Recommendation 2: Minimize government-unique terms applicable to commercial buying.

Problem

FASA was intended to give the government the ability to be more commercial-like in its dealings with the commercial marketplace. By substantially streamlining standard federal government procurement practices, and adopting a much lighter touch in its buying practices, DoD would have the tools to gain greater access to a broad range of commercial products and commercial services, and in particular, rapidly evolving state-of-the-art technologies.

Looking back over the 24 years since FASA, success in implementing this *light touch* has been limited. The number of government-unique clauses that may be applicable to commercial-item and COTS contracts has expanded rapidly—from 57 in 1995 to 165 today—threatening the simplicity and commercial-like terms and practices that were supposed to be a cornerstone of the federal government's commercial buying process.

One safeguard included in FASA intended to help avoid this outcome—a statutory prohibition on applying new clauses to commercial buying except under specific, limited circumstances—provided the government with a control in applying those statutes. This statutory mechanism, however, has not effectively limited the applicability of government-unique clauses to commercial procurements. Although these government-unique clauses and requirements serve a worthwhile purpose, and can often be justified in a vacuum, the aggregate effect creates unnecessary cost, complexity, and risk on commercial contractors that discourages their participation in the DoD supply chain and undermines the central tenet of commercial buying.

Background

The federal government has two distinct, and often conflicting, roles when procuring commercial items. In one role, the federal government acts as a buyer, imposing terms that more closely reflect typical terms and conditions found in the commercial marketplace dealing with such matters as inspection, acceptance, risk of loss, title transfer, terminations, invoicing, and so forth. In the other role, the federal government acts as the sovereign, responsible for promoting public policies and imposing unique requirements to further those public policies. These policies, while serving an important purpose and promoting the public good, carry with them costs that affect both sides of the buyer–seller relationship by going well beyond the nature of the product or service being procured and focusing on the contractor's business practices and systems. By imposing such terms, the government often limits the number of entities willing to participate, and may also pay higher prices for its goods and services because it is limited to only those companies willing and capable of complying with the unique terms. Complex rules and terms also often make the procurement process exceedingly complex for government procurement staffs.

Sellers bear considerable costs of accepting the government's unique terms. For example, sellers often must modify their existing business processes or create new processes that satisfy the unique terms and conditions. Sellers may also need to modify their manufacturing processes, which can be especially costly if doing so disrupts manufacturing of its products to be sold in the commercial marketplace.

Sellers also accept the risks, resulting costs, and other negative effects of noncompliance. For a commercial entity doing business in both the commercial and DoD market, the additional costs of compliance are typically indirect costs borne by both their commercial and government business. For contractors selling only commercial products or services, the costs associated with compliance unique to government customers are borne by all commercial customers, often driving establishment of separate legal entities and cost structure solely to serve the government customers and segregate related compliance costs. Contractor expenditure spent on unique business systems and compliance costs show up in higher prices and are not available for meeting DoD mission needs.

From the 1960s through the 1980s, Congress encouraged DoD to pursue greater engagement with the commercial marketplace to reduce the costs and risks associated with developing and supporting government-unique items. It was not until the passage of FASA in 1994 that Congress meaningfully addressed the obstacles to expanding use of commercial items.

The drafters of FASA recognized the excessive number of procurement-related statutes, executive orders, and agency-driven clauses prescribed for incorporation in virtually every contract were among the major obstacles to accessing the commercial marketplace. It was not unusual for a relatively simple contract for a commercial item to include 50 or more prescribed clauses based solely on dollar value or some other criteria completely unrelated to the product or service being procured. It was the collective, rather than individual, effect of all the unique clauses and the associated compliance requirements that pushed companies with commercial products and services away from doing business with DoD, or into government-unique business entities, thereby limiting access to the commercial marketplace.

FASA took a novel approach to addressing this problem: Title VIII, section 8002 of FASA stated that the FAR shall contain:

> *a list of contract clauses to be included in contracts for the acquisition of commercial end items. Such list shall, to the maximum extent practicable, include only those contract clauses – (A) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items…; or (B) that are determined to be consistent with standard commercial practice.*

With regard to clauses "required to implement provisions of law or executive order," also took a novel approach. For laws in effect at the time FASA was enacted (October 13, 1994), Section 8003 (codified at 41 U.S.C. § 1906(b)(1)) directed creation in the FAR of a "list of provisions of law that are inapplicable to contracts for the procurement of commercial items." Established at FAR 12.5, Applicability of Certain Laws to the Acquisition of Commercial Items and Commercially Available Off-The-Shelf Items, this list included a number of laws in effect on October 13, 1994 that Congress deemed inapplicable to contracts for commercial items (see Section 8103). Congress also directed the creation of a list of clauses that may be applicable to contracts for commercial items, which is located at FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes and Executive Orders – Commercial Items. The combination of these two lists created a streamlined approach to government-unique clauses for acquiring commercial items.

With a framework for existing laws in place, Congress then established a streamlined set of clauses based on provisions of law and executive orders in place at the time FASA was enacted, Congress then established a process in 41 U.S.C. § 1906, List of Laws Inapplicable to Procurements of Commercial

Items, to protect this framework in the future. 41 U.S.C. § 1906 addresses provisions of law enacted in the future by stating that no provision of law enacted after October 13, 1994 will be applicable to procurement of commercial items unless one of the following applies:

- The law provides for criminal or civil penalties.
- The law specifically refers to 41 U.S.C. § 1906 and provides that, notwithstanding § 1906, it shall be applicable to contracts for the procurement of commercial items.
- The FAR Council determines in writing that it would not be in the *best interests* of the government to exempt contracts for the procurement of commercial items from the provision.

The FY 1996 NDAA (also referred to as the Federal Acquisition Reform Act [FARA]), added 41 U.S.C. § 1907, List of Laws Inapplicable to Procurements of Commercially Available Off-The-Shelf (COTS) items. This section is a mirror image of Section 1906 applicable specifically to COTS items.

In addition to protecting the framework by limiting applicability of laws in place at the time of FASA's enactment, and laws enacted subsequent to FASA, it was also necessary to protect this framework from agency supplementation that might run counter to congressional intent to make selling commercial items to the federal government as simple as possible. FASA implementation on October 1, 1995, included at FAR 12.301 (f) a restriction on agency supplementation of Part 12, Acquisition of Commercial Items:

> *Agencies may supplement the provisions and clauses prescribed in this part (to require use of additional provisions and clauses) only as necessary to reflect agency unique statutes applicable to the acquisition of commercial item or as may be approved by the agency senior procurement executive, or the individual responsible for representing the agency on the FAR Council, without power of delegation.*

With the enactment of FASA and FARA, Congress created, for the first time, a mechanism to limit government-unique terms and conditions applicable to the government's procurement of commercial items.

Findings

Despite these efforts, the framework and mechanisms created in 1994 failed to limit the burden on contractors from increasing over time. The FAR has been amended more than 100 times to address various aspects of commercial buying, adding to some of the confusion regarding commercial buying policies. The applicability of various statutes has been a frequent subject of amendment. For example, in 1995, the FAR and DFARS contained a combined total of 57 provisions and clauses applicable to the

procurement of commercial items.[1] Today there are 165, including 122 originating in statute, 20 originating in executive orders, and 23 originating in agency-level regulations or policies.[2]

Of the 122 statutes that may be applicable to procurements of commercial products and services, eight are prescribed in FAR 52.212-4, Contract Terms and Conditions – Commercial Item (January 2017), paragraph (r), Compliance with Laws Unique to Government Contracts. In FASA, Congress exempted certain laws from the requirement for a contract clause when procuring commercial items, but did not exempt commercial items from the requirement to comply with the statute, for example, 49 U.S.C. 40118, Fly American Requirements. It is unclear how exempting commercial contracts from a clause, but not the underlying statute, might relieve the burden of compliance on contractors selling commercial items.

In 1995, FAR 52.212-5(e) required prime contractors selling commercial items to flow down four commercial buying clauses to subcontractors at various tiers; today that number is 22.[3] In 1995, FAR 52.244-6(c) required contractors selling noncommercial items to flow down four commercial buying clauses to commercial subcontractors at all tiers; today that number is 20.[4] Table 1-1 summarizes the increase in commercial clauses between the implementation of FASA in 1995 and the present day.

Table 1-1. Government-Unique Clauses Applicable to the Acquisition of Commercial Items

	1995		2017	
Regulatory Site	FAR 52.212-5	28	FAR 52.212-5	73
	FAR 52.212-4(r)	6	FAR 52.212-4(r)	7
	DFARS 252.212-7001	23	DFARS 212.301	85
	Total	**57**	**Total**	**165**
Clause Origin	Statute	57	Statute	122
	Executive Order	0	Executive Order	20
	Agency-level Policy	0	Agency-level Policy	23
Flow Downs	FAR 52.212-5(e)	4	FAR 52.212-5(e)	22
	FAR 52.244-6(c)	4	FAR 52.244-6(c)	20

[1] The total includes commercial item clauses required to comply with laws unique to government contracts in FAR 52.212-4(r) and commercial items clauses required to implement statutes or executive orders in FAR 52.212-5 and DFARS 252.212-7001, but does not include any alternate clauses.
[2] The total includes commercial item clauses required to comply with laws unique to government contracts in FAR 52.212-4(r) and commercial items clauses required to implement statutes or executive orders in FAR 52.212-5, and DFARS 252.212-7001, but does not include any alternate clauses or the clause at 52.212-5(b)(35) which is enjoined indefinitely.
[3] The total does not include any alternate clauses or the clause at 52.212-5(e)(1)(xvii), which is enjoined indefinitely.
[4] The Section 809 Panel's analysis of commercial flow down clauses is limited to the FAR which specifically lists each flow down clause at FAR 52.212-5(e) and FAR 52.244-6(c).

Federal Acquisition Regulation

To assess the effectiveness of this mechanism, the Section 809 Panel reviewed clauses prescribed in the most recent version of FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes and Executive Orders—Commercial Items (January 2017). The panel found substantial growth in the number of FAR clauses (and statutes in 52.212-4(r)) applicable to commercial items and commercial services since FASA:

- October 1995: 34 clauses (6 of which have since been removed or replaced)
- January 2017: 80 clauses

All 80 clauses are not applicable to any particular contract. When acquiring commercial products or commercial services, contracting officers choose applicable clauses from among those 80 clauses.

Using the FASA framework, the Section 809 Panel analyzed the origins of the applicability of 80 FAR clauses (see Appendix F, Tables F-5, F-6, F-7, and F-8):

- 0 clauses are based on a statute that provides for civil or criminal penalty
- 0 clauses are based on a statute that addresses the applicability to commercial items and COTS by specifically referring to 41 U.S.C. § 1906 and/or § 1907 and providing that it be applicable.
- 14 clauses implement a statute, policy, regulation, or executive order that make no mention of commercial items or COTS, but has a written FAR Council determination that it was not in the *best interests* of the government to exempt contracts for commercial items or COTS.
- 66 clauses implement a statute, policy, regulation, or executive order, but meet none of the 41 U.S.C. § 1906 criteria.

Defense Federal Acquisition Regulation Supplement

FAR 12.301(f) authorizes agencies, such as DoD, to supplement Part 12, but only as necessary to reflect agency-unique statutes, or as may be approved by the Senior Procurement Executive or agency member of the FAR Council. DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, prescribes which clauses and provisions may be included in DoD contracts for commercial items and COTS items. 41 U.S.C. §§ 1906 and 1907 do not specifically refer to statutes applicable only to a single agency (such as DoD), but do speak more generally to including in the Federal Acquisition Regulation a list of provisions of law that are applicable and inapplicable to contracts for the procurement of commercial items and provisions of law that are excluded from that list. Because the DFARS is part of the Federal Acquisition Regulations Systems described in FAR Part 1, an argument can be made that the limitation provisions of 41 U.S.C. §§ 1906 and 1907 would also apply to the DoD-unique statutes listed in the DFARS.

In the 2017 NDAA, Congress enacted 10 U.S.C § 2375, Relationship of Commercial Item Provisions to Other Provisions of Law. This statute established a framework and a similar mechanism to 41 U.S.C. §§ 1906 and 1907 for statutes and contract clauses specifically applicable to DoD.

This report previously discussed the authority of OFPP in 41 U.S.C. §§ 1906/1907 to make determinations that certain governmentwide statutes should not be exempted from applicability to procurements of commercial items. DoD was given a similar authority in 10 U.S.C. § 2375 to determine whether certain defense-unique statutes and clauses should apply to the department's commercial item and COTS contracts:

> *The Defense Federal Acquisition Regulation Supplement shall include a list of defense-unique provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to contracts for the procurement of commercial items.*[5]

10 U.S.C. § 2375 (e) states that a defense-unique statute, regulation, policy, or executive order is inapplicable to procurements of commercial products or services unless it:

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to section 2533a of title 10, or requires that strategic materials critical to national security be bought from American sources pursuant to section 2533b of title 10; or
- Specifically refers to 10 U.S.C. § 2375 and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

In addition to these three criteria, 10 U.S.C § 2375 codifies a defense-unique determination authority for the Under Secretary of Defense for Acquisition, Technology, and Logistics [USD(AT&L)] to "make a written determination that it would not be in the best interest of the Department of Defense" to exempt contracts or subcontracts for the procurement of commercial items or COTS items from a provision or contract clause that did not meet the criteria above. This authority permits the USD(AT&L), through the exercise of individual judgment, to apply statutes and clauses to DoD contracts for commercial items or COTS items that would not otherwise apply.

10 U.S.C. § 2375 parallels 41 U.S.C. §§ 1906/1907 in another important way. It creates a clear line by establishing that a provision of law or contract clause enacted after January 1, 2015, be included on the list of provisions of law or clauses inapplicable to the procurement of commercial items or COTS unless it meets one of the criteria noted above. This provision parallels similar provisions of 41 U.S.C. §§ 1906 and 1907, which established October 13, 1994 (the date of the enactment of FASA), as the date after which certain governmentwide statutes would be inapplicable to procurement of commercial items unless the statute met one of the criteria in 41 U.S.C. § 1906 or § 1907. Statutes enacted prior to these

[5] Applicability of Defense-Unique Statutes to Contracts for Commercial Items, 10 U.S.C. § 2375(b).

dates would remain applicable to procurements of commercial items unless some other action is taken to make then inapplicable.

In assessing how well this DoD-unique process has worked, the Section 809 Panel reviewed the 85 provisions and clauses based on a statute, executive order, or DoD regulation that are currently listed in DFARS 212.301 as applicable to procurements of commercial items. The following identifies the rationale used by DoD to determine that the clauses and provisions should be applicable to DoD's procurement of commercial items:

- 0 clauses impose a civil or criminal penalty.
- 6 clauses implementing statutes that satisfy one of the three criteria in 41 U.S.C. §§.1906/1907 and 10 U.S.C. § 2375 for applicability to DoD's procurements of commercial items.
- 8 clauses implementing statutes, regulations, polices, and executive orders with a DoD determination (using the 41 U.S.C. §§ 1906/1907 criteria) that, notwithstanding that the clause or provision does not meet any of the three criteria, the clause or provision should apply to DoD's procurements of commercial items.
- 71 clauses implementing statutes, regulations, policies, and executive orders that do not satisfy any of the three criteria, and DoD made no written determination explaining its rationale.

In assessing the DFARS clauses, the Section 809 Panel adopted the same approach for defense-unique determination authority of 10 U.S.C § 2375 as it did for the governmentwide determination authority of 41 U.S.C. §§ 1906 and 1907.

Congress clearly asserted in 41 U.S.C. §§ 1906 and 1907, and again in 10 U.S.C. § 2375, that it has a deep interest in simplifying the procurement of commercial products and services to attract the best and the brightest in the commercial marketplace to solve the government's most difficult problems. Congress has shown its willingness to minimize those statutes that would apply to procurements of commercial items by establishing a process that presumes a statute would not apply to commercial items unless it met one of a small number of specific criteria. Most importantly, Congress retained the primary responsibility to formally designate which statutes it wants applied. Congress gave OFPP and DoD limited authority to make determinations if other clauses, not specifically designated by Congress, should also apply. It appears Congress intended that limited authority to be used sparingly.

As indicated by the above data, DoD has frequently used its authority, with or without a formal written determination, to impose conditions on commercial and COTS contracts other than those mandated by Congress. The overuse of this flexibility has undermined the expansion of DoD access to the commercial marketplace and contradicts congressional intent to support implementation of commercial policies within DoD. In much the same way as OFPP, DoD's overuse of its defense-unique authority has not promoted commercial buying.

Conclusions

Stakeholders with whom the Section 809 Panel has interacted have been clear: Contracting with the federal government to sell commercial products and services needs to be much simpler and more

closely reflect standard commercial practices, especially regarding use of unique terms and conditions imposed on commercial suppliers to the federal government. The government market is different from the commercial market. If the federal government and DoD need to have unfettered access to technologies available in the commercial marketplace, they must take bold and dramatic steps to simplify processes, policies, and approaches to interacting in the commercial marketplace, even if doing so means shedding worthwhile, but unnecessarily costly and administratively complex, government-unique requirements.

Streamlining contracts for commercial items will require discipline on the part of Congress and DoD. Both parties speak often about the need for DoD to be more commercial-like in its procurement practices to attract cutting-edge companies in the rapidly evolving commercial marketplace. Without a well-defined structure and the discipline to stick to that structure, DoD will find itself a few years in the future struggling with the same issues of unique terms and conditions that confront it today.

Statutes Applicable to Procurements of Commercial Items

The framework Congress established in FASA in 1994 for limiting the unique terms and conditions typical of the government marketplace is a sound one, but should be further narrowed to ensure it produces the results needed.

No statute should be applicable to procurements of commercial items unless that statute specifically refers to 41 U.S.C. § 1906 or 10 U.S.C. § 2375 and provides that, notwithstanding § 1906 or § 2375, it should be applicable to contracts for procurement of commercial items (governmentwide statutes).

Other statutes, including those that provide for criminal or civil penalties, or that require certain articles be bought from American sources pursuant to 10 U.S.C. § 2533a, or require that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. § 2533b must also include the reference to 41 U.S.C. § 1906 or 10 U.S.C. § 2375.

The current mechanism is clearly not achieving its full potential. Only six of 158 clauses that are currently applicable to procurements of commercial products and services have the prescribed language from 41 U.S.C. § 1906 or 10 U.S.C. § 2375. If Congress believes a specific matter of public policy is so important that it should be included in an otherwise commercial transaction between DoD and a commercial supplier, then it should be specifically stated in the statute as prescribed in 41 U.S.C. § 1906 or 10 U.S.C. § 2375. The FAR Council should not be left to interpret Congress' silence on these matters. If Congress does not state that a statute applies to procurements for commercial products, then it should not apply.

FAR Council Authority

The need for a well-defined structure and the discipline to adhere to it raises another issue regarding the process for FAR Council determinations. The Section 800 Panel indicated there were legitimate reasons why DoD could not purchase commercial items in precisely the same way as commercial firms. Thus, it recommended that DoD have flexibility in determining whether it was in its best interest to

buy commercial items.[6] FASA allows for those flexibilities in 41 U.S.C. §§ 1906 and 1907, which limit the applicability of government-unique provisions of law to contracts for commercial products and commercial services under certain prescribed circumstances.

As noted above, Congress has on only six occasions specified that a statute should apply to commercial products and services as prescribed in 41 U.S.C. §§ 1906 and 1907. Alternatively, it could be argued that Congress did consider that none of the other statutes should be applied to contracts for commercial products and services. For whatever reason, Congress did not designate these statutes as applicable to procurements of commercial items, yet the FAR Council acted to make them applicable. Regardless, there has been too much reliance on using the authority of the FAR Council in 41 U.S.C. §§ 1906 and 1907 regarding the applicability of statutes to acquisitions of commercial items and services, which has contributed to a greater burden on contractors and subcontractors offering commercial items.

Defense-Unique Authority

Congress made it clear in Title VIII of FASA that the federal government has a preference for procuring commercial items. Congress underscored that to implement this preference, the federal government should use commercial-like procurement practices to the maximum extent and only impose government-unique term and conditions under very limited circumstances. In a unique way, Congress retained the responsibility in 41 U.S.C. §§ 1906/1907 and then 10 U.S.C. § 2375 for limiting government-unique terms based on governmentwide and DoD-unique statute by establishing very specific criteria for those limited circumstances.

Congress went a step further with DoD by requiring in 10 U.S.C § 2375 that DoD establish a list in the DFARS of provisions of law and contract clauses based on "government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to contracts for the procurement of commercial items."

Congress demonstrated its deep interest in simplified, commercial-like procurement practices for commercial products and services with its authority to specifically designate those statutes that apply to commercial procurements, and by directing that DoD establish a list of "government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to contracts for the procurement of commercial items." Given this clear message, OFPP and DoD should follow Congress' lead and impose in procurements of commercial products and services only those statutes, executive orders, regulations, and associated clauses that specifically mention 41 U.S.C. §§ 1906/1907 and 10 U.S.C § 2375.

Clause Applicability

Based on this framework, and on the Section 809 Panel's own assessment of commercial buying practices, all existing commercial clauses (including those that were included in the initial implementations of FASA [FAC 90-32 and DAC 91-9]) should be removed from FAR 52.212-4(r), 52.212-5, and DFARS 212.301. All but six statutes do not adhere to the framework established by Congress in 41 U.S.C. §§ 1906/1907 and 10 U.S.C § 2375, which seek to prevent the unnecessary

[6] Acquisition Law Advisory Panel to the United States Congress, *Streamlining Defense Acquisition Laws,* AD-A262699, January 1993, accessed June 6, 2017, http://www.dtic.mil/docs/citations/ADA262699.

accumulation of government-unique aspects within DoD commercial buying practices. The small number of clauses that satisfy the 41 U.S.C. § 1906 and 10 U.S.C. § 2375 criteria are, nonetheless, inconsistent with Congress's intention to minimize the hand of the government in commercial markets and restrain DoD's ability to access the full extent of the commercial marketplace.

These recommendations should give DoD the flexibility and streamlined procurement authority it needs to simplify its procurement processes and attract more participants from the commercial market. For those contractors that sell both commercial and noncommercial products and services to the federal government, these recommendations will offer a measure of relief and encouragement that the government has taken steps to simplify its procurement process. The government-unique requirements imposed through their noncommercial contracts will continue, many of which affect all contracts in a given business segment.

These recommended changes will make a substantial difference for those firms that currently sell only commercial products and services to the federal government, or those that do not yet sell to the government. These businesses, many that have consciously avoided the administrative and compliance complexities of government business, will be encouraged by this major step forward. Making these changes presents an opportunity for Congress and DoD to demonstrate that after 24 years of experience with commercial-like practices, the government is now ready to take the next step and participate as a peer in the commercial marketplace.

Implementation

Legislative Branch

- Revise 41 U.S.C. § 1906 (d) to remove "provides for civil and criminal penalties" as a rationale for imposing a statute on procurements of commercial products and services. Such statutes should also be required to contain the language of 41 U.S.C. § 1906 or § 1907.

- Revise 41 U.S.C. § 1906 to remove the authority of the FAR Council to make a written determination that it is not in the best interest of the government to exempt commercial products or commercial services from the provision of law.

- Revise 10 U.S.C. § 2375 (e) to remove "provides for civil and criminal penalties" and "requires that certain articles be bought from American sources pursuant to section 2533a of this title, or requires that strategic materials critical to national security be bought from American sources pursuant to section 2533b of this title" as rationale for imposing a statute on procurements of commercial products or services. Such statutes should also be required to contain the language of 10 U.S.C. § 2375.

- Revise 10 U.S.C. § 2375 to remove the authority of the Under Secretary of Defense for Acquisition, Technology, and Logistics to make a written determination that it is not in the best interest of DoD to exempt contracts for commercial products and services from the applicability of a defense-unique statutes, regulations, polices or executive orders.

- Revisit any provision of law that currently specifically references 41 U.S.C. § 1906, § 1907 or 10 U.S.C. § 2375 to determine if those statutes are of such importance that they should be inserted into commercial transactions between DoD and commercial suppliers (see Appendix F, Table F-5).

Executive Branch

The FAR Council should do the following:

- Strike all clauses from 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial items, based on statute that specifically refer to 41 U.S.C. § 1906, but are inconsistent with commercial practices (see Appendix F, Table F-5).

- Strike all clauses from FAR 52.212-4 (r), Contract Terms and Conditions – Commercial Items; and strike all clauses from FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items, based on statute that do not specifically refer to 41 U.S.C. § 1906 and provides that, notwithstanding § 1906, it should apply to contracts for the procurement of commercial items (see Appendix F, Table F-6).

- Strike all clauses from FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items, which are derived from executive orders and agency policy or regulations (see Appendix F, Table F-7).

- Transfer certain clauses in FAR 52.212-5 to FAR 52.212-4 Part 12 (see Appendix F, Table F-8).

- Going forward, only include in FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items, those clauses that are based on statutes, executive orders, policies or regulations that specifically refer to 41 U.S.C. § 1906 and state that, notwithstanding section 1906, they are applicable to procurements for commercial products or services.

The Defense Acquisition Regulations (DAR) Council should do the following:

- Strike all clauses in DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, based on statute that specifically refer to 41 U.S.C. § 1906 or 10 U.S.C. § 2375, but are inconsistent with commercial practices.

- Strike all clauses from DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, based on statute that do not specifically refer to 10 U.S.C. § 2375 and provides that, notwithstanding § 2375, it should apply to contracts and subcontracts for the procurement of commercial items (see Appendix F, Table F-4).

- Strike all clauses from DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, which are derived from executive orders, agency policy, or regulations (see Appendix F, Table F-5).

- Going forward, only include in DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, those clauses that are based on statutes, executive orders,

policies or regulations that specifically refer to 10 U.S.C. § 2375 and state that, notwithstanding § 1906, they are applicable to procurements for commercial products or services.

Implications for Other Agencies

- All federal agencies subject to the FAR procure commercial items or commercial services to one degree or another. Similarly, all agencies desire to make procurements for commercial goods and services easier for both the agency and the offerors and contractors. The recommendations above will serve to improve the acquisition of commercial goods and services across the federal government.