PROGRAM FOR PRIVATE SECTOR OPERATION OF NAFI FUNCTIONS.—(1) The Secretary shall carry out a pilot program to test the performance by private-sector sources of payroll and other accounting

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and finance functions of nonappropriated fund instrumentalities and to evaluate the extent to which cost savings and efficiencies would result from the performance of such functions by those sources.

"(2) The payroll and other accounting and finance functions designated by the Secretary for performance by private-sector sources under the pilot program shall include at least one major payroll, accounting, or finance function.

"(3) To carry out the pilot program, the Secretary shall enter into discussions with private-sector sources for the purpose of developing a request for proposals to be issued for performance by those sources of functions designated by the Secretary under paragraph (2). The discussions shall be conducted on a schedule that accommodates issuance of a request for proposals within 60 days after the date of the enactment of this Act [Feb. 10, 1996].

"(4) A goal of the pilot program is to reduce by at least 25 percent the total costs incurred by the Department annually for the performance of a function referred to in paragraph (2) through the performance of that function by a private-sector source.

"(5) Before conducting the pilot program, the Secretary shall develop a plan for the program that addresses the following:

"(A) The purposes of the program.

"(B) The methodology, duration, and anticipated costs of the program, including the cost of an arrangement pursuant to which a private-sector source would receive an agreed-upon payment plus an additional negotiated amount not to exceed 50 percent of the dollar savings achieved in excess of the goal specified in paragraph (4).

"(C) A specific citation to any provisions of law, rule, or regulation that, if not waived, would prohibit the conduct of the program or any part of the program.

"(D) A mechanism to evaluate the program.

"(E) A provision for all payroll, accounting, and finance functions of nonappropriated fund instrumentalities of the Department of Defense to be performed by private-sector sources, if determined advisable on the basis of a final assessment of the results of the program.

"(6) The Secretary shall act through the Under Secretary of Defense (Comptroller) in the performance of the Secretary's responsibilities under this subsection."

26. Section 1010 of the USA Patriot Act of 2001, [Pub. L. 107-56](#) (10 USC 2465 note), provided that:

SEC. 1010. TEMPORARY AUTHORITY TO CONTRACT WITH LOCAL AND STATE GOVERNMENTS FOR PERFORMANCE OF SECURITY FUNCTIONS AT UNITED STATES MILITARY INSTALLATIONS.

"(a) IN GENERAL.—Notwithstanding [section 2465 of title 10, United States Code](#), during the period of time that United States armed forces are engaged in Operation Enduring Freedom, and for the period of 180 days thereafter, funds appropriated to the Department of Defense may be obligated and expended for the purpose of entering into contracts or other agreements for the performance of security functions at any military installation or facility in the United States with a proximately located local or State government, or combination of such governments, whether or not any such government is obligated to provide such services to the general public without compensation.

"(b) TRAINING.—Any contract or agreement entered into under this section shall prescribe standards for the training and other qualifications of local government law enforcement personnel who perform security functions under this section in accordance with criteria established by the Secretary of the service concerned.

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

"(c) REPORT.—One year after the date of enactment of this section [Oct. 26, 2001], the Secretary of Defense shall submit a report to the Committees on Armed Services of the Senate and the House of Representatives describing the use of the authority granted under this section and the use by the Department of Defense of other means to improve the performance of security functions on military installations and facilities located within the United States."

27. Section 852 of the National Defense Authorization Act for Fiscal Year 2012, [Pub. L. 112–81](#), (10 USC 2504 note), as amended, provided that:

SEC. 852. STRATEGY FOR SECURING SUPPLY CHAIN AND INDUSTRIAL BASE.

"(a) REPORT REQUIRED.—The Secretary of Defense shall ensure that the annual report to Congress on the defense industrial base submitted for fiscal year 2012 pursuant to [section 2504 of title 10, United States Code](#), includes a description of, and a status report on, the sector-by-sector, tier-by-tier assessment of the industrial base undertaken by the Department of Defense.

"(b) CONTENTS OF REPORT.—The report required by subsection (a) shall include, at a minimum, a description of the steps taken and planned to be taken-

"(1) to identify current and emerging sectors of the defense industrial base that are critical to the national security of the United States;

"(2) in each sector, to identify items that are critical to military readiness, including key components, subcomponents, and materials;

"(3) to examine the structure of the industrial base, including the competitive landscape, relationships, risks, and opportunities within that structure;

"(4) to map the supply chain for critical items identified under paragraph (2) in a manner that provides the Department of Defense visibility from raw material to final products;

"(5) to perform a risk assessment of the supply chain for such critical items and conduct an evaluation of the extent to which-

"(A) the supply chain for such items is subject to disruption by factors outside the control of the Department of Defense; and

"(B) such disruption would adversely affect the ability of the Department of Defense to fill its national security mission.

"(c) FOLLOW-UP REVIEW.—The Secretary of Defense shall ensure that the annual report to Congress on the defense industrial base submitted for each of fiscal years 2013, 2014, and 2015 includes an update on the steps taken by the Department of Defense to act on the findings of the sector-by-sector, tier-by-tier assessment of the industrial base and implement the strategy required by [section 2501 of title 10, United States Code](#). Such updates shall, at a minimum-

"(1) be conducted based on current mapping of the supply chain and industrial base structure, including an analysis of the competitive landscape, relationships, risks, and opportunities within that structure; and

"(2) take into account any changes or updates to the National Defense Strategy, National Military Strategy, national counterterrorism policy, homeland security policy, and applicable operational or contingency plans."

28. Section 1081(c) of the National Defense Authorization Act for Fiscal Year 2007, P. L. 106–398 (10 U.S.C. 2540c note), provides:

**[TEXT OF SECTIONS PROPOSED FOR REPEAL
BY SECTION 809 PANEL — PACKAGE #2]**

**“SEC. 1081. FUNDS FOR ADMINISTRATIVE EXPENSES UNDER DEFENSE EXPORT LOAN
GUARANTEE PROGRAM.**

(a) ****

(b) ***

(c) **LIMITATION PENDING SUBMISSION OF REPORT.**—The Secretary of Defense may not exercise the authority provided by paragraph (2) of section 2540c(d) of title 10, United States Code, as added by subsection (a), **until** the Secretary submits to Congress a report on the operation of the Defense Export Loan Guarantee Program under subchapter V of chapter 148 of title 10, United States Code. The report shall include the following:

(1) ***

SECTION 809 PANEL RECOMMENDATIONS #2
FOR REPEAL OF CERTAIN TITLE 10 PROVISIONS

**809 PANEL RECOMMENDATIONS #2 FOR
REPEAL OF CERTAIN TITLE 10 PROVISIONS**

[Sections in subsection (b) are set out in U.S. Code section order]

1 **SEC. ____ . REPEAL OF CERTAIN ACQUISITION-RELATED STATUTES.**

2 (a) TITLE 10, UNITED STATES CODE.—

3 (1) REPEAL OF EXPIRED PROVISIONS.—The following sections of title 10, United
4 States Code, are repealed: section 167a, section 2323, and section 2332.

5 (2) CLERICAL AMENDMENTS.—

6 (A) The table of sections at the beginning of chapter 6 of such title is
7 amended by striking the item relating to section 167a.

8 (B) The table of sections at the beginning of chapter 137 of such title is
9 amended by striking the items relating to sections 2323 and 2332.

10 (b) OTHER PROVISIONS OF LAW.—The following provisions of law are repealed:

11 (1) Section 854 of the National Defense Authorization Act for Fiscal Year 2017
12 (Public Law 114-328; 10 U.S.C. 2302 note).

13 (2) Section 829 of the National Defense Authorization Act for Fiscal Year 2013
14 (Public Law 112-239; 10 U.S.C. 2302 note).

15 (3) Section 895 of the National Defense Authorization Act for Fiscal Year 2016
16 (Public Law 114-92; 10 U.S.C. 2304 note).

17 (4) Section 842 of the National Defense Authorization Act for Fiscal Year 2012
18 (Public Law 112–81; 10 U.S.C. 2313 note).

SECTION 809 PANEL RECOMMENDATIONS #2 FOR REPEAL OF CERTAIN TITLE 10 PROVISIONS

1 (5) Section 803(a) of the National Defense Authorization Act for Fiscal Year
2 2017 (Public Law 114–328; 10 U.S.C. 2330 note).

3 (6) Section 882 of the National Defense Authorization Act for Fiscal Year 2016
4 (Public Law 114–92; 10 U.S.C. 2330 note).

5 (7) Section 807 of the National Defense Authorization Act for Fiscal Year 2012
6 (Public Law 112–81; 10 U.S.C. 2330 note).

7 (8) Section 863(a)–(h) of the Ike Skelton National Defense Authorization Act for
8 Fiscal Year 2011 (Public Law 111–383; 10 U.S.C. 2330 note).

9 (9) Section 808 of the National Defense Authorization Act for Fiscal Year 2008
10 (Public Law 110–181; 10 U.S.C. 2330 note).

11 (10) Section 812(b)–(c) of the National Defense Authorization Act for Fiscal Year
12 2006 (Public Law 109–163; 10 U.S.C. 2330 note).

13 (11) Section 831 of the Duncan Hunter National Defense Authorization Act for
14 Fiscal Year 2009 (Public Law 110–417; 10 U.S.C. 2330a note).

15 (12) Section 8133 of the Department of Defense Appropriations Act, 2000 (Public
16 Law 106–79; 10 U.S.C. 2401a note).

17 (13) Section 825(c)(1)–(2) of the National Defense Authorization Act for Fiscal
18 Year 2016 (Public Law 114–92; 10 U.S.C. 2430 note).

19 (14) Section 1058 of the Carl Levin and Howard P. “Buck” McKeon National
20 Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291; 10 U.S.C. 2430
21 note).

22 (15) Section 809 of the National Defense Authorization Act for Fiscal Year 1991
23 (Public Law 101–510; 10 U.S.C. 2430 note).

SECTION 809 PANEL RECOMMENDATIONS #2 FOR REPEAL OF CERTAIN TITLE 10 PROVISIONS

1 (16) Section 833 of the National Defense Authorization Act for Fiscal Year 1994
2 (Public Law 103–160; 10 U.S.C. 2430 note).

3 (17) Section 839 of the National Defense Authorization Act for Fiscal Year 1994
4 (Public Law 103–160; 10 U.S.C. 2430 note).

5 (18) Section 819 of the National Defense Authorization Act for Fiscal Year 1995
6 (Public Law 103–337; 10 U.S.C. 2430 note).

7 (19) Section 5064 of the Federal Acquisition Streamlining Act of 1994 (Public
8 Law 103–355; 10 U.S.C. 2430 note).

9 (20) Section 803 of the National Defense Authorization Act for Fiscal Year 1997
10 (Public Law 104–201; 10 U.S.C. 2430 note).

11 (21) Section 1215 of the Department of Defense Authorization Act, 1984 (Public
12 Law 98–94; 10 U.S.C. 2452 note).

13 (22) Section 347 of the Strom Thurmond National Defense Authorization Act for
14 Fiscal Year 1999 (Public Law 105–261; 10 U.S.C. 2458 note).

15 (23) Section 349 of the Strom Thurmond National Defense Authorization Act for
16 Fiscal Year 1999 (Public Law 105–261; 10 U.S.C. 2458 note).

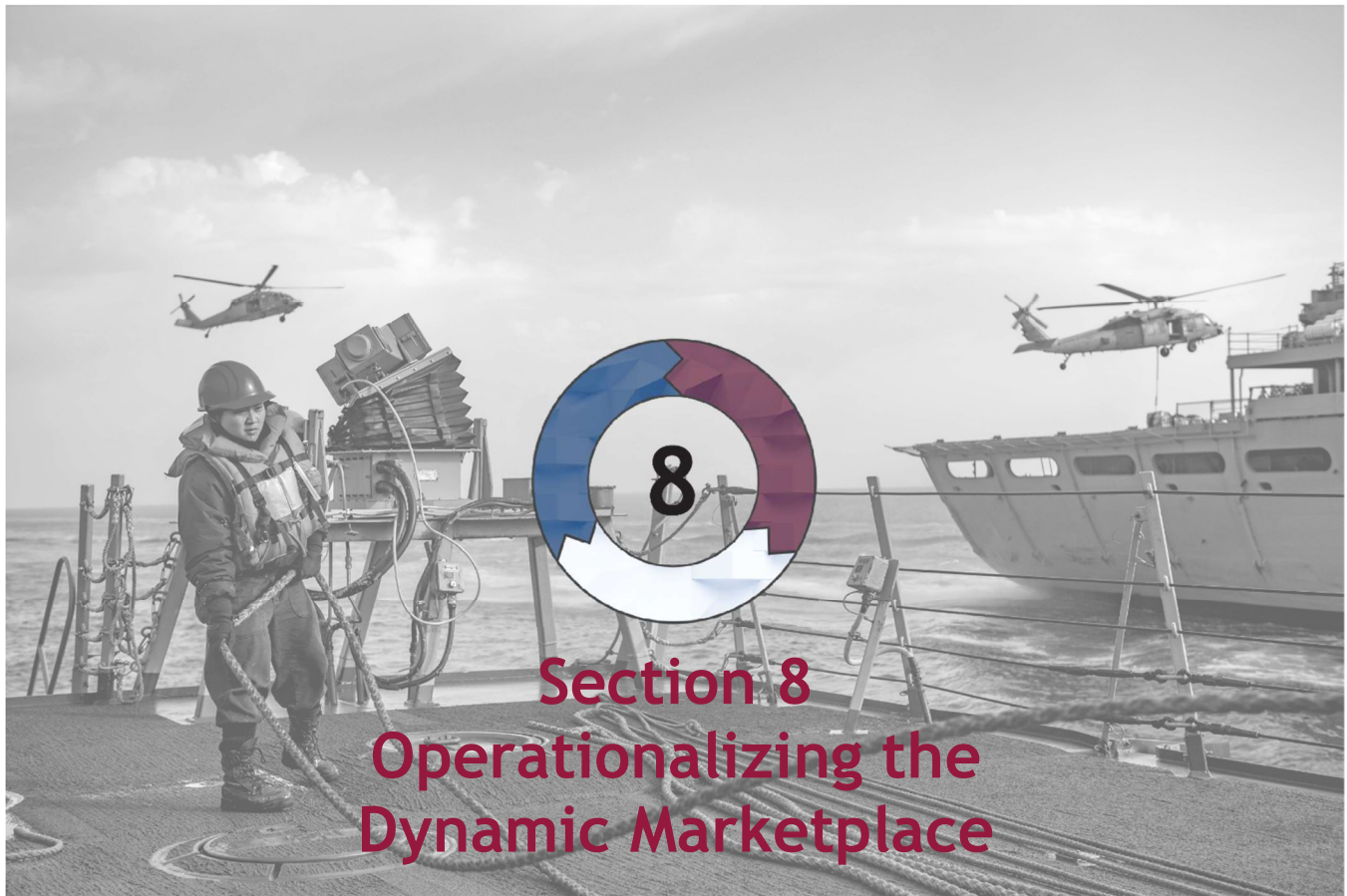
17 (24) Section 395 of the National Defense Authorization Act for Fiscal Year 1998
18 (Public Law 105–85; 10 U.S.C. 2458 note).

19 (25) Section 352 of the National Defense Authorization Act for Fiscal Year 1996
20 (Public Law 104–106; 10 U.S.C. 2458 note).

21 (26) Section 353(b) of the National Defense Authorization Act for Fiscal Year
22 1996 (Public Law 104–106; 10 U.S.C. 2461 note).

SECTION 809 PANEL RECOMMENDATIONS #2 FOR REPEAL OF CERTAIN TITLE 10 PROVISIONS

- 1 (27) Section 1010 of the USA Patriot Act of 2001 (Public Law 107–56; 10 U.S.C.
- 2 2465 note).
- 3 (28) Section 852 of the National Defense Authorization Act for Fiscal Year 2012
- 4 (Public Law 112–81; 10 U.S.C. 2504 note).
- 5 (29) Section 1081(c) of the National Defense Authorization Act for Fiscal Year
- 6 2007 (Public Law 106–398; 10 U.S.C. 2540c note).



The ultimate goal is an outcomes-based DoD acquisition system that exhibits flexibility, empowered decision making, speed to the marketplace, and collaboration.

FROM CONCEPT TO OPERATIONAL REALITY

The Section 809 Panel's *Volume 1 Report* identified the unique challenges DoD acquisition faces. Bold changes to the existing cost-centric and inflexible system that values process perfection over operational output are necessary for DoD to deliver lethality to warfighters, obtain technical dominance, maintain technical dominance, and most importantly “deliver performance at the speed of relevance.”¹ The bold changes recommended by the Section 809 Panel are guided by a vision of tomorrow's outcomes-focused acquisition system and the five essential attributes articulated in the *Volume 1 Report* that call for a system that does the following:²

- Competes dissimilar solutions amidst robust collaboration/communication.
- Is adaptive and responsive.

¹ DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge*, 10, accessed June 5, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

² Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 7 (2018).

- Is transparent.
- Is time sensitive.
- Allows for trade-offs to deliver optimal results.

The *Volume 1 Report* also included two conceptual models, one imagining how DoD can better collaborate with industry to identify solutions and another envisioning how DoD can better leverage the dynamic marketplace in which DoD functions. The former is being incorporated into broad recommendations for how DoD should address requirements in general. The latter was expressed as a four-lane approach to describing what DoD buys and the characteristics of the market from which those products and services are acquired. The lanes are characterized by the risk associated with delivering specific products or services and the procedures and terms and conditions that apply to the business arrangements completed between DoD and sellers.

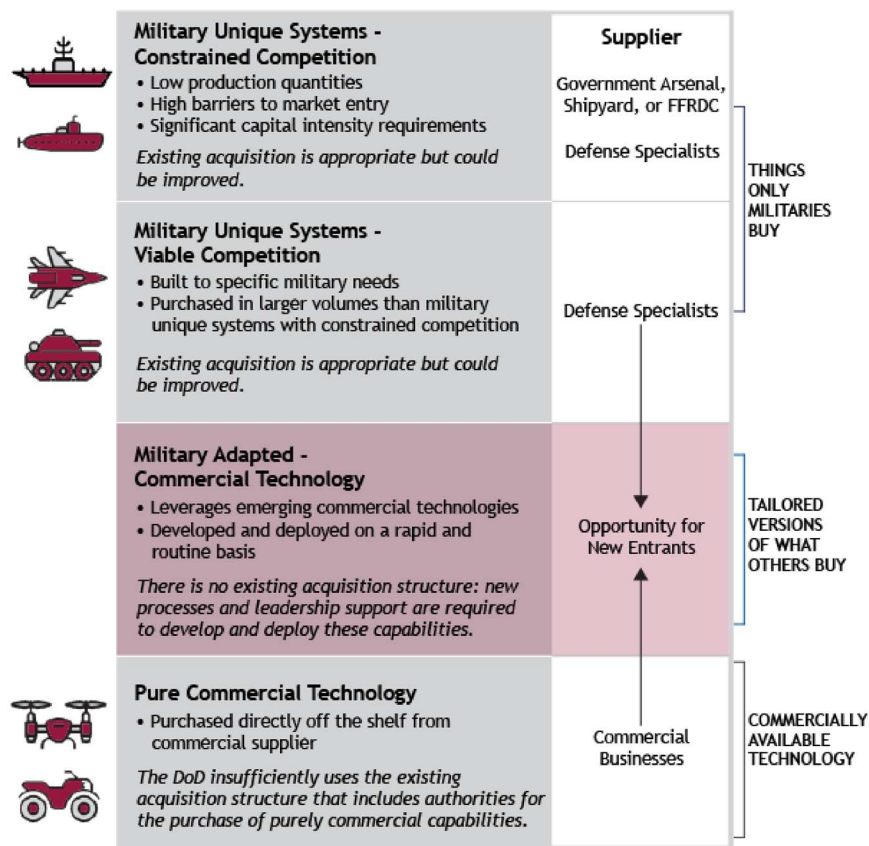
The Section 809 Panel's four lanes were adapted from the four capability segments identified in the Center for a New American Security's (CNAS's) paper, *Future Foundry: A New Strategic Approach to Military-Technical Advantage*.³ Figure 8-1 is a graphical representation the CNAS paper uses to summarize findings regarding the capability segments and the current acquisition system's ability to adequately develop and deploy products and services in each segment. As the Section 809 Panel has endeavored to translate this concept into defined "transaction rules appropriate to each lane," it has become apparent that rather than four lanes and four distinct sets of transaction rules, there are three.⁴ The four lanes outlined in the *Volume 1 Report* should be collapsed into three lanes consistent with the three categories of what DoD buys, as described by the CNAS paper: commercially available technology, tailored versions of what others buy, and things only militaries buy.⁵

³ Ben FitzGerald, Alexandra Sander, and Jacqueline Parziale, *Future Foundry: A New Strategic Approach to Military-Technical Advantage*, Center for a New American Security, December 2016, accessed May 30, 2018, <https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report-FutureFoundry-final.pdf?mtime=20161213162640>.

⁴ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 12 (2018).

⁵ See Figure 8-1 and Ben FitzGerald, Alexandra Sander, and Jacqueline Parziale, *Future Foundry: A New Strategic Approach to Military-Technical Advantage*, Center for a New American Security, December 2016, accessed May 30, 2018, <https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report-FutureFoundry-final.pdf?mtime=20161213162640>.

Figure 8-1. Center for a New American Security View of Defense Acquisition's Four Capability Segments⁶



The three lanes that will serve as the conceptual basis for the Section 809 Panel's recommendations have been refined as follows:

- **Lane 1—Readily Available:** Any product or service that requires no customization by the vendor and can be put on order by customers, to include products and services that only governments buy or only governments can buy due to export controls or other legal limitations. Optional, priced features of products, services and solutions in a form that is offered for sale sold in the normal course of business, fall within the definition of readily available.
- **Lane 2—Readily Available with Customization:** Includes the products and services that are sold in the private sector, including to other public sector customers. However, customization or manufacturing that is consistent with existing private-sector practices is necessary to meet DoD's needs. Customization for products 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. Services are considered customized when a performance

⁶ Ben FitzGerald, Alexandra Sander, and Jacqueline Parziale, *Future Foundry: A New Strategic Approach to Military-Technical Advantage*, Center for a New American Security, December 2016, 23, accessed May 30, 2018, <https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report-FutureFoundry-final.pdf?mtime=20161213162640>.

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.

- **Lane 3—Defense-Unique or Development:** DoD financed development, either to repurpose a readily available product or solution or to develop a new product or solution, to meet a defense-unique capability.

This view of the dynamic marketplace recognizes, as CNAS did, that accessing and translating “pure commercial technology” and “military adapted commercial technology” into capabilities presents the greatest challenges to the current DoD acquisition system.⁷ To be a competent participant in what is generally understood to be the commercial market, “new processes and leadership support” are required.⁸ Additionally, DoD needs to improve the acquisition of products and services that have defense-unique applications and are developed using DoD dollars.

The Section 809 Panel intends to provide DoD with a new set of simplified acquisition procedures to use when it is buying from the private sector, while also streamlining the way DoD develops and acquires everything else. Using the above definitions, the panel’s efforts are now focused on implementing the new processes necessary to create an outcomes-based acquisition system that is a means to an end: “empowering the warfighter with the knowledge, equipment, and support systems to fight and win.”⁹ It is all about supporting warfighters.

This volume includes recommended statutory and regulatory changes to commercial buying that nudges the existing defense acquisition system closer to what the future system must resemble to adequately leverage rapidly advancing commercial technology. The *Volume 3 Report* will include strategic recommendations for a bold new process for acquiring products and services that are readily available or are readily available but require customization.

READILY AVAILABLE AND A FUTURE WITHOUT COMMERCIAL ITEMS

Section one of the January 2018 *Volume 1 Report* provides an accurate assessment of the state of commercial buying in DoD today and actionable recommendations for improving that process.¹⁰ These previous recommendations, and the commercial buying recommendations in this report, have the potential to restore much of what has been lost because of “a steady erosion in the government’s use of a streamlined approach to commercial item acquisition,” yet there is more to do.¹¹

Congress and DoD have, in recent years, made multiple attempts to incentivize and increase use of simplified commercial buying procedures.¹² Unfortunately, commercial buying remains burdened by

⁷ Ibid

⁸ Ibid.

⁹ DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military’s Competitive Edge*, 10, accessed June 5, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

¹⁰ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, Section 1: Commercial Buying (2018).

¹¹ Aerospace Industries Association, *Defense Acquisition Reform: Moving Toward an Efficient Acquisition System*, November 2011, 11, accessed April 10, 2018, https://www.aia-aerospace.org/wp-content/uploads/2016/05/report_acquisition_reform.pdf.

¹² Moshe Schwartz and Heidi M. Peters, *Acquisition Reform in the FY2016-FY2018 National Defense Authorization Acts (NDAA’s)*, Congressional Research Service Report 7-5700, January 19, 2018, 5, accessed June 5, 2018, <https://fas.org/sgp/crs/natsec/R45068.pdf>.

layers of complicated statutory and regulatory revisions and bound by opinions from the DoD Inspector General, GAO, and Court of Federal Claims.¹³ As discussed in the *Volume 1 Report*, the purchase of commercial items has actually decreased since the implementation of FAR Part 12 in 1995. The FY 2012–FY 2017 decline in commercial obligations was 29 percent, and the FY 2012–FY 2017 decline in noncommercial obligations was 7 percent.¹⁴

Commercial buying should be a simple concept, but DoD relies on the Defense Contract Management Agency's Commercial Items Group, with six centers of excellence and a 67-page guide, to determine what meets the definition of a commercial item.¹⁵ The current system is far from simple. To make matters worse, the effects are not limited to DoD buyers:

*subcontractors struggle to convince prime contractor buyers that their items meet the FAR definition [of commercial items].... While prime contractors can ask their government contracting officers to submit the CID [Commercial Item Determination] to the Commercial Item Group for resolution, subcontractors do not seem to have a similar path of appeal.*¹⁶

The Section 809 Panel is developing new processes that will expedite the procurement of *readily available* products and services, which if adopted, will subsume the existing *commercial buying* structure. In addition to purchases currently considered commercial, readily available, with and without customization, also includes all nondevelopmental items, construction, and many of the services DoD procures by contract. Aligning DoD procurement more closely with how the rest of the world buys these readily available products and services will require DoD, Congress, and especially the acquisition workforce to think about competition, transparency, and pricing in a whole new paradigm.

Paradigm shifts take time, and full implementation of this one will likely require changes to existing trade agreements, procurement statutes, and regulations, as well as substantial investment by DoD to modernize procurement tools and workforce training. Meanwhile, there are targets of opportunity for Congress and DoD within the existing commercial buying framework to make changes now that will immediately relieve unnecessary friction. For these reasons, the Section 809 Panel will continue to build on the commercial buying recommendations in this report and the *Volume 1 Report*. These recommendations are iteratively driving toward the efficient and effective acquisition of readily available products and services the future DoD acquisition system will require.

DEFENSE-SPECIFIC OUTCOMES OVER PROCESS

Acquiring products and services that only militaries buy often presents unique challenges, especially in the areas of competition, cost and pricing, and supply-chain security. DoD must balance its need for

¹³ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, Section 1: Commercial Buying (2018). The existence of a 67-page guide and a Commercial Items Group with six centers of excellence around the country just to help DoD understand what meets the current definition of a commercial item.

¹⁴ Data from FPDS, extracted January 7, 2018.

¹⁵ See USD(AT&L), *Commercial Item Determination Guidebook Part A*, accessed April 10, 2018, https://www.acq.osd.mil/dpap/cpic/cp/docs/Guidebook_Part_A_Commercial_Item_Determination_20180129.pdf.

¹⁶ Nick Sanders, *DoD Makes Changes to Commercial Item Procurements*, apogeeconsulting.biz, February 6, 2018, accessed April 10, 2018, http://www.apogeeconsulting.biz/index.php?option=com_content&view=article&id=1333:dod-makes-changes-to-commercial-item-procurements&catid=1:latest-news&Itemid=55.

processes that protect core interests with its desire to “more quickly respond to changes in the security environment and make it harder for adversaries to offset our systems.”¹⁷ DoD may represent the only demand in a particular market segment; however, it must engage in business practices that entice suppliers to participate in this market by reducing or eliminating the barriers to entry that many companies have identified. These barriers are often in the form of business practices that differ substantially from private-sector business practices, creating burden without adding corresponding value. The acquisition system must more rapidly deliver capabilities and adapt them once they are fielded. The acquisition team must be willing to take smart risks, fail fast, and modify “the system of incentives that today increase cost and deliver capabilities late to need.”¹⁸

Recommendations that will be included in the *Volume 3 Report* will focus on streamlining processes and procedures to make defense-specific acquisition, especially development, more efficient. Specifically, the Section 809 Panel will propose ways to more effectively manage programs, leverage industry expertise, manage risk rather than avoid it, and eliminate unnecessary oversight and compliance throughout each tier of the supply chain. The intended outcome of this process is renewed focus on needed tools to warfighters to guarantee success when they are called on to address aggression or humanitarian crises worldwide.

CONCLUSION—THE DYNAMIC MARKETPLACE

The Section 809 Panel will continue to develop a practical implementation plan for bold and far-reaching changes to how DoD operates within today’s dynamic marketplace, while also offering recommendations that refine the existing system. The ultimate goal is an outcomes-based DoD acquisition system that exhibits flexibility, empowered decision making, speed to the marketplace, and collaboration—while providing DoD with the tools to rapidly acquire and field private-sector technologies and solutions that go beyond what can be achieved through incremental improvements to the existing commercial buying process. Achieving this goal requires a whole new construct borne out of the concepts put forward by CNAS, and implemented through the integrated recommendations the Section 809 Panel is developing. This future system will allow DoD to field tomorrow’s solutions today instead of yesterday’s solutions tomorrow. U.S. warfighters and citizens deserve no less.

¹⁷ DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military’s Competitive Edge*, 11, accessed June 5, 2018, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

¹⁸ Ibid.



The Section 809 Panel recognizes that the Department of Defense's priority is defending the nation, and that the defense acquisition system's mission is to support warfighters by delivering lethality and providing the best products and services that allow warfighters to maintain their technological superiority over near-peer competitors and nonstate actors. The panel recognizes that acquisition is a team process conducted both within DoD and with its industry partners.

The panel's work has provided the unique opportunity to propose reforms to DoD's acquisition system in conjunction with other relevant efforts, including the realignment of the office of the Under Secretary of Defense(USD) into USD(Acquisition & Sustainment) and USD(Research & Engineering) structures, the work of DoD's DFARS regulatory reform task force, and the reform initiatives in the Military Departments. The panel will continue to coordinate closely with these emerging efforts and other policy initiatives as its research evolves in the coming months.

This report is the second of three volumes of the *Final Report* required by Congress, and continues the panel's mandate to streamline acquisition. To date, the panel's recommendations have formed the basis for provisions in the FY 18 NDAA and in the House-passed FY 2019 NDAA, H.R. 5515. Among other things, these adopted recommendations include the elimination or sun-setting of statutory offices to improve DoD's organizational structure and the Secretary of Defense's flexibility, the elimination of the statutory requirement for certain reports; a refocus of small business policy to prioritize the roles of

small business in improving warfighting capabilities, and changes to commercial item acquisition policy to align DoD's acquisition practices more closely to the private sector.¹

In adopting all of the panel's *Interim Report* statutory recommendations and many of the *Volume 1 Report* recommendations over the past year, Congress demonstrated its willingness and ability to turn the panels' recommendations into implementable policies. In this report, among other things, the panel makes recommendations about streamlining cost accounting standards (CAS) oversight and application; taking additional steps to simplify the FAR Part 12 (commercial products and services), Source Selection Process; introducing streamlined workforce policies that authorize enhanced and targeted hiring; authorizing aligning pay more closely with performance and closely track training dollars to performance outcomes; and eliminating the distinction in law between personal and nonpersonal services.

As the Section 809 Panel proceeds with its research for additional recommendations to be included in its final volume in January 2019, the panel will continue to stretch for policy targets to achieve desired shifts in acquisition policy, recognizing that the current climate offers a rare alignment of will in Congress and DoD needed to attain meaningful change. The recommendations here are arranged in sections that identify the related Problem, Background, Discussion, Conclusions, Implementation and contain language designed for ready implementation in law and regulation, including draft legislative text, and regulatory changes to the Federal Acquisition Regulations and Defense Federal Acquisition Regulations Supplement. The *Volume 2 Report* provides a number of reforms that the Section 809 Panel recommends for implementation by DoD and Congress.

Volume 3 of the Section 809 Panel's *Final Report* is slated for completion in January 2019, and the panel recognizes the opportunity for change is waning. In an effort to maximize its opportunity to positively affect the defense acquisition system, the panel has redoubled its efforts and anticipates a variety of recommendations in *Volume 3* to fulfill that promise. The panel will continue to partner with Congress, DoD, and industry in support of further acquisition streamlining efforts designed to enable DoD to deliver lethality to warfighters.

¹ H.R. 5515, Section 801, Framework for new Part V of Subtitle A; Sections 806–809, Redesignation and Cross References; Section 811–813, Amendment to, and Repeal of, Defense Acquisition laws and DoD Reporting Requirements; Section 830, Clarification of Services Contracting Definitions; Sections 831–835, Provisions related to commercial item reform; and Section 851, DoD Small Business Strategy.

List of Section 809 Panel Recommendations

INTERIM REPORT - MAY 2017

#	Recommendation	Page	Status
IR-1	Affirm agency mission as the primary goal of DoD acquisition (“Mission First”).	2	Sec. 801 of FY 2018 NDAA directed DFARS be revised to include certain statements of purpose.
IR-2	Increase contract time for fuel storage from 20 years to 30 years.	5	Enacted as Sec. 881 of the FY 2018 NDAA in the form recommended by the Panel.
IR-3	Eliminate the requirement for contractors to use recycled paper.	10	Recommendation for executive branch action and not addressed in the FY 2018 NDAA.
IR-4	Eliminate FAR section on texting while driving. (FAR Clause 52.223-18)	17	Recommendation for executive branch action and not addressed in the FY 2018 NDAA.
IR-5	Eliminate the requirement to accept and dispense dollar coins at government business operations.	22	Enacted as Sec. 885. The final text was the language recommended by the Panel, with the addition of a “conforming amendment” and a “technical amendment.”

VOLUME 1 - JANUARY 2018

#	Recommendations	Page	Status
1	Revise definitions related to commercial buying to simplify their application and eliminate inconsistency.	18	Addressed in Sec. 831 of FY19 House NDAA
2	Minimize government-unique terms applicable to commercial buying.	32	Implementation outcome status undetermined as of publication.
3	Align and clarify FAR commercial termination language.	44	Implementation outcome status undetermined as of publication.
4	Revise DFARS sections related to rights in technical data policy for commercial products.	46	Implementation outcome status undetermined as of publication.
5	Align DCAA’s mission statement to focus on its primary customer, the contracting officer.	64	Implementation outcome status undetermined as of publication.
6	Revise the elements of DCAA’s annual report to Congress to incorporate multiple key metrics.	67	Implementation outcome status undetermined as of publication.
7	Provide flexibility to contracting officers and auditors to use audit and advisory services when appropriate.	70	Implementation outcome status undetermined as of publication.
7a	Prior to requesting field pricing/audit assistance, contracting officers should consider other available internal resources and tailor their request for assistance to the maximum extent possible.	71	Implementation outcome status undetermined as of publication.
7b	Define the term <i>audit</i> .	72	Implementation outcome status undetermined as of publication.
7c	DCAA should use the full range of audit and nonaudit services available.	72	Implementation outcome status undetermined as of publication.
7d	Direct a review of the roles of DCAA and DCMA to ensure appropriate alignment and eliminate redundancies.	74	Implementation outcome status undetermined as of publication.
8	Establish statutory time limits for defense oversight activities.	76	Implementation outcome status undetermined as of publication.
9	Permit DCAA to use IPAs to manage resources to meet time limits.	80	Implementation outcome status undetermined as of publication.
10	Replace system criteria from DFARS 252.242-7006, Accounting System Administration, with an internal control audit to assess the adequacy of contractors’ accounting systems.	82	Implementation outcome status undetermined as of publication.
11	Develop a Professional Practice Guide for DoD’s oversight of contractor costs and business systems.	87	Implementation outcome status undetermined as of publication.
12	Require DCAA to obtain peer review from a qualified external organization.	91	Implementation outcome status undetermined as of publication.
13	Increase coverage of the effectiveness of contractor internal control audits by leveraging IPAs.	93	Implementation outcome status undetermined as of publication.
14	Incentivize contractor compliance and manage risk efficiently through robust risk assessment.	95	Implementation outcome status undetermined as of publication.
15	Clarify and streamline the definition of and requirements for an adequate <i>incurred cost proposal</i> to refocus the purpose of DoD’s oversight.	100	Implementation outcome status undetermined as of publication.
16	Combine authority for requirements, resources, and acquisition in a single, empowered entity to govern DBS portfolios separate from the existing acquisition chain of command.	111	Implementation outcome status undetermined as of publication.
17	Eliminate separate requirement for annual IRB certification of DBS investments.	130	Implementation outcome status undetermined as of publication.

#	Recommendations	Page	Status
18	Fund DBSs in a way that allows for commonly accepted software development approaches.	137	Implementation outcome status undetermined as of publication.
19	Eliminate the Earned Value Management mandate for software programs using Agile methods.	151	Implementation outcome status undetermined as of publication.
20	Clarify the definitions of personal and nonpersonal services and incorporate in the DFARS a description of supervisory responsibilities for service contracts.	159	Implementation outcome status undetermined as of publication.
21	Refocus DoD's small business policies and programs to prioritize mission and advance warfighting capabilities and capacities.	169	Addressed in FY19 House and Senate NDAA
21a	Establish the infrastructure necessary to create and execute a DoD small business strategy, ensuring alignment of DoD's small business programs with the agency's critical needs.	192	Addressed partially in FY19 House and Senate NDAA
21b	Build on the successes of the SBIR/STTR and RIF programs.	193	Addressed in FY19 House and Senate NDAA
21c	Enable innovation in the acquisition system and among industry partners.	194	Implementation outcome status undetermined as of publication.
22	Eliminate, or sunset within 5 years, the statutory requirement for certain acquisition-related offices and Secretary of Defense designated officials to increase flexibility and/or reduce redundancy.	199	Version Included in Sec. 811 of FY19 House NDAA
22a	Repeal the statutory requirement for Department of Defense Test Resource Management Center, 10 U.S.C. § 196.	199	Implementation outcome status undetermined as of publication.
22b	Repeal the statutory requirement for Office of Corrosion Policy and Oversight, 10 U.S.C. § 2228.	200	Addressed in Sec. 811 (a) of FY19 House NDAA
22c	Repeal the statutory requirement for Director for Performance Assessment and Root Cause Analysis (PARCA), 10 U.S.C. § 2438.	201	Addressed in Sec. 811 (b) of FY19 House NDAA
22d	Repeal the statutory requirement for Office of Technology Transition, 10 U.S.C. § 2515.	203	Addressed in Sec. 811 (c) of FY19 House NDAA
22e	Repeal the statutory requirement for Office for Foreign Defense Critical Technology Monitoring and Assessment, 10 U.S.C. § 2517.	204	Addressed in Sec. 811 (d) of FY19 House NDAA
22f	Repeal the statutory requirement at 10 U.S.C. § 204 for a Small Business Ombudsman within each defense audit agency.	206	Addressed in Sec. 811 (e) of FY19 House NDAA
22g	Repeal the statutory requirement for Secretary of Defense to designate a competition advocate for the Defense Logistics Agency, 10 U.S.C. § 2318.	207	Partially Addressed in Sec. 811 (f) (1) of FY19 House NDAA
22h	Repeal the statutory requirement for the Hypersonics Development section of Joint Technology Office on Hypersonics, Section 218 of the FY 2007 NDAA (Pub. L. No. 109–364, 120 Stat. 2126; 10 U.S.C. § 2358 note).	208	Implementation outcome status undetermined as of publication.
22i	Repeal the statutory requirement for Improvement in Defense Research and Procurement Liaison with Israel, Section 1006 of the FY 1989 NDAA (Pub. L. No. 100-456; 10 U.S.C. § 133 note).	210	Addressed in Sec. 811 (h) of FY19 House NDAA
22j	Repeal the statutory requirement for Coordination of Human Systems Integration Activities Related to Acquisition Programs, Section 231 of the FY 2008 NDAA (Pub. L. No. 110–181, 10 U.S.C. § 1701 note).	211	Addressed in Sec. 811 (i) of FY19 House NDAA
22k	Repeal the statutory requirement for Focus on Urgent Operational Needs and Rapid Acquisition, Section 902 of the FY 2013 NDAA (Pub. L. No. 112–239; 10 U.S.C. § 2302 note).	213	Addressed in Sec. 811 (j) of FY19 House NDAA
22l	Repeal the statutory requirement for Senior Official for Dual-Use Science and Technology Projects, Section 203(c) of the FY 1998 NDAA (Pub. L. No. 105–85; 10 U.S.C. § 2511 note).	215	Addressed in Sec. 811 (k) of FY19 House NDAA
22m	Repeal the statutory requirement for Executive Agent for Printed Circuit Boards, Section 256 of FY 2009 NDAA (Pub. L. No. 110–417; 10 U.S.C. § 2501 note).	216	Addressed in Sec. 811 (l) of FY19 House NDAA
22n	Sunset the statutory requirement for Joint Directed Energy Transition Office (JDETO), 10 U.S.C. § 219 (10 U.S.C. § 2431 note) in FY 2023.	218	Implementation outcome status undetermined as of publication.
23	Establish a permanent, automatic 5-year sunset provision for DoD congressional reporting requirements.	227	Version included in Sec. 1048 of FY19 Senate NDAA
24	Repeal, preserve, or maintain various DoD congressional reporting requirements.	229	Versions included in FY19 House and Senate NDAA
24a	Repeal the statutory requirement for the Defense Test Resource Management Center biennial strategic and budget reports, 10 U.S.C. § 196(d) and (e).	234	Implementation outcome status undetermined as of publication.
24b	Repeal the statutory requirement for the Ballistic Missile Defense Programs annual budget justification reports, 10 U.S.C. § 223a(a).	235	Implementation outcome status undetermined as of publication.
24c	Repeal the statutory requirement for the Programs for Combating Terrorism: Annual budget overview report, 10 U.S.C. § 229.	237	Addressed in Sec. 1049 (a)(1)(A) in FY19 Senate NDAA
24d	Repeal the statutory requirement for the Annual Long-Term Plan for the Procurement of Aircraft for the Navy and the Air annual strategic plan, 10 U.S.C. § 231a.	238	Addressed in Sec. 1049 (a)(2)(B) in FY19 Senate NDAA
24e	Repeal the statutory requirement for the Cyber Mission Forces annual budget overview report, 10 U.S.C. § 238(a).	240	Implementation outcome status undetermined as of publication.
24f	Repeal the statutory requirement for the Corrosion Control and Prevention annual budget and policy report, 10 U.S.C. § 2228(e).	241	Implementation outcome status undetermined as of publication.
24g	Repeal the statutory requirement for the Major Satellite Acquisition Programs annual integration report, 10 U.S.C. § 2275.	243	Addressed in Sec. 813 (a)(3) in FY19 House NDAA
24h	Repeal the statutory requirement for the Commercial Space Activities annual Cooperation with DoD report, 10 U.S.C. § 2276(e).	244	Addressed in Sec. 813 (a)(4) in FY19 House NDAA and Sec. 1049 (3) in FY19 Senate NDAA
24i	Repeal the statutory requirement for the Depot-Level Maintenance overview report, 10 U.S.C. § 2466(d).	246	Implementation outcome status undetermined as of publication.
24j	Repeal the statutory requirement for the Covered Naval Vessels Repair Work in Foreign Shipyards annual report, 10 U.S.C. § 7310(c).	247	Addressed in Sec. 1049 (a)(4) in FY19 Senate NDAA
24k	Repeal the statutory requirement for the Reserve Component Equipment annual procurement report, 10 U.S.C. § 10543(a).	249	Addressed in Sec. 813 (a)(5)(A) in FY19 House NDAA
24l	Repeal the statutory requirement for the Reserve Components annual procurement threshold report, 10 U.S.C. § 10543(c).	250	Addressed in Sec. 813 (a)(5)(A) in FY19 House NDAA
24m	Repeal the statutory requirement for the Missile Defense Agency annual overview report, FY 2002 NDAA, 232(h)(3).	252	Implementation outcome status undetermined as of publication.
24n	Repeal the statutory requirement for the Ford-Class Aircraft Carrier annual cost estimate report, FY 2007 NDAA, 122(d)(1).	253	Addressed in Sec. 813 (b) of FY19 House NDAA
24o	Repeal the statutory requirement for the Carriage by Vessel annual Repair Work in Foreign Shipyards report, FY 2007 NDAA, 1017(e).	254	Addressed in Sec. 1049 (b) of FY19 Senate NDAA
24p	Repeal the statutory requirement for the Bandwidth Capacity annual overview report, FY 2009 NDAA, 1047(d)(2).	255	Addressed in Sec. 1049 (d) of FY19 Senate NDAA

#	Recommendations	Page	Status
24q	Repeal the statutory requirement for the Afghanistan Infrastructure Fund annual overview report, FY 2011 NDAA, 1217(i).	257	Addressed in Sec. 1049 (e) of FY19 Senate NDAA
24r	Repeal the statutory requirement for the MDAP Testing and Evaluation annual justification of progress report, FY 2013 NDAA, 904(h)(1) and (2).	258	Addressed in Sec. 813 (g)(2)(A) in FY19 House NDAA
24s	Repeal the statutory requirement for the Ticonderoga-Class Cruisers and Dock Landing Ships annual modernization report, FY 2015 NDAA, 1026(d).	260	Addressed in Sec. 813 (h) in FY19 House NDAA and Sec. 1049 (f) in FY19 Senate NDAA
24t	Repeal the statutory requirement for the Ballistic Missile Defense Systems annual preproduction assessment reports, FY 2015 NDAA, 1662(c)(2) and (d)(2).	261	Implementation outcome status undetermined as of publication.
24u	Preserve the statutory requirement for the Director of Operational Test and Evaluation annual overview report, 10 U.S.C. § 139(h).	264	Implementation outcome status undetermined as of publication.
24v	Preserve the statutory requirement for Naval Vessel Construction annual strategic plan report, 10 U.S.C. § 231.	265	Addressed in Sec. 1021 in FY19 House NDAA
24w	Preserve the statutory requirement for the Director of Operational Test and Evaluation annual program report, 10 U.S.C. § 2399(g).	267	Not directly addressed in FY19 House or Senate NDAA
24x	Terminate in 2021 the statutory requirement for the Ballistic Missile Defense Programs annual acquisition baselines report, 10 U.S.C. § 225(c).	268	Not directly addressed in FY19 House or Senate NDAA
24y	Terminate in 2021 the statutory requirement for Depot-Level Maintenance biennial capability requirements report, 10 U.S.C. § 2464(d).	269	Not directly addressed in FY19 House or Senate NDAA
24z	Terminate in 2021 the statutory requirement for the National Technology and Industrial Base annual policy overview report, 10 U.S.C. § 2504.	271	Not directly addressed in FY19 House or Senate NDAA
24aa	Terminate in 2021 the statutory requirement for the Distribution of Chemical and Biological Agents to Non-Federal Entities annual overview report, FY 2008 NDAA, 1034(d).	272	Not directly addressed in FY19 House or Senate NDAA
24ab	Terminate in 2021 the statutory requirement for the Research and Development in Defense Laboratories annual funding report, FY 2009 NDAA, 219(c).	274	Not directly addressed in FY19 House or Senate NDAA

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#	Recommendations	Page
25	Streamline and adapt hiring authorities to support the acquisition workforce.	64
26	Convert the Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) from an indefinite demonstration project to a permanent personnel system.	78
27	Improve resourcing, allocation, and management of the Defense Acquisition Workforce Development Fund (DAWDF).	87
28	Simplify the selection of sources for commercial products and services.	102
29	Revise 41 U.S.C. §§ 1501-1506 to designate the Cost Accounting Standards Board as an independent federal organization within the executive branch.	114
30	Reshape CAS program requirements to function better in a changed acquisition environment.	122
31	Eliminate the statutory and regulatory distinction between personal services contracts (PSC) and nonpersonal services (NPS) contracts.	148
32	Exempt DoD from paying the Federal Retail Excise Tax.	162
33	Update the Assignment of Claims processes under FAR Part 32.805.	168
34	Repeal certain Title 10 sections and note sections, create a new Part V under Subtitle A of Title 10, and redesignate sections in Subtitles B–D to make room for Part V to support a more logical organization and greater ease of use.	172



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APPENDIX A: ENABLING LEGISLATION

Section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), As Amended

(Amended by sec. 863(d) of the NDAA for Fiscal Year 2017 (P. L. 114-328) and
secs. 803(c) & 883 of the NDAA for Fiscal Year 2018 (P. L. 115-91))

SEC. 809. ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS.

(a) **ESTABLISHMENT.**—The Secretary of Defense shall establish an independent advisory panel on streamlining acquisition regulations. The panel shall be supported by the Defense Acquisition University and the National Defense University, including administrative support.

(b) **MEMBERSHIP.**—The panel shall be composed of at least nine individuals who are recognized experts in acquisition and procurement policy. In making appointments to the advisory panel, the Under Secretary shall ensure that the members of the panel reflect diverse experiences in the public and private sectors.

(c) **DUTIES.**—The panel shall—

(1) review the acquisition regulations applicable to the Department of Defense with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage; and

(2) make any recommendations for the amendment or repeal of such regulations that the panel considers necessary, as a result of such review, to—

(A) establish and administer appropriate buyer and seller relationships in the procurement system;

(B) improve the functioning of the acquisition system;

(C) ensure the continuing financial and ethical integrity of defense procurement programs;

(D) protect the best interests of the Department of Defense;

(E) improve the efficiency of the contract auditing process, including through the development of risk-based materiality standards; and

(F) eliminate any regulations that are unnecessary for the purposes described in subparagraphs (A) through (E).

(d) **ADMINISTRATIVE MATTERS.**—

(1) **IN GENERAL.**—The Secretary of Defense shall provide the advisory panel established pursuant to subsection (a) with timely access to appropriate information, data, resources, analysis, and logistics support so that the advisory panel may conduct a thorough and independent assessment as required under such subsection.

(2) **INAPPLICABILITY OF FACA.**—The requirements of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the advisory panel established pursuant to subsection (a).

(3) **AUTHORITIES.**—The panel shall have the authorities provided in section 3161 of title 5, United States Code.

(e) **REPORT.**—

(1) PANEL REPORT.—Not later than January 15, 2019, the panel shall transmit a final report to the Secretary of Defense and the congressional defense committees.

(2) ELEMENTS.—The final report shall contain a detailed statement of the findings and conclusions of the panel, including—

(A) a history of each current acquisition regulation and a recommendation as to whether the regulation and related law (if applicable) should be retained, modified, or repealed; and

(B) such additional recommendations for legislation as the panel considers appropriate.

(3) INTERIM REPORTS.—(A) Not later than 6 months and 18 months after the date of the enactment of this Act, the Secretary of Defense shall submit a report to or brief the congressional defense committees on the interim findings of the panel with respect to the elements set forth in paragraph (2).

(B) The panel shall provide regular updates to the Secretary of Defense for purposes of providing the interim reports required under this paragraph.

(4) FINAL REPORT.—Not later than 60 days after receiving the final report of the advisory panel, the Secretary of Defense shall transmit such comments as the Secretary determines appropriate to the congressional defense committees.

(f) DEFENSE ACQUISITION WORKFORCE DEVELOPMENT FUND SUPPORT.—The Secretary of Defense may use amounts available in the Department of Defense Acquisition Workforce Development Fund established under section 1705 of title 10, United States Code, to support activities of the advisory panel under this section.

(g) TERMINATION OF PANEL.—The advisory panel shall terminate 180 days after the date on which the final report of the panel is transmitted pursuant to subsection (e)(1).

The joint statement of managers on the conference report on the FY 2018 NDAA (at page 888 of House Report 115-404) provides the following:

The conferees recognize the importance of the work of the Advisory Panel, established by the Congress, which is aimed at streamlining and improving the Department of Defense's acquisition processes to ensure the Department's continued technological advantages. Therefore, the conferees agree that the Advisory Panel's work should be extended. The Advisory Panel shall provide its recommendations to the Committees on Armed Services of the Senate and the House of Representatives using a phased approach. The recommendations shall be delivered in January 2018, June 2018, and January 2019. Each report shall contain a roughly equal number of recommendations to avoid an oversized final deliverable.

The conferees also note that the panel's projected total cost will be nearly \$15.0 million for expenses, salaries, and other items given the extension authorized in this provision. Given this expenditure and the importance of acquisition reform, the conferees expect the Panel will make significant efforts to deliver actionable recommendations to both the Congress and Executive Branch, and provide supporting analyses and consultation to inform review and potential implementation of such recommendations.

APPENDIX B: FAR GENEALOGY

Requirement to Review Acquisition Regulations

Section 809(c) of the FY 2016 NDAA, Pub. L. No. 114–92 charges the Section 809 Panel to the following:

(c) Duties. – The panel shall –

(1) review the acquisition regulations applicable to the Department of Defense with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage;

Implementing Review Requirement

To implement the duties assigned by Section 809(c)(1) of the FY 16 NDAA, the Section 809 Panel researched genealogies for the Federal Acquisition Regulation (FAR) parts, Defense Federal Acquisition Regulations System (DFARS) parts, and associated clauses. These genealogies provide a research tool that traces the FAR and DFARS to the 1984 initial FAR Federal Register notice and provide historical background used by the panel to develop thorough and informed recommendations.

Methodology

The Section 809 panel traced the FAR and DFARS parts to several primary sources, beginning with the originating 1984 Federal Register notice. Additional Federal Register notices indicate the regulation, statute, or Executive Order (E.O.) that initiated creation, repeal, or amendment of each subpart after 1984.¹ The FAR and DFARS parts include annotated references to their relevant establishing records, such as Federal Acquisition Circulars, Defense Acquisition Circulars, FAR and DFARS case files, Public Laws, and E.O.s. The *Electronic Code of Federal Regulations* (e-CFR) provides the most recent versions of the FAR and DFARS, found in Title 48, Chapters 1 and 2.² Each genealogy contains the text of the part, the complete set of references, and copies of the relevant Federal Register notices.

Final plans to archive these genealogies are under development.

¹ “Federal Register,” U.S. Government Publishing Office, accessed June 19, 2018, <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR&browsePath=2001&isCollapsed=true&leafLevelBrowse=false&ycord=0>

² “Electronic Code of Federal Regulations,” U.S. Government Publishing Office, accessed June 19, 2018, https://www.ecfr.gov/cgi-bin/text-idx?gp=&SID=63b955a8ac9f243e3a978bd993708574&mc=true&tpl=/ecfrbrowse/Title48/48tab_02.tpl

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APPENDIX C: HIRING AUTHORITIES APPLICABLE TO THE ACQUISITION WORKFORCE

Hiring Authority	Statutory/Regulatory Citation
DoD AWF	
Expedited Hiring Authority	10 U.S.C. § 1705(f)
DHA for Technical Acquisition Experts	10 U.S.C. § 1701 note
DHA for Veteran Technical Acquisition Experts	10 U.S.C. § 1701 note
AcqDemo Simplified Accelerated Hiring	10 U.S.C. § 1762
AcqDemo Voluntary Emeritus Program	10 U.S.C. § 1762
DoD	
DHA for Veterans in STRL Scientific and Engineering Positions	10 U.S.C. § 2358a
DHA for Individuals with Bachelor's Degrees in STRL Scientific and Engineering Positions	10 U.S.C. § 2358a
DHA for Students Enrolled in Scientific and Engineering Programs in STRL Scientific and Engineering Positions	10 U.S.C. § 2358a
DHA for Individuals with Advanced Degrees in STRL Scientific and Engineering Positions	10 U.S.C. Ch. 81
Personnel Management Authority for Experts in Science and Engineering	10 U.S.C. § 1599h
Highly Qualified Experts	5 U.S.C. § 9903
Information Assurance Scholarship Program	10 U.S.C. § 2200a
Science, Mathematics and Research for Transformation (SMART) Scholarship Program	10 U.S.C. § 2192a
Defense Civilian Intelligence Personnel System (DCIPS) Excepted Service Hiring Authority	10 U.S.C. § 1601
DHA for Post-Secondary Students and Recent Graduates	10 U.S.C. Ch. 81
DHA for Financial Management Experts	10 U.S.C. Ch. 81
Pilot Program on Direct Commissions to Cyber Positions	10 U.S.C. § 503 note
DHA for Domestic Defense Industrial Base Facilities, the Major Range and Test Facilities Base, and the Office of the Director of Operational Test and Evaluation	10 U.S.C. Ch. 81
DHA for Business Transformation and Management Innovation	10 U.S.C. Ch. 81
Pilot Program on Enhanced Personnel Management System for Cybersecurity and Legal Professionals in the Department of Defense	10 U.S.C. Ch. 81
Government-Wide	
DHA for Information Technology Management	5 U.S.C. § 3304(a)
DHA for Positions Involved in Iraqi Reconstruction Efforts	5 U.S.C. § 3304(a) 5 CFR Part 337
Delegated Examining Authority	5 U.S.C. § 1104(a)
Pathways Internship Program	EO 13562 5 CFR Part 362

Hiring Authority	Statutory/Regulatory Citation
Government-Wide (continued)	
Pathways Recent Graduate Program	EO 13562 5 CFR Part 362
Pathways Presidential Management Fellows Program	EO 13562 5 CFR Part 362
Intergovernmental Personnel Act (IPA)	5 U.S.C. §§ 3371-3375
Promotion and Internal Placement	5 CFR Part 335
Transfers Within Government	5 CFR 315.501 5 CFR Part 335
Details	5 U.S.C. § 3341 5 CFR Part 300, Subpart C
Experts and Consultants	5 U.S.C. § 3109 5 CFR Part 304
Scientific and Professional (ST) Positions	5 U.S.C. § 3104 5 U.S.C. § 3325 5 CFR Part 319
Senior Executive Service	5 U.S.C. §§ 3131-3136
Senior Level (SL) Positions	5 U.S.C. § 5108 5 U.S.C. § 3324 5 CFR Part 319
Temporary Appointments	5 CFR Part 316, Subpart D
Term Appointments	5 CFR Part 316, Subpart C
Veterans Recruitment Appointment (VRA)	38 U.S.C. § 4214
Veterans Employment Opportunities Act (VEOA) of 1998	5 U.S.C. § 3304 5 CFR 335.106
30% or More Disabled Veterans	5 U.S.C. § 3312 5 CFR 315.707
Noncompetitive Appointment of Certain Military Spouses	EO 13473 5 U.S.C. § 3330d 5 CFR 315.612
Schedule A Authority for Family Members of Active Duty Military and Civilians Stationed in Foreign Areas	5 CFR 315.608
Schedule A Hiring Authority for Fellowship and Similar Appointments in the Excepted Service	5 CFR 213.3102(r)
Schedule A for Persons with Disabilities and the Workforce Recruitment Program	5 CFR 213.3102(u)
Schedule C (Political Appointees)	5 CFR 213.3301

APPENDIX D: PANEL ACTIVITIES

Monthly Full-Panel Meetings

September 20-21, 2016	
Identifying the “Big Rocks” to Improving Defense Acquisition and Maintaining Defense Technology Advantage	<ul style="list-style-type: none"> ▪ BG David Ehrhart, USAF (Ret.), Lockheed Martin Corp. ▪ Susan Warshaw Ebner, ABA Public Contract Law
AIA Perspectives	<ul style="list-style-type: none"> ▪ Jason Timm, Aerospace Industries Association
Updating the Regulatory Source Code	<ul style="list-style-type: none"> ▪ Andrew Hunter, Center for Strategic and International Studies
Acquisition Transformation Project, Acquisition of the Future (AOF)	<ul style="list-style-type: none"> ▪ Ann-Marie Johnson, ASI Government ▪ Dina Jeffers, Deputy Secretary of the Army, Procurement ▪ Kymm McCabe, Deloitte Consulting
OFPP Priorities and Category Management	<ul style="list-style-type: none"> ▪ Anne Rung, OFPP, OMB
Perspectives on Acquisition Reform, Lessons Learned from Research	<ul style="list-style-type: none"> ▪ Dan Chenok, IBM Center for Business of Government
Acquisition Reform to Enable Military Effectiveness	<ul style="list-style-type: none"> ▪ Lou Kratz, Lockheed Martin Corp.
Industry Roundtable (cohosted by U.S. Chamber of Commerce and Professional Services Council)	<ul style="list-style-type: none"> ▪ Christian Zur, U.S. Chamber of Commerce ▪ Scott Amey, Project on Government Oversight ▪ Brian Collins and Susan Maybaumwisniewski, Business Executives for National Security (BENS) ▪ Roger Waldron and Mandy Smithberger, Center for Defense Information
November 15-16, 2016	
Expert Presentations to the Panel	<ul style="list-style-type: none"> ▪ Chris Gunderson, U.S. Air Force ▪ Louis Kratz, Lockheed Martin Corp. ▪ Wendy Ginsberg, Congressional Research Service
December 14, 2016	
Expert Presentations to the Panel	<ul style="list-style-type: none"> ▪ Soraya Correa, U.S. Department of Homeland Security ▪ Paul Francis, Government Accountability Office
January 24-25, 2017	
Major Defense Acquisition Programs	<ul style="list-style-type: none"> ▪ Lt Gen Christopher C. Bogdan, F-35 Executive Officer ▪ VADM David Johnson, Principal Military Deputy ▪ Frank Kendall, Former USD(AT&L) ▪ Gary Bliss, OUSD(AT&L)

February 21-22, 2017

Geopolitical Threat Environment	<ul style="list-style-type: none"> Heather Conley and Melissa Dalton, Center for Strategic and International Studies (CSIS) Ben FitzGerald, Center for a New American Security (CNAS) Lt Gen Anthony Ierardi, Joint Chiefs of Staff, J8
Acquisition of Services in DoD	<ul style="list-style-type: none"> Ken Brennan, Defense Procurement and Acquisition Policy (DPAP) James Meade, Naval Air Systems Command (NAVAIR) Dan Helfrich, Deloitte Consulting LLP

March 21-22, 2017

Commercial Buying	<ul style="list-style-type: none"> James Steggall and Joseph Fengler, AIA Janice Muskopf, AFMC Jon Etherton, Etherton & Associates Paul Milenkowic, ACC-NJ, Picatinny Arsenal Bill McNally, NASA Tyler Merkeley, HHS, BARDA Tim Applegate and Scott Ulrey, DARPA
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April 25-26, 2017

Expert Panel: The Effects of Socio-Economic Policies on Defense Acquisitions	<ul style="list-style-type: none"> James Galvin, PhD, DoD Small Business Programs Kenneth Dodds, U.S. Small Business Administration Donna Huneycutt, Wittenberg Weiner Consulting Burt Ford, Lockheed Martin Corp.
Building a National Security Marketplace for Rapid Technology Discovery and Acquisition	<ul style="list-style-type: none"> Tim Greeff, NSTXL
Imagining a Post-Barriers World	<ul style="list-style-type: none"> Meagan Metzger, DCode42

May 23-24, 2017

Former Navy Secretary Perspective	<ul style="list-style-type: none"> The Honorable John Lehman, former Secretary of the Navy
SOF AT&L "Pain Points"	<ul style="list-style-type: none"> James "Hondo" Geurts, SOCOM AT&L

June 20-21, 2017

SMC's Acquisition Challenges: PM, Contracting, and Budgeting Perspectives	<ul style="list-style-type: none"> Barbara Baker, SMC/PID, ACE Chief Col Tom Hoskins, USAF Mike Wood, SMC
Cyber Acquisition Challenges	<ul style="list-style-type: none"> John Metzger, IOC PEO C4I, SPAWARSSCOM
SSC Pacific's Views on Acquisition	<ul style="list-style-type: none"> Sharon Pritchard and Scott Crellin, SSC-Pacific
Improving the Speed and Impact of Acquisitions	<ul style="list-style-type: none"> Eric Patten, President/CEO, Ocean Aero
Venture Capital in the Defense Space	<ul style="list-style-type: none"> James Cross, Vice President, Franklin Equity Group
Access to Emerging Tech and Innovation	<ul style="list-style-type: none"> VADM Ted Branch, USN (ret), President, Drone Aviator
Workforce Strategy and Tools	<ul style="list-style-type: none"> Tracy Price, CEO, QMerit

July 18-19, 2017

Perspectives from Congress	<ul style="list-style-type: none"> Ben FitzGerald and Arun Seraphin, SASC Doug Bush and Alexis Lasselle Ross, PhD, HASC
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August 22-23, 2017	
Regulatory Updates	<ul style="list-style-type: none"> ▪ Joo Chung, DCMO ▪ Linda Neilson, DPAP
September 12-13, 2017	
Deliberations for Volume 1 Report	<ul style="list-style-type: none"> ▪ Internal Volume 1 Report Discussion and Voting
October 17-18, 2017	
Deliberations for Volume 1 Report	<ul style="list-style-type: none"> ▪ Internal Volume 1 Report Discussion and Voting
November 14-15, 2017	
Deliberations for Volume 1 Report	<ul style="list-style-type: none"> ▪ Internal Volume 1 Report Discussion and Voting
December 12-13, 2017	
Deliberations for Volume 1 Report	<ul style="list-style-type: none"> ▪ Internal Volume 1 Report Discussion and Voting
January 23-24, 2018	
Deliberations for Volume 2 Report	<ul style="list-style-type: none"> ▪ Internal Volume 2 Report Discussion and Voting
Space Related Acquisition	<ul style="list-style-type: none"> ▪ Col Norm Dozier, SMC Comptroller ▪ Michael Wood, Chief of the Financial Analysis Division ▪ Lisa Dybvad, Senior Consultant to FM ▪ Theresa Humphrey, Senior Consultant FM
February 20-21, 2018	
Deliberations for Volume 2 Report	<ul style="list-style-type: none"> ▪ Internal Volume 2 Report Discussion and Voting
Threats Update	<ul style="list-style-type: none"> ▪ The Honorable Robert Work, former Deputy Secretary of Defense
Workforce RSACI	<ul style="list-style-type: none"> ▪ David Miskimens, Professor of Program Management Mission Assurance, Defense Acquisition University
March 20-21, 2018	
Deliberations for Volume 2 Report	<ul style="list-style-type: none"> ▪ Internal Volume 2 Report Discussion and Voting
Lessons from Army Modernization Command Stand-Up	<ul style="list-style-type: none"> ▪ LTG Edward Cardon, Director, Office of Business Transformation
April 17-18, 2018	
Deliberations for Volume 2 Report	<ul style="list-style-type: none"> ▪ Internal Volume 2 Report Discussion and Voting
May 22-23, 2018	
Deliberations for Volume 2 Report	<ul style="list-style-type: none"> ▪ Internal Volume 2 Report Discussion and Voting
Thoughts on DoD Acquisition	<ul style="list-style-type: none"> ▪ David Berteau, former Assistant Secretary of Defense for Logistics and Materiel Readiness
June 19-20, 2018	
Deliberations for Volume 2 Report	<ul style="list-style-type: none"> ▪ Internal Volume 2 Report Discussion and Voting
Deliberations for Volume 3 Report	<ul style="list-style-type: none"> ▪ Internal Volume 3 Report Discussion

Semimonthly Stakeholder Meetings

January 12, 2017	
Thinking Holistically and Broadly About the Panel Mandate	<ul style="list-style-type: none"> Stan Soloway, Celero Strategies
State of Defense IT Acquisition Reform	<ul style="list-style-type: none"> John Weiler, IT Acquisition Advisory Council (IT-AAC) Marvin Langston, Langston Associates, LLC
PSC Research on DoD Task Order Awards Made Under IDIQ Contracts	<ul style="list-style-type: none"> Alan Chvotkin and Matthew Taylor, Professional Services Council (PSC)
IDIQ Discussion	<ul style="list-style-type: none"> Jeff Koses, GSA, Office of Government-wide Policy Roger Waldron, Coalition for Government Procurement
January 26, 2017	
Commercial Subcontract Flowdown; Simplified Acquisition Procedures	<ul style="list-style-type: none"> Ron Smith, Ronald Smith Contracts
Acquisition Reform and Successful Programs	<ul style="list-style-type: none"> Jeff Wieringa, Navy International Programs Office (NIPO)
February 23, 2017	
Security Cooperation Reforms and the Impact of FY17 NDAA	<ul style="list-style-type: none"> VADM Joseph Rixey, Defense Security Cooperation Agency
DoD's Use of Project Structure	<ul style="list-style-type: none"> Mike Morgan, Charles Mahon, and John Driessnack, Project Management Institute
Successful Acquisition and Fielding of Software in the DoD: Impediments and Improvements	<ul style="list-style-type: none"> Matt Chandler, Palantir Technologies
Acquisition Workforce Study	<ul style="list-style-type: none"> Rene Thomas-Rizzo, Human Capital Initiatives, OUSD (AT&L)
March 9, 2017	
Technology: How to Use and Buy More Effectively	<ul style="list-style-type: none"> Kenneth Allen, Jennifer Napper, and Lou Kerestes, ACT-IAC
Doing Business with DoD: Small Business Perspective	<ul style="list-style-type: none"> Bryson Bort, Grimm
Strategies for Contracting Digital Services	<ul style="list-style-type: none"> David Zvenyach, GSA, 18F
March 23, 2017	
Challenges Related to Government Practices for Commercial Items and Services Acquisitions	<ul style="list-style-type: none"> Danielle Berti and Stephanie Gilson, Johnson & Johnson
The State of Public Procurement Metrics	<ul style="list-style-type: none"> Raj Sharma, Public Spend Forum
Organizational Culture and the Panel's Mission	<ul style="list-style-type: none"> Lou Kerestes, Gov Innovation
Acquisition of the Future (AOF) Model	<ul style="list-style-type: none"> Stan Soloway, Celero Strategies Kymm McCabe, Deloitte
DoD Acquisition	<ul style="list-style-type: none"> Mike Morgan, Charles Mahon, and John Driessnack, Project Management Institute

April 13, 2017

Software Concerns in DoD Acquisition: The Opportunity Presented by Agile Development	▪ Eileen Wrubel and Alyssa Le Sage, Software Engineering Institute, CMU
Cloud and IT Acquisition Policy: Recommendations and Next Steps	▪ Richard Beutel, Cyrrus Analytics
Optimizing Acquisition: Procurement Transformation and Category Management	▪ David Shields and Anne Laurent, ASI Government

April 27, 2017

Regulations and Laws that Add Unnecessary Bureaucratic Obstacles to DoD Acquisitions	▪ Barbara Kinosky, Esq., Centre Law and Consulting
The Highly Regulated Federal Purchasing System: Implications and Alternatives	▪ Richard Dunn, Strategic Institute for Innovation in Government Contracting ▪ David Rothzeit, DIUx
Commercial Buying	▪ Shay Assad, Defense Procurement and Acquisition Policy

May 25, 2017

Research Findings: NAICS Cyber Security Requirements and Mid-Tier Companies	▪ Leslie Lewis, PhD, Independent Consultant
Findings and Recommendations Related to Reduced Acquisition Opportunities for Mid-Sized and Small Businesses	▪ John Gilligan, Coalition for Competition ▪ Jim Neu, Coalition for Competition

June 8, 2017

MIBP's Industry Data Analytics and Work with OSD Small Business Office	▪ Dr. Jerry McGinn, Acting DASD for Manufacturing and Industrial Base Policy
The Impact of Defense Regulations on Suppliers of Commercial Items to DoD	▪ Eric Roegner, EVP and Group President, Arconic Global Rolled Products and President, Arconic Defense

June 22, 2017

Rental Services for COTS Test and Measurement Equipment	▪ Tony Ricotta, Director, Strategic Services, Aerospace & Defense Electro Rent Corporation
Barriers to Entry into the Defense Market	▪ Darryl Anunciado, President/CEO, Action Drone
Barriers to Entry Roundtable	▪ Lou Kelly, Director, San Diego Regional Innovation Cluster ▪ Rebecca Unitec, Fuse Integration ▪ Scott Velazquez, Innovation Digital ▪ Gary Abramov, Pacific Blue Innovations ▪ Jim Winso, Spectral Labs

August 24, 2017

Protests and Modernizing CICA	▪ Ralph Nash, Professor Emeritus of Law, The George Washington University
Unique Perspectives and Challenges in Selling in the Federal Marketplace	▪ Wyn Elder, Director, Strategic Initiatives and Business Development, U.S. Government, Apple
Positive Features of FY18 NDAA and Impediments to Reform	▪ John Anderson, Legislative Representative, American Federation of Government Employees

September 14, 2017

Mission Engineering	<ul style="list-style-type: none"> James Moreland, Jr., PhD, Deputy Director, Naval Warfare OUSD ATL/Tactical Warfare Systems
Using Data Analytics to Enhance Decision-making in DoD Procurement	<ul style="list-style-type: none"> Eric Heffernan and Christine Kettler, Grant Thornton
NASA iTech	<ul style="list-style-type: none"> Kira Blackwell, NASA HQ, Innovation Program Executive, Office of the Chief Technologist

September 28, 2017

IDIQ Contracts, SWACs, and MACs	<ul style="list-style-type: none"> Richard Ginman, former Director, DPAP
Measurement, Workforce Competencies, and Procurement Technology	<ul style="list-style-type: none"> Raj Sharma, Chairman, Public Spend Forum
Recommendations to the Section 809 Panel	<ul style="list-style-type: none"> Roger Waldron, Coalition for Government Procurement

January 11, 2018

Improving Services Acquisition	<ul style="list-style-type: none"> Ronda Schrenk, Senior Policy Advisor, Intelligence and National Security Alliance (INSA) Ellen McCarthy, Chair, INSA Acquisition Management Council, Noblis-NSP Howard Weitzner, Vice Chair, INSA Acquisition Management Council, Managing Director, U.S. Federal, Accenture Federal Services
Other Transaction Agreements: An Enabler for Space Launch	<ul style="list-style-type: none"> Gary Kyle, President, Persistent Agility, Inc. Ron Poussard, Applied Federal Contract Associates
Rapid Acquisition	<ul style="list-style-type: none"> Tonico Beope, Director of Contracting, Air Force Special Access Programs, SAF/AQ
The Future Impact of Cloud Computing on Acquisition	<ul style="list-style-type: none"> Jay Huie, Director, GSA TTS Secure Cloud Portfolio John Hamilton, FedRAMP PM for Operations Evan Issacs, FedRAMP PMO Support

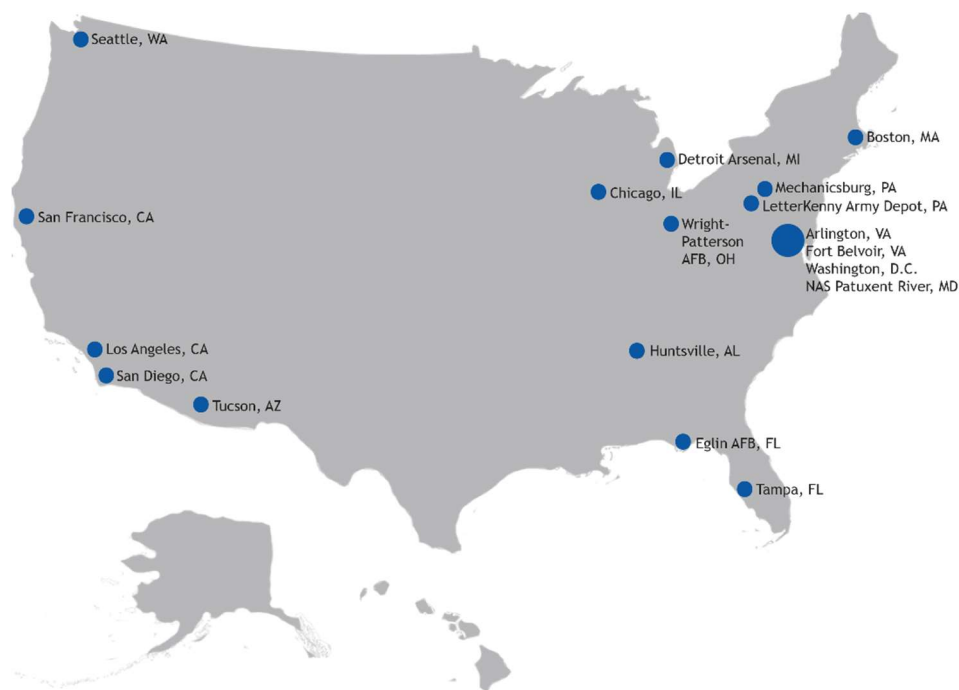
Team Meetings/Interviews

- (ISC)^2
- Action Drone
- Aerospace Industries Association
- AFCEA
- Air Force Materiel Command
- Allen Federal Business Partners
- Amazon Business, Public Policy, and Web Services
- American Federation of Government Employees
- ANG Budget Division Chief
- Anser
- Apple, Inc.
- Arconic Defense
- Arlluk Technology Solutions
- Army Cyber Institute (ACI)
- U.S. Army Tank-automotive and Armaments Command (TACOM)
- ASN (RDA), DASN Unmanned
- Arnold & Porter Kaye Scholer LLP
- Ausco, Inc.
- BAE
- Bain Capital
- Baker Tilly
- Berkley Research Group LLC
- BMNT Partners
- Boeing
- Booz Allen Hamilton
- Boston Engineering
- Buchanan & Edwards
- Catalytic
- Carnegie Mellon University, Software Engineering Institute
- Celero Strategies LLC
- Coalition for Competition
- Coalition for Government Procurement
- Cohen Mohr LLP
- Covington & Burling LLP
- Cpacket Networks
- Crowell & Moring LLP
- Center for Strategic and Budgetary Assessments (CSBA)
- Cyber Security Strategies, LLC
- Cymmetria
- Defense Advanced Research Projects Agency (DARPA), Contracts Management Office
- DART
- DASD, Manufacturing and Industrial Base Policy
- Defense Acquisition University
- DCode42
- Defense Contract Management Agency
- Defense Entrepreneurs Forum
- Defense Technical Information Center (DTIC)
- Defense Logistics Agency
- Defensewerx
- Deloitte
- Department of Commerce
- Department of Energy
- Dewberry
- DFJ Venture
- Department of Health and Human Services (DHHS), Biomedical Advanced Research and Development Authority (BARDA)
- Direct Steel LLC
- Defense Innovation Unit Experimental (DIUx)
- Doolittle Institute, Inc.
- Dozuki
- Draper
- Defense Systems Management College (DSMC)
- Electro Rent Corporation
- Ernst & Young
- Etherton & Associates
- EWA
- Federal Aviation Administration (FAA)
- ForgeRock
- Fortney & Scott LLC
- Frankel PLLC
- Fuse Integration
- GAO, Acquisitions and Sourcing Management Office

- General Dynamics
- General Electric
- Grant Thornton
- Grey Aviation Advisors & Solutions
- GSE Dynamics
- Hacking4Defense
- Harvard Kennedy School of Business
- HeartFlow
- Heritage Foundation
- Hogan Lovells LLP
- Holland & Knight LLP
- Headquarters, Department of the Army (HQDA), Deputy Assistant Secretary for Procurement (DASA P)
- InfoReliance Corporation
- Information Systems Asset Management
- Information Systems Security Association
- Innovation Digital
- Integrated Dual Use Commercial Companies (IDCC)
- Invensense
- IT Alliance for Public Sector (ITAPS)
- Jenner & Block LLP
- JLT Specialty USA
- Johnson & Johnson, Government Business Compliance
- Jones Day
- Latham & Watkins LLP
- Leidos
- LMI
- Lockheed Martin
- Mayer Brown LLP
- Microsoft
- Mead & Hunt
- Miles and Stockbridge P.C.
- Ministry of Finance Kyrgyz Republic
- MITRE
- Morrison & Foerster LLP
- MVM, Inc.
- National Aeronautics and Space Administration (NASA), Contracts and Grants Policy and Office of Procurement
- NASA, Office of the Chief Technologist
- National Defense University
- NGC
- National Oceanic and Atmospheric Administration (NOAA)
- NRI Secure Technologies
- National Security Technology Accelerator (NSTXL)
- Nyotron
- Office of the Assistant Secretary of the Navy, Financial Management and Comptroller (OASN(FM&C)), FMB
- ODG
- U.S. Office of Management and Budget (OMB), Office of Federal Procurement Policy (OFPP)
- Omera Khan
- Office of the Chief of Naval Operations (OPNAV), N9
- Office of the Secretary of Defense – Comptroller
- OUSD(AT&L), Tactical Warfare Systems
- Pacific Architects and Engineers, Inc.
- Pacific Blue Innovations
- Perkins Coie LLP
- Phillips Screw Company
- Precision Gear
- Prevalent
- PricewaterhouseCoopers
- Procurement Technical Assistance Center – Illinois, Maryland, and Virginia
- Professional Services Council
- Progressive Industries, Inc.
- Public Spend Forum
- Qualcomm Institute
- QCWare
- Raytheon
- Rogers Joseph O'Donnell, P.C.
- San Diego Regional Innovation Cluster
- Sandia National Laboratories
- SBDC Florida
- Section 813 Panel
- Senator Collins Staff
- Sevatec
- Sheffield Asset Management

- Software Engineering Institute
- SOS International LLC
- Sourcing Outcomes and Solutions LLC
- SpaceX
- Spectral Labs
- SS8
- Steptoe & Johnson LLP
- Symantec
- Telefonica
- The ELOCEN Group
- UI LABS
- U.S. Air Force, Acquisition Law and Litigation Directorate
- U.S. Army Contracting Command
- U.S. Army Corps of Engineers
- United Technologies
- University of Illinois at Urbana-Champaign; School of Information Sciences
- University of San Diego
- OUSD(AT&L), Defense Procurement Acquisition Policy (DPAP)
- United States Special Operations Command (USSOCOM)
- Varonis
- Vencore
- ViaStat
- Wiley Rein LLP
- Wing Venture Capital
- Wittenberg-Weiner Consulting
- Woods Peacock
- Yaniv Strategies

Team Travel/Site Visits



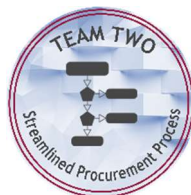
- Boston, MA
- Chicago, IL
- Detroit Arsenal, MI
- Eglin AFB, FL
- Huntsville, AL
- Letterkenny Army Depot, PA
- Los Angeles, CA
- Mechanicsburg, PA
- NAS Patuxent River, MD
- San Diego, CA
- San Francisco, CA
- Seattle, WA
- Tampa, FL
- Tucson, AZ
- Wright-Patterson AFB, Ohio

APPENDIX E: PANEL TEAMS



FAR to Statute Baseline

FAR to Statute Baseline is reviewing how statutes, regulations, or procedures should be written to take into account the threat and business environments that exist today. The team is systematically reviewing the FAR and identifying the statutory basis for regulations when they exist, as well as listing regulations that could potentially be deleted.



Streamlined Procurement Process

Streamlined Procurement Process is researching options for substantially streamlining noncomplex acquisitions less than \$15 million. Although the current acquisition system generally treats \$1 million contracts the same as \$1 billion contracts, the team is considering ways to enable DoD to meet its acquisition needs for smaller contracts more efficiently and effectively.



Commercial Buying

Commercial Buying is focused on simplifying DoD's commercial buying practices. Simplification will enable greater access to companies not currently selling to DoD and to be more adaptable and agile in its acquisition process.



Barriers to Entry

Barriers to Entry is focused on evaluating and removing regulatory, cultural, or bureaucratic barriers to entering the DoD marketplace. Removing barriers to entry will attract companies interested in conducting business with DoD that have not previously entered the DoD marketplace.



Characteristics of Successful Programs

Characteristics of Successful Programs is identifying the attributes and qualities common to successful programs, with an eye toward identifying techniques, tools, and practices that can be widely employed. The team will make recommendations for best practices, regulations, and statutes.



IT Acquisition

IT Acquisition is investigating how to best streamline the information technology (IT) acquisition process as DoD modernizes its use of IT, with a specific focus on defense business systems and IT services. The ultimate goal is to increase use of commercial best practices and business processes, delivering capability faster and keeping DoD's technology current and supportable.



Budget

Budget is considering the broader budgeting process in DoD. The team aims to arrive at recommendations that will optimize budgeting policy and processes to maintain military technological superiority through the efficient flow of resources in the acquisition system.



Streamlining Regulations

Streamlining Regulations is identifying regulations pertaining to defense acquisition that are no longer necessary. The team is packaging together comprehensive ideas that would substantially streamline the acquisition process.



Cost Accounting Standards

Cost Accounting Standards is reviewing the administrative and accounting requirements of cost accounting standards (CAS), along with exemptions from CAS and thresholds for applying CAS to contracts. The team will make recommendations aimed, broadly, at streamlining requirements.



Workforce

Workforce is looking at statutory and regulatory reform that would foster a culture of authority and accountability in the acquisition process, enabling the workforce to serve the mission free of unnecessary obstacles. Defense acquisition is a human activity dependent on the judgments and decisions of people operating in the real world.



Statutory Reorganization

The statutory reorganization effort will propose a reorganization and consolidation of the acquisition-related provisions of title 10, U.S. Code, and other related provisions of law to provide a more cohesive and coherent structure for defense acquisition statutes within title 10. Nonsubstantive revisions will be made to improve readability and achieve greater internal consistency and, where possible, revisions will be made to achieve greater consistency with parallel provisions in title 41.

APPENDIX F: COMMUNICATION WITH THE PANEL

Website

The Section 809 Panel hosts an abundance of information, such as Congressional reports, meeting information, commissioner and staff biographies, and media products, on its website at section809panel.org.

To conclude the panel's statutory duties in a timely fashion, the Section 809 Panel will no longer be accepting public comments or suggestions after June 30, 2018. Stakeholder feedback received before that time will be evaluated by the panel, and as appropriate, incorporated into the panel's research. Although the web portals will no longer be active after June 30, 2018, panel staff and commissioners will continue to interact with the public to gather information as needed. The panel is grateful for the public's interest in and input on streamlining acquisition. This input has enhanced the panel's research as it fulfills its mission to streamline and codify defense acquisition.

Daily Media Clips

Each business day, the Section 809 Panel publishes news clips that highlight current articles related to defense acquisition. Those interested in receiving the daily media clips via email should contact Katie Cook at katie.cook@dau.mil.



Social Media



For the latest updates and news, follow the Section 809 Panel on Twitter (@Section809Panel) and LinkedIn (Section 809 Panel).

Public Information

If you would like to invite a panel commissioner to address your group or be a guest on your show, to request an interview, or to receive media kit information, such as biographies, key messages, or contact information, email Shayne Martin at shayne.martin@dau.mil.

Section 809 Panel Forums and Town Hall Meetings

The Section 809 Panel holds periodic public forums, industry days, and town hall meetings providing the opportunity for stakeholders to engage directly with commissioners and receive up-to-date information on potential panel recommendations. Visit the panel's website at section809panel.org for more information.

Bold Bites Podcast

The Section 809 Panel produces a monthly podcast called *Bold Bites*. Commissioners and professional staff speak about their latest research, recommendations, and meetings. To listen, go to section809panel.org/media/bold-bites-podcast/.



Federal Register

The Section 809 Panel publishes periodic notices in the Federal Register. To review these notices, please visit the Federal Register or section809panel.org/media/news-releases/.

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APPENDIX G: PANEL MEMBERS AND PROFESSIONAL STAFF

Commissioners

Mr. David A. Drabkin

Chair

Mr. David G. Ahern

Maj Gen Casey D. Blake, USAF

Mr. Elliott B. Branch

The Honorable Allan V. Burman

VADM Joseph W. Dyer, USN (Ret.)

Ms. Cathleen D. Garman

BG Michael D. Hoskin

The Honorable William A. LaPlante

Maj Gen Kenneth D. Merchant, USAF (Ret.)

Mr. David P. Metzger

Dr. Terry L. Raney

Maj Gen Darryl A. Scott, USAF (Ret.)

LTG N. Ross Thompson III, USA (Ret.)

Mr. Laurence M. Trowel

Mr. Charlie E. Williams, Jr.

Former Commissioners

Ms. Claire M. Grady

Mr. Harry P. Hallock

The Honorable Deidre A. Lee

Major Contributors to This Report

Mr. Terry Albertson

Mr. Brent Calhoun

Mr. Patrick Fitzgerald

Mr. Roger Holbrook

Mr. Pete Modigliani

Ms. Barbara Michael

Ms. Linda Neilson

Mr. Bill Romenius

Mr. Louis Rosen

Mr. Jim Thomas

Mr. Steve Trautwein

Mr. Richard J. Wall

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Professional Staff Member

COL Harry R. Culclasure, USA
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Michelle VJ Johnson, PhD
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Jessica Dobbeleare
Professional Staff Member

LTC Thomas D. Kelley, USA
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Jeanette M. Snyder
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APPENDIX H: ACRONYM LIST

Acronym/Term	Definition
A&AS	Advisory and Assistance Services
AAP	Acquisition Advisory Panel
ACAT	Acquisition Category
AcqDemo	Acquisition Workforce Personnel Demonstration Project
ADEO	AcqDemo Eligible Organizations
AFMC	Air Force Materiel Command
AFRCO	Air Force Rapid Capabilities Office
AI	Artificial Intelligence
AoA	Analysis of Alternatives
APB	Acquisition Program Baseline
ARCO	Army Rapid Capabilities Office
AROC	Army Requirements Oversight Council
ASN(RDA)	Assistant Secretary of the Navy for Research, Development and Acquisition
ASPR	Armed Services Procurement Regulation
AWF	Acquisition Workforce
BES	Budget Estimate Submission
BOA	Basic Ordering Agreement
BPA	Blanket Purchase Agreement
CAE	Component Acquisition Executive
CAPE	Cost Assessment and Program Evaluation
CAR	Contract Action Report
CAS	Cost Accounting Standards
CASB	Cost Accounting Standards Board
CBA	Capabilities Based Assessment
CBO	Congressional Budget Office
CDD	Capability Development Document
CFR	Code of Federal Regulations
CJCS	Chairman of the Joint Chiefs of Staff
CJCSI	CJCS Instruction
CLIN	Contract Line Item Number
CNAS	Center for a New American Security
COCOM	Combatant Command
CONOPS	Concept of Operations
CPD	Capability Production Document
CPFF	Cost-Plus-Fixed-Fee

Acronym/Term	Definition
CPM	Capability Portfolio Manager
CRS	Congressional Research Service
CSD	Critical Skill Deficiency
DACM	Defense Acquisition Career Manager
DAE	Defense Acquisition Executive
DAR	Defense Acquisition Regulation
DAS	Defense Acquisition System
DAU	Defense Acquisition University
DAWDF	Defense Acquisition Workforce Development Fund
DAWIA	Defense Acquisition Workforce Improvement Act
DCAA	Defense Contract Audit Agency
DCMA	Defense Contract Management Agency
DFARS	Defense Federal Acquisition Regulation Supplement
DHA	Direct-Hire Authority
DHA	Defense Health Agency
DLA	Defense Logistics Agency
DMAG	Deputy's Management Action Group
DoD	Department of Defense
DoDD	DoD Directive
DoDI	DoD Instruction
DOT&E	Director, Operational Test and Evaluation
DPG	Defense Planning Guide
DPPG	Defense Planning and Programming Guide
DSS	Decision Support System
ECPM	Enterprise-level Capability Portfolio Management
EER	Enduring Enterprise Requirement
EHA	Expedited Hiring Authority
EPA	Economic Price Adjustment
EVM	Earned Value Management
FAIR Act	Federal Activities Inventory Reform Act
FAR	Federal Acquisition Regulation
FARA	Federal Acquisition Reform Act (1996)
FASA	Federal Acquisition Streamlining Act (1994)
FFP	Firm Fixed Price
FIPT	Functional Integrated Product Team
FL	Functional Leader

Acronym/Term	Definition
FMR	Financial Management Regulation
FPDS	Federal Procurement Data System
FPI	Fixed-Price Incentive
FRET	Federal Retail Excise Tax
FRN	Federal Register Notice
FY	Fiscal Year
GAAP	Generally Accepted Accounting Principles
GAO	Government Accountability Office
GS	General Schedule
H4D	Hacking for Defense™
HCI	Human Capital Initiatives
HQE	Highly Qualified Expert
HTF	Highway Trust Fund
ICD	Initial Capabilities Document
IDC	Indefinite Delivery Contract
IDV	Indefinite Delivery Vehicles
IP	Intellectual Property
IRS	Internal Revenue Service
JCA	Joint Capability Area
JCIDS	Joint Capability Integration and Development System
JCS	Joint Chiefs of Staff
JROC	Joint Requirements Oversight Council
KPP	Key Performance Parameter
LCSP	Life Cycle Sustainment Plan
LO	Low Observable
LOE	Level-of-Effort
M&R	Maintenance and Repair
MDA	Milestone Decision Authority
MDAP	Major Defense Acquisition Program
MFP	Major Force Program
MIBP	Manufacturing and Industrial Base Policy
MOCAS	Mechanization of Contract Administration Services
MOFE	Measure of Force Effectiveness
MPT	Micro-Purchase Threshold
MVP	Minimum Viable Product
NDAA	National Defense Authorization Act

Acronym/Term	Definition
NPS	Nonpersonal Services
NSPS	National Security Personnel System
O&M	Operations and Maintenance
OCI	Organizational Conflict of Interest
OCO	Overseas Contingency Operations
OCONUS	Outside of the Continental United States
OEM	Original Equipment Manufacturer
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget
OPM	Office of Personnel Management
OSD	Office of the Secretary of Defense
OSD(C)	
PAE	Program Acquisition Executive
PASB	Portfolio Acquisition and Sustainment Baseline
PCI	Personal Conflict of Interest
PE	Program Element
PEO	Program Executive Officer
PM	Program Manager
POM	Program Objective Memorandum
PPBE	Planning, Programming, and Budget Execution
PPBS	Planning, Programming, and Budgeting System
PSC	Personal Service Contract
PSM	Product Support Manager
R&D	Research and Development
RDT&E	Research, Development, Test, and Evaluation
RGS	Requirements Generation System
SAE	Service Acquisition Executive
SARA	Services Acquisition Reform Act (2003)
SAT	Simplified Acquisition Threshold
SES	Senior Executive Service
SLRP	Student Loan Repayment Plan
SMART	Science, Mathematics and Research for Transformation (scholarship program)
SPB	Sustainment Program Baseline
SSB	Senior Steering Board
ST	Scientific and Professional Positions (hiring authority)
STEM	Science, Technology, Engineering, and Math

Acronym/Term	Definition
STRL	Science and Technology Reinvention Laboratories
T&M	Time and Materials
TINA	Truth in Negotiations Act
USD(A)	Undersecretary of Defense for Acquisition
USD(A&S)	Under Secretary of Defense for Acquisition and Sustainment
USD(AT&L)	Under Secretary of Defense for Acquisition, Technology, and Logistics
USD(R&E)	Undersecretary of Defense for Research and Engineering
USD(R&E)	Under Secretary of Defense for Research and Engineering
VA	Department of Veterans Affairs
WMG	Workforce Management Group

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Learn more about the Section 809 Panel and
how to engage with our staff and commissioners
at www.section809panel.org.



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