Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations

Volume 1 of 3

January 2018

SECTION 809 PANEL | *Streamlining & Codifying Acquisition*

January 31, 2018

In May 2017, the Section 809 Panel submitted its *Interim Report,* which laid out the panel's rationale for streamlining the Department of Defense (DoD) acquisition process. That report included several recommendations that were intended to show Congress, DoD, and private-sector stakeholders the direction the panel would go, with more ambitious, bold recommendations to come in the future. This *Volume I Report* (the first of three volumes of the *Final Report*) continues the Section 809 Panel's comprehensive examination of acquisition reform.

The Section 809 Panel intereacts regularly with stakeholders inside and outside government. The research teams have met with hundreds of representatives from industry, think tanks, DoD, and other entities in an effort to carefully consider all aspects of the system. Outreach efforts have generated hundreds of ideas for reform that the panel is diligently investigating.

This January 2018 *Volume I Report* introduces the Dynamic Marketplace framework—an approach for an outcome-based acquisition system for providing DoD access to the entire market. The panel's research shows unequivocally that the cumbersome, and often one-size-fits-all, acquisition process is an obstacle to DoD's ability to access a marketplace that has moved far beyond the captive industrial base of the Cold War era.

This report contains 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, clarify definition of personal and nonpersonal services, remove statutory requirements for 13 acquisition-related DoD offices, and repeal 20 acquisition-related statutory reporting requirements. In all cases, the Section 809 Panel has laid out the rationale for change, and followed up with specific, actionable, statutory and regulatory language.

The Section 809 Panel's work going forward will build on this effort as research teams explore these and other areas of the acquisition process. The Section 809 Panel looks forward to hearing from the acquisition community as part of the continued effort to develop additional reform proposals.

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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.

In order to provide up to date information, this report includes FPDS data on FY 2017 transactions. Charts, tables, and calculations are cited with date of data extraction. Because these data extractions occurred a few weeks before the 120 day deadline, officially certified DoD data will differ slightly from the data in this report.

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Revisions to Volume 1 of 3
Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations

Date	Description
3/14/2018	In the Section 1 Commercial Buying Implementation Details (gray pages), in the subsection for Recommendation 1, removed the seven pages with text and one blank page that immediately preceded the cover page for Recommendation 3. The first page of those removed began with: ▪ Amend U.S. Code, Title 41, to add the following new section: Replaced the pages removed with five pages with text and one blank page. This set of pages begins with the following: ▪ Amend FAR, Subpart 2.101, Definitions of Words and Terms, to revise the following definitions:
3/14/2018	In the Section 1 Commercial Buying Implementation Details (gray pages), in the subsection for Recommendation 3, replaced three pages with text and one blank page with one page with text and one blank page. Changes include removing FAR text for which there were no additions or deletions, highlighting in gray any additions to the FAR language, and adding language to be removed from the FAR and denoting it with ~~strikeout~~ text.
3/14/2018	In Appendix F, a row for 204.7304(a)/252.204-7008 was added to Table F-1 Clauses with Unique Relief for COTS Items on p. A-27.

Introduction

This *Volume 1* report is the first of three volumes of the Section 809 Panel's *Final Report* and continues the panel's mandate for making recommendations to streamline acquisition. To date, the efforts of the panel have proven to be highly productive, and outreach efforts continue to generate hundreds of ideas for improving acquisition that the panel is diligently investigating.

The May 2017 Section 809 Panel *Interim Report* provided three statutory recommendations that were all enacted into law in the Fiscal Year (FY) 2018 National Defense Authorization Act (NDAA).[1] Through these actions, Congress demonstrated its willingness to expedite the panel's recommendations to improve the efficiency and effectiveness of the Department of Defense (DoD) acquisition process. In the coming months, the panel will continue to be a partner to Congress, DoD, and industry in support of further efforts to streamline acquisition to better enable DoD to meet its strategic warfighting goals.

This Introduction does not identify all the findings and conclusions included in *Volume 1* of the *Final Report*, but instead touches briefly on several of the key recommendations and draws attention to several critically important areas discussed in further detail in the report.

One key area of work for the Section 809 Panel is the conceptualizing of a Dynamic Marketplace framework—an outcome-based acquisition process for providing DoD simplified access to the global marketplace. The panel's research shows unequivocally that the current acquisition process is an

[1] FY 2018 NDAA, Pub. L. No. 115-91, Section 801, Statements of Purpose for DoD Acquisition, Section 881, Extension of Maximum Duration of Fuel Storage Contracts, and Section 885, Exception for Business Operations from Requirement to Accept $1 Coins, enacted December 12, 2017.

obstacle to DoD's ability to access a marketplace that has moved far beyond the traditional defense industrial base of the Cold War era. Accordingly, the Section 809 Panel has started to develop a new framework that can harness the benefits from the global marketplace of ideas, solutions, products, and services at a speed that is closer to real time than the current acquisition process allows. A preliminary description of the streamlined alternative acquisition process envisioned as the Dynamic Marketplace immediately follows this Introduction.

In upholding the mission of the panel to streamline acquisition, this report includes recommendations to repeal many obsolete provisions of law that are envisioned by the panel to be included in the FY 2019 NDAA. The purpose of repeal is to remove provisions from statute that either unnecessarily constrain the authority of the Secretary of Defense (also referred to as the Secretary) or are no longer operative, giving DoD greater flexibility with which to operate. To better facilitate acquisition of commercial items and allow for rapid technology insertion, the Section 809 Panel recommends eliminating 165 government-unique contract clauses that act as barriers to the acquisition of commercial items. In an effort to bolster clarity in commercial acquisition, the Section 809 Panel recommends implementing a single definition of *subcontractor* to replace the current 27 separate, sometimes overlapping, definitions.

The Section 809 Panel learned that modernization requirements for defense business systems (DBS) are subject to nine approval layers. Accordingly, the panel recommends giving approval authority to lower-level, experienced portfolio leaders. To further enhance DoD's ability to access the best suited information technology solutions when they are needed, the panel recommends eliminating the imposition of Earned Value Management (EVM) when developing software using Agile methods.

This report identifies current acquisition approaches that provide reliable returns on investment for warfighters, such as the Small Business Innovation Research (SBIR) and the Small Business Technology Transfer (STTR) programs. A recent Air Force report indicates these programs provide a 10-fold return on investment; therefore, the panel recommends making SBIR and STTR acquisition authority permanent.

As stated in the cover letter above, this report contains recommendations to update the processes by which DoD updates commercial buying principles, streamline DoD's auditing requirements, improve how DoD acquires and funds IT business systems, clarify the definition of personal and nonpersonal services, address challenges in how the small business community and DoD interact, remove statutory requirements for acquisition-related DoD offices, and repeal many obsolete acquisition-related statutory reporting requirements.

Each of the recommendations highlighted above, and others, are elaborated on in the Volume 1 sections identified below. The sections ahead are laid out as follows:

- Section 1 – Commercial Buying
- Section 2 – Contract Compliance and Audit
- Section 3 – Defense Business Systems: Acquisition of Information Technology Systems
- Section 4 – Earned Value Management for Software Programs Using Agile

- Section 5 – Services Contracting
- Section 6 – Small Business
- Section 7 – Statutory Offices
- Section 8 – Statutory Reporting

To facilitate navigating the report, recommendations are arranged in subsections that identify the related Problem, Background, Findings, Conclusions, and Implementation. At the end of each section, the report features gray pages that include Implementation Details, such as draft legislative text, amendments to the Federal Acquisition Regulations (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS), and other statutory and regulatory changes to facilitate implementation of the recommendations.

In preparing recommendations for the next two volumes of its *Final Report* (to be published in June 2018 and January 2019), the Section 809 Panel remains committed to considering the views of stakeholders in government and industry and, consistent with its statutory obligations, encouraging participation from all stakeholders dedicated to streamlining DoD acquisition.

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The Dynamic Marketplace

The Section 809 Panel is developing an outcome-based acquisition system that seeks solutions to DoD's problems from across the entire marketplace.

THE FUNDAMENTAL CHALLENGES TO OVERCOME

Secretary of Defense James Mattis, in his January 19, 2018 National Defense Strategy,[1] emphasized that we face a dynamic threat. The National Defense Strategy states, "We are emerging from a period of strategic atrophy, aware that our competitive military advantage has been eroding. We are facing increased global disorder, characterized by decline in the long-standing rules-based international order—creating a security environment more complex and volatile than any we have experienced in recent memory. Inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security."

To address that concern, the National Defense Strategy[2] asserts, "A rapid, iterative approach to capability development will reduce costs, technological obsolescence, and acquisition risk…This approach, a major departure from previous practices and culture, will allow the Department to more

[1] DoD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge,* accessed January 23, 2018, https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf.
[2] Ibid.

quickly respond to changes in the security environment and make it harder for competitors to offset our systems."

In its May 2017 *Interim Report*, the Section 809 Panel highlighted the challenges DoD faces because of the rapidly evolving global threat. In this *Volume 1 Report*, the panel provides 24 recommendations that begin to move the DoD acquisition system from one that emphasizes process to one that emphasizes delivering timely warfighting capabilities.

The Section 809 Panel's research shows the acquisition system has many unique challenges. The system is cost-centric. DoD often equates cost of a product or service with the risk of an acquisition. As such, arbitrary dollar thresholds dictate factors such as authorities, processes, and oversight.[3] Another problem is that the acquisition system stresses process perfection over output. This perspective is shared by many stakeholders with whom the Section 809 Panel has met and was aptly described by one stakeholder who met with the Section 809 Panel as "mission becoming secondary to perfection of the contract."[4]

The acquisition system is inflexible and takes a one-size-fits-all approach. Dissimilar products or services are acquired using the same processes. One example is the application of the many regulatory and oversight requirements that may be appropriate for major defense acquisition programs (MDAPs) but are not necessarily appropriate for the acquisition of basic commodities, to which they are also applied. This approach results in unnecessary process delays and the inability to tailor activities to meet warfighters' needs. Despite acquisition regulations permitting risk-taking, the acquisition workforce is neither incentivized nor empowered to make decisions, much less take risks.[5]

Collectively, these problems produce an insular, risk-averse culture that hinders DoD's ability to work with the broadest possible array of partners to deliver solutions to DoD's problems and affect the outcomes DoD seeks. 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.

To stay ahead in a dynamic, ever-changing environment, DoD needs a new approach to acquisition. Rather than focusing on price and process to measures success, DoD's acquisition system should focus on outcomes.

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[3] For example, to date, the Section 809 Panel has identified more than 900 references to dollar thresholds in the Federal Acquisition Regulation (FAR).
[4] Meeting with Section 809 Panel, November 2017.
[5] *See* Statement of Guiding Principles for the Federal Acquisition System, FAR 1.102.

THE PANEL'S VISION FOR THE FUTURE

The Section 809 Panel, thus far, has identified five essential attributes that should be inherent in tomorrow's outcome-based acquisition system:

- Competitive and collaborative
- Adaptive and responsive
- Transparent
- Time sensitive
- Allows for trade-offs

The sections below define these attributes and offers initial concepts of how each can be achieved through bold recommendations.

Competitive and Collaborative

The number of companies competing for defense contracts is declining. Industry experts forecast that acquisitions and mergers in the defense market segment will continue and exacerbate the decline in competition.[6] A report by CSIS that was scheduled for release in January 2018 indicates a substantial decline has occurred in the number of "first-tier prime vendors" between 2011 and 2015.[7] The number of small businesses registered to do business with the federal government fell by more than 100,000 companies, and the number of DoD contract actions for small business decreased by approximately 70 percent from FY 2011 to FY 2014.[8] As stressed in the Section 809 Panel's May 2017 *Interim Report*, the traditional defense industrial base is dramatically changing shape; consequently, DoD must be able to operate in a dynamic marketplace in which it wields less influence.[9] The Section 809 Panel's research has shown that companies for which DoD is not a primary customer either struggle to understand DoD's acquisition system or decide not to conform to its transaction rules. These companies are often unwilling to engage in time-consuming, tedious, competitive processes, and they do not plan their transactional calculus around meeting extraneous and irrelevant contractual requirements. In extreme cases, delays in the award of contracts caused by prolonged process requirements have put some companies out of business, a problem especially acute among small businesses and technology innovators.[10]

DoD's current approach to administering competition by predetermining a set of defined specifications and requirements is too slow and limits opportunities for new entrants into the defense marketplace. Consequently, the range of potential solutions available to DoD to solve its warfighting challenges is

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[6] Advisory Panel on Streamlining and Codifying Acquisition Regulations, Section 809 Panel Interim Report, May 2017, 10, accessed on January 6, 2018, https://section809panel.org/wp-content/uploads/2017/05/Sec809Panel_Interim-Report_May2017_FINAL-for-web.pdf.
[7] Joe Gould, "American exodus? 17,000 US defense suppliers may have left the defense sector," Defense News, accessed January 8, 2018, https://www.defensenews.com/breaking-news/2017/12/14/american-exodus-17000-us-defense-suppliers-may-have-left-the-defense-sector/.
[8] Steve Chabot, Chairman, Committee on Small Business, testimony before House Committee on Armed Services, April 14, 2015, 4-5, accessed November 8, 2017, https://smallbusiness.house.gov/uploadedfiles/chabot_written_statement_fy_16_ndaa.pdf.
[9] Advisory Panel on Streamlining and Codifying Acquisition Regulations, *Section 809 Panel Interim Report,* May 2017, 10, accessed on January 6, 2018, https://section809panel.org/wp-content/uploads/2017/05/Sec809Panel_Interim-Report_May2017_FINAL-for-web.pdf.
[10] Meeting with the Section 809 Panel, June 22, 2017.

artificially constrained by a rigid requirements process.[11] As Section 809 Panel Commissioner Dr. William LaPlante noted in the Panel's testimony before Congress in May 2017, the nation's adversaries are not spending years "studying for analysis of alternatives" but are focusing on quickly fielding new capabilities and solutions to their own operational and strategic challenges.[12]

Given DoD's myriad acquisition challenges, the Section 809 Panel sees need for bold change—perhaps even a new definition of competition altogether. The Section 809 Panel is exploring ways to modify competitive procedures, irrespective of the acquisition dollar value, by recognizing that competition has taken place in certain market segments—a concept outlined in greater detail below. An *open market* adaptation to the current forms of acceptable DoD competitive processes could preclude any need for further competition. Ideally, a reconfigured competition model could integrate more use of value analysis (such as valuing the cost avoided due to DoD not having to develop a capability itself), to assess price reasonableness at the transactional level.

Changing DoD's competitive procedures to compete solutions to problems, rather than assess a company's ability to meet detailed technical specifications, could be another avenue for systemic change. Using such an approach, DoD could give warfighters greater input into the process by leveraging their first-hand experience to articulate problems and select the best solutions put forth by industry. Changing the character of competition in such a way could shift DoD away from spending extensive time defining and validating requirements, to using more challenge-based competitions or taking advantage of available market solutions to quickly develop and field new capabilities.

DoD's current approach to acquisition does not foster meaningful collaboration with the private sector or within DoD itself. DoD's acquisition workforce fears that communication with industry may result in punishment. This concern undermines DoD's ability to work with industry as a true partner.[13] An inability or unwillingness to collaborate with industry results in DoD lacking awareness of the full range of available potential solutions; creates barriers for nontraditional contractors to enter the defense marketplace; and results in DoD acquiring suboptimal products, services, and solutions. DoD must foster collaborative partnerships across the entire marketplace to accomplish its mission today and in the future.

Adaptive and Responsive

In addressing responsiveness and adaptability, the Section 809 Panel has researched programs to inform a potential new acquisition model state. One commonly cited is DoD's Mine Resistant Ambush Protected Vehicle (MRAP) program. The program demonstrated when an outcome is urgently required to save lives, the acquisition system can adapt. Widely considered to be a successful acquisition

[11] For example, 10 U.S.C. § 2366(b) and subsequent policy guidance to the acquisition community through DoDI 5000.02 mandate that prior to the release of an Request for Proposal (RFP), the program requirements to be bid against must be firm.
[12] "Initial Findings of the Section 809 Panel: Setting the Path for Streamlining and Improving Defense Acquisition," U.S. House of Representatives Committee on Armed Services, May 17, 2017, accessed January 6, 2018, https://armedservices.house.gov/legislation/hearings/initial-findings-section-809-panel-setting-path-streamlining-and-improving.
[13] "Jacques Gansler: 'Global war' on contractors must stop," ExecutiveBiz, January 15, 2010, accessed January 6, 2018, http://blog.executivebiz.com/2010/01/jacques-gansler-global-war-on-contractors-must-stop/7105/.

program, the MRAP program can also be instructive along several related acquisition fronts to directly inform the new dynamic marketplace concepts presented here.

When initially confronted with the problem of Improvised Explosive Devices in the Iraq battlespace, DoD looked at solutions already existing in the marketplace, such as those developed abroad by Israel and South Africa, as well as other tailored solutions. After evaluating the benefits or costs associated with those alternative approaches, DoD decided to acquire a militarized version of an item manufactured by various vehicle companies already selling to DoD. Although that choice was substantially more responsive to the need for armored vehicle protection than the typical DoD program, and saved lives on delivery, an alternative built around existing items, such as proffered in this marketplace framework, may also have complemented that tailored capability. The MRAP acquisition program also relied on direct involvement by the Secretary of Defense and a variety of waivers and tailored processes.[14] Program success that relies on intervention by DoD's most senior leadership is not scalable to the majority of DoD acquisitions. Acquisition by exception is neither a scalable nor a cost-effective model, and when the process does not take full advantage of the marketplace, it is still neither fully adaptive nor responsive.

To demonstrate adaptability and responsiveness, DoD needs to create an organization that is malleable, and at times decentralized. Leaders and the workforce as a whole must be empowered and trusted to make quick decisions; policies and procedures must constantly evolve; and cross-functional teams must be incentivized to solve problems collaboratively. General Electric's FastWorks technique of assembling interdisciplinary teams, constantly seeking customer feedback, and setting aggressive schedules demonstrates how large organizations can be adaptable to changing environments and end-user demands.[15] The Section 809 Panel recommends building similar models with demonstrated success in DoD, such as SOFWERX and Hacking for Defense, to scale such approaches across DoD's acquisition system.

Transparent

Transparency in DoD acquisition is essential to promoting competition and collaboration, as well as ensuring the trust of the American people. In the context of acquisition, transparency has entwined meanings—one being visibility of relevant information to buyers and sellers in the marketplace about requirements and transactional outcomes, and the other being access to accurate data necessary for proper oversight. DoD struggles to create an environment in which transparency in acquisition for either purpose is valued as a critical element of success.

Companies unfamiliar with DoD struggle to find clear points of entry into the defense marketplace, and relevant information about business opportunities is difficult to identify through most public government portals. Many small businesses have no idea, for instance, how to register with SAM.gov

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[14] GAO, *Defense Acquisitions: Rapid Acquisition of MRAP Vehicles, Statement of Michael J. Sullivan before the House Armed Services Committee, Defense Acquisition Reform Panel, October 2009, GAO-10-155T,* accessed January 6, 2018, http://www.gao.gov/assets/130/123503.pdf.

[15] Office of Federal Procurement Policy, *"Myth-busting 3" Further Improving Industry Communication with Effective Debriefings,* OMB Memorandum, January 5, 2017, accessed January 6, 2018, http://www.ago.noaa.gov/acquisition/docs/ofpp_myth_busting_3.pdf.

or how to use FedBizOpps.[16] It is time to test the use of transparent, widely-used media like Twitter and Facebook to post solicitations and publicize DoD's needs.

Even when companies have been able to successfully navigate the preaward processes, award decisions are often still mystifying to vendors. Although the Section 809 Panel is continuing its research, it is clear that protests have become a tool for industry to receive feedback and better understand the government's acquisition decisions. Such extreme and costly steps should not be needed for industry to get information on DoD's needs and processes or to understand the end result of the acquisition process.

The U.S. military is one of the most trusted institutions in the United States today.[17] It is imperative that tomorrow's defense acquisition system maximizes transparency to bolster and maintain that trust.

Time Sensitive

Time has to become a more valued attribute of the acquisition life cycle. Anecdotes and data abound about the excessive lead time experienced for delivering products and services to the warfighter; the FY 2018 NDAA directs DoD to implement a study of Procurement Administrative Lead Time as evidence of the desire for DoD to account for delays at many process points.[18] Slow processes drive business and healthy market competition away from DoD.

The prolonged length of an acquisition by DoD indicates the existence of two problematic issues: a workforce culture beholden to process over mission and a system that lacks incentives to quantify lost opportunity and manpower costs. The current DoD acquisition workforce culture emphasizes and rewards process-driven behavior for which time becomes of secondary or tertiary value, yet there is little in the acquisition literature to prove that valuing time means sacrificing regulation or safeguards.

Valuing time comprises balancing speed with the due diligence appropriate for a given acquisition. U.S. adversaries, both state and nonstate, are not subject to the level of acquisition regulation or oversight strictures imposed on DoD, and consequently, they can deliver capability to the field much more rapidly. Tomorrow's acquisition system must allow DoD to find and deliver to its warfighters the lethality, technical dominance, and the maintenance of technical dominance necessary to maintain superiority and deter potential new adversaries.

Allows for Trade-Offs

The framework introduced here was developed by the Section 809 Panel with the understanding that not all acquisitions are alike. Allowing for trade-offs gives DoD the flexibility required to obtain optimal results. It is not always feasible to implement any or all of the above attributes simultaneously. When urgency requires immediate delivery, for example, DoD may be willing to forgo competition altogether. Allowing for trade-offs empowers informed decision-making during any given acquisition.

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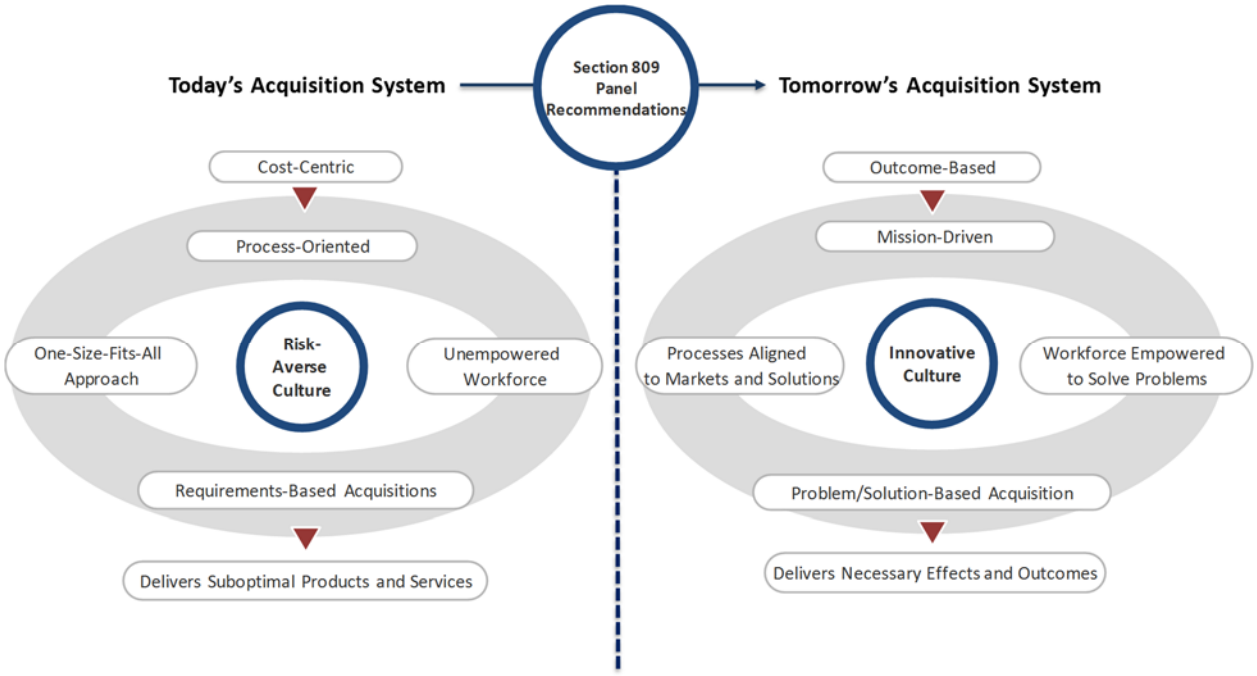
[16] See Section 6: Small Business.
[17] "Americans' Confidence in Institutions Edges Up," Gallup News, accessed January 17, 2018, http://news.gallup.com/poll/212840/americans-confidence-institutions-edges.aspx.
[18] Section 886 of FY 2018 NDAA, Pub. L. No. 115-91 (2017).

MOVING TOWARD AN OUTCOME-BASED SYSTEM

The Section 809 Panel envisions an outcome-based acquisition system that emphasizes industry competing solutions to DoD's problems. Distinct from the current emphasis on defining requirements, the approach introduced here favors deeper market analysis and problem-driven competitions.[19] DoD should be more open to and benefit from the full array of potential solutions to the outcomes it seeks to achieve.

Figure 1. The Section 809 Panel's Vision for Transforming Defense Acquisition



Building on a concept originally developed by the Center for New American Security (CNAS), the Section 809 Panel's vision includes four types of products, services, and solutions that DoD acquires: (1) readily available products and services; (2) products and services requiring minor customization; (3) products and services requiring major customization; and (4) products and services uniquely developed for DoD.[20] The Section 809 Panel is developing four lanes aligned to these types of products, services, and solutions. The lanes are further defined by the degree of customization necessary to meet DoD's needs, as well as DoD's influence (relative to other potential buyers) in the marketplace. The Section 809 Panel builds on CNAS's original concept by further defining the four lanes as follows:

[19] Professional Services Council, *White Paper: Enhanced Market Research Drives Better Acquisitions,* February 2017, accessed January 6, 2018, https://www.pscouncil.org/Downloads/documents/PSCWhitePaper-MarketResearchDrivesBetterAcquisitions_02-10-17.pdf.
[20] CNAS identified the *lanes* as: military unique systems with constrained competition, military unique systems with viable competition, military adapted commercial technology, and purely commercial technology. *See* 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, 8, accessed November 20, 2017, https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report-FutureFoundry-final.pdf?mtime=20161213162640.

- **Lane 1 – Readily Available:** This lane encompasses existing products and services that require no vendor customization to meet DoD's needs. DoD may be one of many potential buyers. These products are generally marketed and sold to nondefense entities and consumers.[21]

- **Lane 2 – Minor Customization:** The second lane includes products and services that are primarily sold in the private sector, and for which DoD may be one of many potential buyers. To meet DoD's needs; however, venders must perform less-than-major customization prior to DoD use.[22]

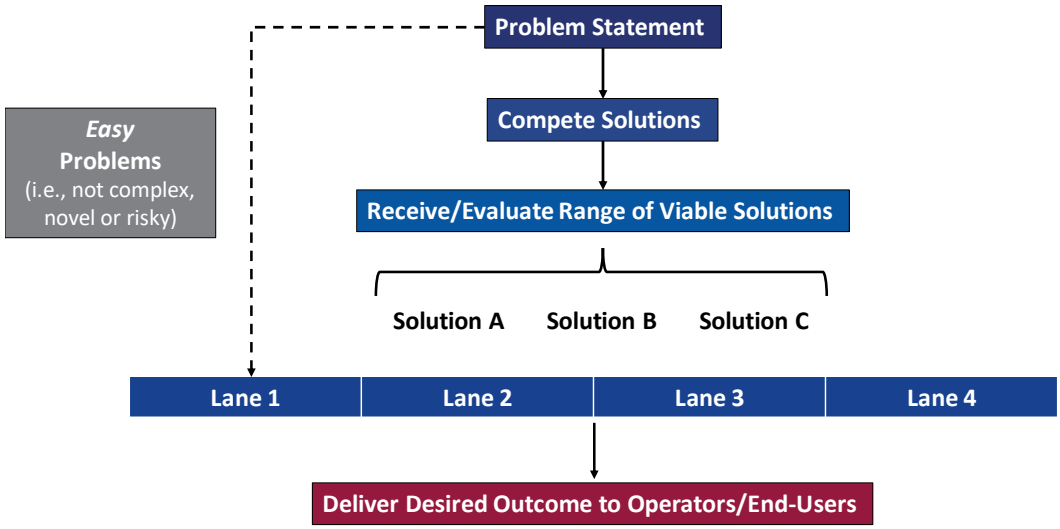
- **Lane 3 – Major Customization:** This lane includes products and services for which DoD may be one of few potential buyers, and for which there may be little or no private-sector applicability. Underlying functions, technology, and other customizations may be available for purchase in the private sector, but the customization required to meet DoD's needs is of such significance that it transforms the product or service to have primarily defense-related application.

- **Lane 4 – Defense-Specific Development:** In this lane there is no private-sector applicability, as the products and services are developed exclusively for defense-related use. In most cases DoD will be the only buyer, and in a limited number cases, DoD may be one of a few potential buyers globally.

Building on the CNAS' *optionality strategy*, the Section 809 Panel is developing two additional features in the proposed acquisition model.[23] The first feature is the manner in which DoD arrives at any particular lane; the second is defining transaction rules appropriate to each lane. How DoD makes its way to the marketplace is initially represented by Figure 2, and will be more fully develop in the Section 809 Panel's June 2018 *Volume 2* report.

[21] Customization refers to a product completed by vendors, or tailoring of service execution and delivery by vendors to meet DoD needs. It does not refer to configuration, which leverages inherent flexibility of a product or services.
[22] Major customization refers to changes that fundamentally alter a product's design or function, or the execution and delivery of a service. Whether a customization is minor or major will differ across vendors and industries.
[23] 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 November 20, 2017, https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report-FutureFoundry-final.pdf?mtime=20161213162640.

Figure 2. A Potential Framework for Solving Problems through the Marketplace



In its future reports, the Section 809 Panel will define how competition, transaction, and transparency rules should differ across the four lanes. By doing so, DoD can tailor how it acquires solutions from each lane and align itself with market behavior norms. For example, there should be DoD-unique transaction rules and oversight when working with the traditional defense marketplace segment (i.e., companies primarily operating in Lanes 3 and 4). DoD must be able and willing, however, to reduce management and oversight to capitalize on the nondefense marketplace segment (i.e., those companies operating principally in Lanes 1 and 2). By ending DoD's monolithic approach to engaging with industry to develop and acquire solutions, DoD can become a better customer and more knowledgeable actor in the marketplace.

This approach has several advantages:

- It is the result of evidence-based analysis informing how DoD can best compete for goods and services in the marketplace.
- It considers the fundamental limitations of DoD as a consumer in a rapidly changing marketplace against fast evolving enemies.
- It is flexible enough to allow for an empowered and informed acquisition leaders and workforce to work efficiently with industry to deliver effects quickly to the warfighter.

The behavioral norms and standard transaction rules will differ in each lane to align with industry practices and market dynamics. For example, companies offering products and services that are readily available (i.e., in Lane 1) may not view DoD as their principal customer; therefore, they will not be amenable to meeting a litany of DoD-unique contractual terms and conditions. Not until DoD determines through a competitive process which solutions best solve its problems does it determine what it will ultimately acquire and how to will acquire it. This approach will allow DoD to compete solutions without predetermining its acquisition process. It will enable DoD to operate with greater sophistication across the marketplace by tailoring its contracts, terms, and conditions to align with market and industry standards.

THE DYNAMIC MARKETPLACE

The Section 809 Panel will continue to evolve the vision and framework described above and develop an outcome-based system in which to situate future recommendations. The themes identified throughout the recommendations in this report—flexibility, empowered decision-making, speed to the marketplace, and collaboration—underscore the importance and urgent need for an outcome-based acquisition model for DoD to employ when it approaches the marketplace. The framework introduced in this section proposes radical changes by practical means. It identifies ways to solve known problems, eliminates a one-size-fits-all approach, reflects an understanding of how the marketplace is structured and operates, and allows as many new ways as possible to meet warfighter needs. Volumes 2 and 3 of the *Final Report*, published in June 2018 and January 2019 respectively, will tie this marketplace framework to more elements of the acquisition system and undertake integration of the concept across the subjects being researched by the Section 809 Panel.

Section 1
Commercial Buying

Streamline and simplify DoD's access to the commercial market.

RECOMMENDATIONS

Rec. 1: Revise definitions related to commercial buying to simplify their application and eliminate inconsistency.

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

Rec. 3: Align and clarify FAR commercial termination language.

Rec. 4: Revise DFARS sections related to rights in technical data policy for commercial products.

INTRODUCTION

Commercial buying represents an important component of the DoD acquisition process. Congress and DoD in particular, and the federal government in general, have urged greater use of the commercial marketplace since the early 1970s. Numerous reports have advocated eliminating government specifications and clauses to give the government increased access to commercial markets and to help avoid the high cost of developing unique products.[1] Legislation such as the Competition in Contracting Act of 1984 and the Defense Procurement Reform Act of 1984 mandated use of commercial items whenever it was technically acceptable and cost effective.[2] Despite these efforts, many commercial firms were still unable to do business with DoD because of the high cost of complying with unique requirements such as the Truth in Negotiation Act (TINA) and the Cost Accounting Standards, both of which involved implementing a government-specific business system. Commercial firms could qualify for an exception to TINA only if their commercial items were *sold in substantial quantities* to the public—subject to a sales test—but modifications to commercial items were all subject to TINA.[3]

The FY 1991 NDAA directed DoD to establish an advisory panel on streamlining and codifying acquisition laws (Section 800 Panel). The Section 800 Panel noted that commercial items tend to be much less expensive; are increasingly more technically advanced than their government-unique counterparts; and that buying in the commercial market increases competition, which yields lower prices, greater economies of scale, increased surge capacity, and increased access to cutting-edge technologies. The Section 800 Panel recommended changes in law, including a preference for commercial items, a definition of *commercial items*, and relief from numerous statutes and clauses for items deemed *commercial*.[4]

Congress adopted many of the Section 800 Panel recommendations to simplify procurement of commercial items in the Federal Acquisition Streamlining Act of 1994 (FASA). This Act established a definition for the term *commercial item,* a preference for procuring commercial items, an emphasis on commercial market research, greater reliance of commercial sector business processes, a requirement to use *standard commercial terms and conditions* to the maximum extent practicable, waiver of many statutes that would otherwise have been applicable to commercial items, and a framework for maintaining a limit on the number of future statutes that may be applied to procurements of commercial items. FASA also required numerous other related changes throughout the FAR and DFARS.[5] Congress passed the Federal Acquisition Reform Act (FARA) in 1996, furthering its preference for buying commercial items by, among other things, creating a definition for *commercially available off-the-shelf (COTS) item*, providing additional clause exemptions for COTS items, and establishing a TINA waiver for items

[1] Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, accessed January 9, 2018, https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.
[2] 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.
[3] Ibid.
[4] Ibid.
[5] Federal Acquisition Streamlining Act, Pub. L. No. 103-355 (1994).

determined to be *commercial* without a sales test.[6] FASA's commercial buying policies are implemented in Part 12 of the FAR[7] and Part 212 of the DFARS.[8]

Despite these efforts, commercial buying has not become as widespread in DoD as Congress had hoped. Only 18 percent of DoD's total obligations in FY 2017 were for the acquisition of commercial items, and commercial item spending actually declined by 29 percent between FY 2012 and FY 2017.[9] Congress has continued to enact changes to commercial policies, and DoD has continued to evolve its policies, training, and tools; however, the commercial marketplace is evolving at a much faster rate. DoD's commercial buying practices require a comprehensive reevaluation to fulfill the promise offered by FASA 24 years ago.

DoD's commercial buying has stagnated for multiple reasons. The acquisition workforce has faced issues with inconsistent interpretations of policy, confusion over how to identify eligible commercial products and services, and determining that prices are fair and reasonable.[10] DoD contracting officers have received increasing criticism and oversight from both the DoD Inspector General (IG)[11] and the Government Accountability Office (GAO).[12] This confusion has resulted in frequent promulgation of legislative revisions as Congress seeks ways to encourage DoD to access the commercial marketplace, as well as agency-level policy and local guidance intended to improve the workforce's ability to buy commercially.[13]

The FAR has been amended more than 100 times to address various aspects of commercial buying, making commercial buying policies more difficult to navigate.[14] The majority of FAR amendments related to commercial buying policy were administrative in nature, although others were driven by statute and agency-level policy related to contract type, the applicability of various statutes, and pricing. Since FASA was implemented, the number of DoD-related commercial buying provisions and clauses has increased by 188 percent, and the number of commercial clauses that may be flowed down has increased five-fold. In 1995, the FAR and DFARS contained a combined total of 57 government clauses applicable to commercial items. Today there are 165 clauses, with 122 originating in statute, 20 originating in executive orders, and 23 originating in agency-level policies.[15]

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[6] FY 1996 NDAA, Pub. L. No. 104-106, 110 Stat. 186 (1996).
[7] Acquisition of Commercial Items, FAR, Part 12.
[8] Acquisition of Commercial Items, DFARS, Part 212.
[9] FY 2012–FY2017 decline in commercial obligations was 29 percent and the FY 2012–FY2017 decline in noncommercial obligations was 7 percent. Data from FPDS, extracted January 7, 2018.
[10] USD(AT&L), *Guidance on Commercial Item Determinations and the Determination of Price Reasonableness for Commercial Items*, June 6, 2017, http://www.acq.osd.mil/dpap/policy/policyvault/USA003554-16-DPAP.pdf.
[11] DoDIG, *Procuring Noncompetitive Spare Parts Through an Exclusive Distributor*, accessed June 6, 2017, http://www.dodig.mil/audit/reports/fy08/08-048.pdf.
[12] GAO, *Contract Management: DOD Vulnerabilities to Contracting Fraud, Waste, and Abuse*, accessed June 6, 2017, http://www.gao.gov/new.items/d06838r.pdf.
[13] USD(AT&L), *Guidance on Commercial Item Determinations and the Determination of Price Reasonableness for Commercial Items*, accessed June 6, 2017, http://www.acq.osd.mil/dpap/policy/policyvault/USA003554-16-DPAP.pdf.
[14] Based on Section 809 Panel analysis.
[15] 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, DFARS 252.212-7001/212.301, but does not include any alternate clauses.

RECOMMENDATIONS

Recommendation 1: Revise definitions related to commercial buying to simplify their application and eliminate inconsistency.

Problem

The FAR's commercial buying terms are confusing, poorly defined, or undefined altogether. The term *commercial item* is overly broad, encompassing both commercial products and commercial services. The terms *commercial item* and *commercially available off-the-shelf item* appear in the U.S. Code in numerous sections, but do not incorporate the same universal definition; in some instances, the terms are defined differently, and in other instances they lack any definition at all. Subcontracting, which is subject to dozens of unique definitions for the terms *subcontract* and *subcontractor*, reflects similar disharmony. The inconsistency among commercial definitions generates confusion and creates risk that contracting officers may fail to apply commercial practices uniformly.

Background

Commercial buying represents an important component of the DoD acquisition process. For more than 2 decades, Congress and DoD have sought to encourage use of commercial buying by easing the statutory, regulatory, and procedural framework for buying commercial goods and services, as well as broadening the scope of goods and services that are eligible for revised commercial buying policies. The Section 800 Panel recognized the potential of commercial buying and recommended a number of changes in law to facilitate its acceptance. Included within its preference for buying commercial items, the Section 800 Panel recommended a definition for commercial item.[16] The Section 800 Panel's efforts contributed to passage of the 1994 FASA in which Congress took a number of important steps to enhance the federal government's access to the broader commercial market. These steps included exempting qualifying items procured at the prime or subcontract level from various statutes, policies, and contracting requirements unique to the federal procurement process. For this reason, the matter of the definitions that serve as the criteria for determining if an item qualifies is critically important. Two years after FASA was signed into law, Congress passed the 1996 FARA, which furthered the preference for buying commercial items by creating a definition for COTS items.[17]

Notwithstanding these efforts to promulgate a wide-ranging commercial buying policy, DoD's acquisition workforce has struggled to consistently interpret and apply the policy.[18] Confusion over how to identify eligible commercial products and services has subjected DoD contracting officers to

[16] Acquisition Law Advisory Panel to the United States Congress, *Streamlining Defense Acquisition Laws*, accessed June 6, 2017, http://www.dtic.mil/docs/citations/ADA262699.
[17] FY 1996 NDAA, Pub. L. No. 104–106, 110 Stat. 186 (1996).
[18] USD(AT&L), *Guidance on Commercial Item Determinations and the Determination of Price Reasonableness for Commercial Items*, accessed June 6, 2017, http://www.acq.osd.mil/dpap/policy/policyvault/USA003554-16-DPAP.pdf.

increased criticism and oversight.[19] It has also sparked frequent legislative and regulatory revisions in an effort to improve the policies and tools available to buy commercially.[20]

Findings

The Section 809 Panel identified a number of problems regarding definitions used in the procurement of commercial items.

Definition of Commercial Item

Congress gave DoD the widest possible access to the commercial marketplace by including in the definition the phrase *of a type*, which provides DoD the flexibility needed to take full advantage of the vibrant and constantly changing commercial marketplace. Many challenges have been raised regarding portions of the definition intended to allow the federal government to acquire items that are of a type sold in the commercial marketplace or that have *minor* modifications to satisfy a government-unique requirement. The same is true for items that are newly *offered for sale*, allowing the government the opportunity to be among the first to procure these state-of-the-art products. Both government and industry have, in recent years, established a better understanding of the application of the definition. Issues typically arise regarding facts of a particular acquisition, not as a result of a serious deficiency in the statutory definitions. Tinkering with the definition to address unique, fact-specific examples would not give DoD the broadest reasonable definition for accessing the commercial marketplace.

The definition of a commercial item encompasses both commercial products and commercial services. Defining an item as meaning either a product or service is confusing. The term *item* is not generally thought to include a *service*. For example, a standard dictionary definition for item is individual article or unit; 41 U.S.C. § 108, Item and Item of Supply, defines an item as "an individual part, component, subassembly, or subsystem integral to a major system;" and FAR 2.101, Definitions, defines a *common item* as a "material that is common to the applicable government contract and the contractor's other work."[21] To illustrate the confusion caused by the existing definition, a service can be a commercial item offered in support of a product that is also a commercial item. Furthermore, a COTS item is a subset of a commercial item, but the definition of a COTS item only includes products and does not include services.[22]

Commercial Services

Commercial services have become substantially more important in the 24 years since their inclusion in FASA. DoD obligated more than $23 billion for commercial services in FY 2017, which was 18 percent of all service obligations.[23] The important statutory language addressing commercial services lies buried within several subparagraphs of the definition of a commercial item. This aspect of the definition may lead to confusion over the distinction between services offered directly in support of a

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[19] DoDIG, *Procuring Noncompetitive Spare Parts Through an Exclusive Distributor*, June 6, 2017, http://www.dodig.mil/audit/reports/fy08/08-048.pdf. GAO, *Contract Management: DOD Vulnerabilities to Contracting Fraud, Waste, and Abuse*, accessed June 6, 2017, http://www.gao.gov/new.items/d06838r.pdf.
[20] USD(AT&L), *Guidance on Commercial Item Determinations and the Determination of Price Reasonableness for Commercial Items*, June 6, 2017, http://www.acq.osd.mil/dpap/policy/policyvault/USA003554-16-DPAP.pdf.
[21] Item and Item of Supply, 41 U.S.C. §108. Definitions, FAR 2.101.
[22] Commercially Available Off-the-Shelf Item, 41 U.S.C. §104.
[23] FPDS Data, accessed January 7, 2017.

commercial item, and services unrelated to a specific commercial item, but of a type offered in the commercial marketplace.

Defining a commercial item in a way that includes both commercial products and commercial services does not reflect the significant roles services and commercial services play today in the DoD procurement budget. Carefully bifurcating the existing definition into commercial products and *commercial services* would better serve DoD.

Addressing Commercial Processes

The existing definition of a commercial item does not properly consider the output of *commercial processes* because it fails to encompass products that are manufactured to federal government specifications or drawings by manufacturers that customarily manufacture to customer specifications and drawings (such as paint, castings, mounting components on circuit cards using their standard commercial processes).

The Section 800 Panel originally made the recommendation with the intention of providing the federal government access to this important element of the commercial marketplace.[24] The Section 800 Panel recommendation to allow DoD to access commercial processes, in addition to commercial products and services, continues to make sense and would benefit DoD today. For DoD to have broader access to the commercial marketplace and further the objective of greater integration of the commercial and defense industrial bases, it is important to expand the definition of a commercial item to include not only commercial products but also certain commercial processes.

Unintended Consequences of the Definition of COTS

In 1996, with the definition of commercial item less than 2 years old, Congress created a new definition for COTS item.[25] COTS items are a much narrower subset of the broader universe of commercial products.[26] The intent was to provide additional opportunities for the government to buy from the commercial market by providing for additional statutory exemptions for commercial items that satisfied the much narrower COTS definition. FAR 12.505, Applicability of Certain Laws for the Acquisition of COTS Items, and DFARS 212.570, Applicability of Certain Laws to Contracts and Subcontracts for the Acquisition of Commercially-Available Off-the-Shelf Items, were established to identify statutes that were inapplicable or modified in some fashion to further simplify the acquisition of COTS.

The definition of COTS has provided little additional opportunity for procuring commercial products, and may have unintended consequences of limiting the acceptance of the broader definition of commercial products.

Commercial products are defined, generally, as items of a type that have been sold, leased, or licensed—or offered for sale, lease, or license— to the general public. An item that is not yet available in the market, but evolved from one that is, may also be procured as a *commercial item*. By contrast, a

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[24] Section 800 Panel Report, section 8.3.1.6.
[25] Clinger-Cohen Act of 1996, section 4203 (FY 1996 NDAA, Pub. L. No. 104-106).
[26] Commercially Available Off-the-Shelf Item, 41 U.S.C. §104. The term *COTS* does not apply to commercial services.

COTS item must be sold in substantial quantities in the marketplace, a throwback to the pre-FASA days of the substantial sales-based commercial item TINA exception.

A product may be considered commercial if it includes a customary modification or a unique modification specifically to meet a federal government requirement, as long as that unique modification is *minor*. By contrast, a COTS item must be procured by the government *without modification* and in the same form as is sold in the commercial marketplace.

The combination of the requirement for COTS products to have sales in *substantial quantities* and be without modification substantially limits DoD's ability to leverage the commercial market, especially for new or state-of-the-art products. For example, if a commercial company offered for sale a new, substantially improved version of an existing server, DoD would need to wait until the server was sold in substantial quantities to be able to procure the product using the additional COTS exemption.

As of January 2018, there are 18 statutes and associated FAR or DFARS clauses that are either exempt or modified with regard to their applicability to COTS products (see Appendix F, Table F-1). Of those 18, five exemptions/modifications are established in statute, 11 result from a determination by the FAR Council or Office of Federal Procurement Policy (OFPP), and two result from a determination by DoD. Only six of these 18 exemptions/modifications are identified in FAR 12.503 or DFARS 212.570.

Although these additional COTS exemptions appear helpful on the surface, they may, in fact have created two distinct classes of commercial products: the broad, inclusive commercial product, and the very narrow COTS product.

The effect of creating these two classes is that much of the streamlining Congress intended for commercial products is being more narrowly applied to COTS items. For example, FAR 52.222-50, Combating Trafficking in Persons, paragraph (h), requires contractors that offer supplies other than COTS to prepare and maintain a compliance plan. It is unclear why a contractor selling supplies that meet the narrow definition of a COTS product should be exempt from the requirement to prepare and maintain a compliance plan, yet a contractor selling similar supplies that differ only in that they are not sold in substantial quantities, should not also be exempt.

Granting relief to contractors selling COTS items, but not those selling the broader commercial products and commercial services, serves as an obstacle to the government's stated goal of attracting the best and the brightest to the government marketplace to solve its most difficult problems. If DoD is seeking a high-tech, cutting-edge solution, that solution will likely not satisfy the **sold in substantial quantities** and **without modification** criteria of the COTS definition. Rather, it is more likely to be *new and innovative* and, therefore, **sold in less-than-substantial quantities**; *offered, but not yet sold*; or *entirely new technologies* that evolved from existing products, all of which fall under the definition of commercial products.

It is time for Congress and DoD to fully accept and embrace the commercial product and commercial services definitions and use them with all the flexibility FASA intended. DoD needs greater access to the full breadth of the commercial market place, and especially the cutting edge of that marketplace. Relieving the burden of government-unique requirements is an important step DoD must take to make that happen, but relieving the burden on only the vary narrow universe of COTS products will not

produce the desired result. Progress will only be made when real relief exists across the full spectrum of commercial products and commercial services.

Unique Statutory Definitions of Commercial Items

Congress codified the definition of a *commercial item* at 41 U.S.C § 103. This definition is used when determining whether an item qualifies for certain exemptions provided by Congress. To achieve the maximum benefit and avoid confusion, it is essential that the definitions be clear, well understood, and consistent. The Section 809 Panel analysis of 10 U.S.C. and 41 U.S.C. identified 40 distinct definitions of *commercial item*. Although the majority of these references point to the primary definitions at 41 U.S.C. § 103, many others do not, providing their own unique definitions, or none at all.

The definition from 41 U.S.C. § 103 is used for 34 of the 40 distinct citations for commercial items. Six terms in Title 10 do not incorporate the primary definitions by reference, whether due to the use of alternative definitions or through the absence of definitions entirely. Six instances of the term commercial item lacked a definition in accord with Title 41(see Appendix F, Table F-2). Four of the terms lacked any definition; a fifth term referred to a definition of commercial items later in its own section; and a sixth term referred only to the commercial acquisition procedures of FAR Part 12.

There does not appear to be any stated rationale for the differing definitions in the case of these six citations. The Section 809 Panel reviewed the legislative histories of each provision, but found no justification for omitting the primary definitions of Title 41.[27] The underlying statutes themselves also did not explain the lack of definitions, or the existence of separate definitions.

Harmonizing the Use of Terms in Statute

Commercial buying processes would benefit from harmonizing all U.S.C. references to commercial products and commercial services—including 41 U.S.C., 10 U.S.C., and other miscellaneous uses of the terms in other titles of the U.S.C.—with the primary definitions of those terms in Title 41. The Section 809 Panel identified more than 75 uses of the term commercial item in statute. Every use of the terms commercial product and commercial service in the U.S.C. should incorporate, by reference, the primary definitions of those terms at 41 U.S.C. §§ 103, 103a and 104, respectively.

An exception to this general perspective that requires further elaboration is the commercial item definition at Core Logistics Capabilities, 10 U.S.C. § 2464(a)(3). This unique definition of commercial item was crafted in 1998.

10 U.S.C. §2464 (a)(5), Core Logistics Support states,

> *(5) The commercial items covered by paragraph (3) are commercial items that have been sold or leased in substantial quantities to the general public and are purchased without modification in the same form that they are sold in the commercial marketplace, or with minor modifications to meet Federal Government requirements.*

[27] Based on Section 809 Panel analysis.

It consists of portions of the definitions of a COTS item (41 U.S.C. § 104) and a commercial item (41 U.S.C. § 103). This unique definition likely represented the early thinking and concerns about how the relatively new definition (1995) of commercial item at 41 U.S.C. § 103 might be implemented and the effect it may have on weapon systems, subsystems, and components.

The definition states that the covered items addressed in 10 U.S.C. § 2464 are commercial items (a term that is defined in 10 U.S.C. § 2302 and 41 U.S.C. § 103), but then continues by carving out portions of the commercial item definition as well as portions of the definition of a COTS item (also defined at 10 U.S.C. 2302 and 41 U.S.C. § 104). The 10 U.S.C. § 2464 definition of commercial item does not include items of a type, items offered for sale, items that *evolved from commercial items*, and items that are not yet available in the commercial marketplace but will be available in time to meet the federal government delivery requirement. These are all important elements of the commercial item definition Congress created to give the federal government the opportunity to procure items that are state-of-the-art but may not otherwise be available to them under a COTS sold in substantial quantities criteria. The 10 U.S.C. § 2464 definition allows for minor modifications unique to the federal government, but does not include modifications to commercial items that are *customarily available in the commercial marketplace*. The 10 U.S.C. § 2464 definition appears to reflect the early concerns that contracting officers would take a very liberal approach to the definition, procuring many items as commercial, to the point that it would potentially undermine the depot role in weapon system readiness by tying support of such items to industry.

The potential concerns expressed above were prevalent in the late 1990s, but over time, they have generally proven unfounded. The distinction between commercial and noncommercial items has remained firm, particularly in regard to the kinds of items that would likely be maintained in a depot. Contracting officers have been careful to understand the commercial marketplace for an item and the extent of minor modifications necessary to meet the federal government requirements before making a determination that an item is a commercial item. Contracting officers have also been careful to consider the realities of the commercial marketplace (most notably concerning technical data) and to address the data already available to other customers in the commercial marketplace, as well as data necessary for the minor modifications.

The unique definition of a commercial item at 10 U.S.C. § 2464 presents a potential practical problem for the DoD acquisition and logistics support workforce. As noted above, at the time an item is being considered for procurement as a commercial item, the contracting officer considers all the available information and, based on the definition at 41 U.S.C. § 103 (commercial item) or § 104 (COTS item), determines if the item satisfies the appropriate definition and may be procured using the unique FAR policies and procedures for commercial items and COTS items. Later, when that same item is being considered for logistics support, the logistics community makes another determination of the item's *commerciality* using the unique definition at 10 U.S.C. § 2464.

These two separate determinations, using two distinct definitions of *commercial item*, create considerable conflict, and ignore the reality that the decisions made at the time of initial procurement, including decisions with regard to the procurement of technical data, make later decisions using different criteria difficult, if not impractical. This situation is especially relevant when an item originally procured and planned for support as a commercial product or COTS product under

41 U.S.C. §§ 103 or 104, later is determined by the logistics support team not to meet the 10 U.S.C. § 2464 definition, but lacks the data necessary for depot-based support. The logistics support community should participate at the time the initial determination of *commerciality* is made by the contracting officer using the definition at 41 U.S.C. §§ 103 or 104, and then carry forward that determination into the logistics support phase. Making a separate determination, using a different definition at a later point in time, leads to confusion and inconsistency in the determination. Congress has recently taken steps at 10 U.S.C. § 2306a(b)(2) to avoid similar inconsistencies in how the initial commercial item determinations are handled by DoD.

The past 22 years have established a firm foundation for the application of the 41 U.S.C. § 103 commercial item definition and its impact on the depot logistics support, and no longer represents a compelling argument in favor of a unique definition of commercial item. For these reasons, 10 U.S.C. § 2464 should not retain its own unique definition. The citation should be conformed to the primary definition at 41 U.S.C. § 103 (commercial item).

Another exception that requires further elaboration is the commercial item definition at 10 U.S.C. § 2321, Validation of Proprietary Data Restrictions. This section addresses the contractor justifications for data use or release restrictions and DoD review and challenge of these restrictions. Paragraph (f) of this section addresses the special rules "with respect to technical data of a contractor or subcontractor under a contract for commercial items." Subsection (f)(1) provides, generally, that "the contracting officer shall presume the contractor or subcontractor has justified the restriction on the basis that the item was developed at private expense." This presumption applies, according to (f)(2)(A):

> *with regard to a commercial subsystem or component of a major system, if the major system was acquired as a commercial item in accordance with section 2379(a) of this title;*
> *with regard to a component of a subsystem, if the subsystem was acquired as a commercial item in accordance with section 2379(b) of this title; and*
> *with regard to any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements*

Paragraph (i) provides that a *commercial subsystem* or *component of a major system* qualifies for the special presumption because it *was acquired as a commercial item*. In this paragraph (i), the term commercial item has the meaning in 10 U.S.C. § 2302, Definitions, subsection which refers back to the definition at 41 U.S.C. § 103. The same analysis is true in paragraph (ii) for components of a subsystem, if the subsystem was acquired as a commercial item.

Subsection (f)(2)(A)(iii) provides that a component that is not part of a major system or subsystem would only qualify for the presumption of being developed at private expense if it is a COTS item or a COTS item with modifications of a type customarily available in the marketplace or minor modifications made to meet federal government requirements.[28] This later portion of subparagraph (iii) is actually a blending of the existing COTS definition at 41 U.S.C. § 104 and the commercial item

[28] Validation of Proprietary Data Restrictions, 10 U.S.C. § 2321 (f)(2)(A)(iii).

definition at 41 U.S.C. § 103, with several key elements of the commercial item definition left out. The legislative history provides no rationale for this unique definition.

This unique definition sets up a number of conflicts and adds confusion over the critical issue of proprietary data restrictions for products procured in the commercial marketplace. The following are examples:

- By virtue of being in Chapter 137, 10 U.S.C. § 2321 is tied to the definition of commercial item and COTS item at 41 U.S.C. § 103 and § 104, respectively. The text of 10 U.S.C. § 2321 includes its own twist on these two established definitions, introducing unnecessary confusion and potential conflict.

- The blended language raises questions with regard to the criteria for items with minor modifications. For example, if an item is a "commercially available off-the shelf item with …minor modifications made to meet Federal Government requirements,"[29] it is unclear if that means it must meet the sold in substantial quantities criteria in the COTS definition to qualify for the presumption. It is also unclear if an item with minor modifications incorporated to meet unique federal government requirements is likely to be sold in substantial quantities to the general public.

The language of § 2321 (f)(2) is intended to define when a component is a commercial component, yet 41 U.S.C. § 102 already defines a commercial component as a "component that is a 'commercial item.'"[30]

When procuring a component found in the commercial marketplace, the contracting officer will evaluate the item against the criteria for a commercial item in Definitions, FAR 2.101. The language of 2.101 is the same definition found in Definitions, 41 U.S.C. § 103. When evaluating the contractor or offeror assertion that a component was developed at private expense, the contracting officer must use the unique definition in 10 U.S.C. § 2321 to establish if the component meets the criteria for the special presumption. The possibility exists that the contracting officer could determine a component meets the definition of a commercial item but does not meet the criteria for the presumption of being developed at private expense. This ambiguity unnecessarily complicates the contracting officer's already difficult task.

Because the standard 41 U.S.C. § 103 definition of a commercial item is not used in § 2321(f)(A), certain components would not qualify, such as those that are of a type customarily used by the general public or items sold, leased, or licensed to the general public at less than the substantial quantities criteria found in the COTS definition; or "any item that evolved…through advances in technology or performance and that is not yet available in the commercial marketplace."[31] These items are exactly the types of state of-the-art technologies DoD is pursuing. This type of confusion can lead to frustration

[29] Ibid.
[30] Commercial Component, 41 U.S.C. § 102.
[31] Commercial Item, 41 U.S.C. § 103 and Commercially Available Off-the-Shelf Item, 41 U.S.C. § 104.

and unnecessary issues over protection of proprietary data for these types of item, making it more difficult to do business in the high-tech marketplace.

It is problematic to have a unique definition of commercial product solely for the purpose of protecting proprietary data that is inconsistent with the standard definition of the term used throughout the U.S.C. and the FAR. This inconsistency can only lead to further confusion and complexity, and potentially serve to discourage high technologies firms in the commercial marketplace from offering their best to DoD.

Definitions of Subcontract and Subcontractor

In today's defense marketplace, prime contractors typically subcontract more than 60 percent of their work to other firms through numerous tiers of commercial and noncommercial subcontracts. Even for the most complex, government-unique items, the further down the supply chain one looks, the more likely one is to find commercial suppliers with commercial items. Through the flow down process, the commercial item policies, procedures, and government-unique terms also generally apply to these subcontracts, regardless of tier, which complicates the process for procuring commercial items and commercial services at the subcontract level.

The FAR currently defines the term *contract*, an important term used widely throughout the FAR and DFARS. However, neither the FAR nor DFARS defines the term *subcontract*, another term used throughout the FAR and DFARS. The FAR would benefit from a definition for the terms *subcontract* and *subcontractor*, both of which today have numerous definitions in the FAR and DFARS.

A search of the FAR and DFARS produced 27 distinct definitions of the term *subcontract*. Seventeen of these definitions were essentially the same with only minor differences. The other 10 were unique in one way or another, but shared many of the same common elements. 41 U.S.C. § 87, the Anti-Kickback Act, implemented at FAR 3.5 was the only definition based in statute (see Appendix F, Table F-3).

The FAR and DFARS search also produced 21 distinct definitions of *subcontractor*. Most of those definitions shared common elements that could be conducive to drafting a single, common definition. Several had a unique element that would require accommodation (see Appendix F, Table F-4).

Subcontracts for Commercial Items for Inventory or Multiple Contracts

The Section 809 Panel heard from many companies regarding the cost and significant administrative effort required to flow down terms and conditions to their subcontracts. Of particular interest to the Panel were the issues associated with the flow down of government-unique terms and conditions to commercial suppliers, and where the contractor procured items and components from its subcontractors for multiple contracts or for their inventory and not for a specific contract.

The requirement to flow down a clause to subcontractors may be mandatory or subject to certain criteria contained within the clause. A relative few clauses limit the flow down to prime contractors' first tier of subcontractors, yet other clauses flow down to subcontractors at all tiers that meet the specified criteria contained in the clause.

The mechanics of flowing down such clauses is often administratively complex, costly, and time consuming for prime contractors, and potential subcontractors at each successive tier. Before accepting

these terms and conditions, proposed subcontractors must evaluate each of the clauses, assess the effects of the requirements of the clause on their businesses and confirm their ability to comply with each of the individual requirements. In the government business environment, there is an expectation of strict literal compliance with these requirements, and there is considerable oversight to ensure such compliance.[32] A subcontractor would be taking a substantial business risk to shortcut this important process.

For those firms that regularly participate in the federal government procurement process at the prime contractor or subcontracting tier, the flow down of terms and conditions is difficult, complex, and carries potentially great business risk, yet it is a process that has become one of the *costs of doing business* with the federal government. For a prime or subcontractor that sells in both commercial and government markets, or one that sells only in the commercial market, it is more than just a cost of doing business.

Federal government contracting regulations generally assume that procurements are fulfilled on a *job-order* basis, for which each contract stands alone and subsystems and components are only procured subsequent to, and in direct response to, the award of the higher-tier contract. Commercial business is most often based on forecasts of future sales and anticipated demand, for which contractors' order materials and subcomponents from their suppliers to satisfy current production and inventory for meeting future market demands.

The dichotomy between government and commercial markets presents a number of practical and compliance risks. For example, a contractor in the commercial market, manufacturing a commercial product, will typically procure commercial components for inventory without knowing, at the time the orders are placed, who the customers will be for the yet-to-be-manufactured end items. If the government subsequently procures even one of those commercial end items, the prime contractor must accept the government-unique terms, including the requirement for mandatory flow down to lower-tier suppliers. The prime contractor is then faced with the dilemma of asserting that its suppliers have been given the mandatory terms even though it has already procured the components, and the components currently reside in its inventory.

To address this risk, commercial manufacturers may choose to flow down government-unique terms to all of their subcontractors (some of which may not accept them) on the chance the government might at some point procure one of its end items. A commercial contractor that has little or no expectation of selling to the government would have no reason to take such an inclusive approach to flow down at the time it procures its components. If the government wanted to procure a commercial item from such a company, the contractor might be faced with the risk of accepting the terms without the ability to flow the terms down because the product or components are already on the shelf. The FAR makes no provisions for situations in which a commercial product is manufactured with components that were

[32] "Men must turn square corners when they deal with the government," Supreme Court Justice Oliver Wendell Holmes, Jr. *Rock Island C.R.R.* v. *United States,* 254 U.S. 141, 143 (22 November 1920). In today's federal market, oversight includes formal oversight from DCMA, DCAA, DOD/IG, GAO, and Congress, and informal oversight by public watch-dog groups, whistle blowers, and False Claims Act relators.

procured for general inventory and already in the prime contractor's inventory before contracting with the government.

One commercial contractor that spoke to the Section 809 Panel cited a specific example of an increased subcontractor workload resulting from flow-down requirements. This commercial contractor sells the same or similar items in both government and commercial markets but procures its common components from its suppliers by administratively issuing two separate purchase orders for the same part number—one with the mandatory government flow-down terms to satisfy anticipated government demand and another without the flow down to satisfy anticipated demand from its commercial customers. This idea of segregating the procurement of the identical parts simply to satisfy flow down requirements raises the question of whether the contractor also needs to segregate the parts in the warehouse. Situations such as this one represent an unreasonable burden on contractors and their commercial suppliers, and likely serve as a deterrent to firms contemplating entering the government marketplace.

Congress recently noted this burden and took several steps to address it in two similar sections of the FY 2017 NDAA. Section 877, Treatment of Commingled Items Purchased by Contractors as Commercial Items, (codified at 10 U.S.C. § 2380B) addresses the burden associated with the flow down of mandatory, government-unique terms and conditions on relatively low-value items (less than $10,000). Section 874, Inapplicability of Certain Laws and Regulations to the Acquisition of Commercial Items and Commercially Available Off-The-Shelf Items, (codified at 10 U.S.C. § 2375 (c)(3)) addresses the issue in a different manner by excluding procurement of certain items from treatment as a *subcontract,* and thus the requirement for flow down of government-unique terms. Below is a summary comparison of the two provisions.

10 U.S.C § 2380B

- Applies to *items* (presumably both commercial and noncommercial) with a value of less than $10,000.
- For use in performance of multiple contracts with the department of defense and other parties.
- Not identifiable to any particular contract.
- Must be treated as a *commercial item* (and still receive terms to be flowed down, but presumably only terms and conditions associated with *commercial products*).

10 U.S.C § 2375(c)(3)

- Applies to agreements for *commodities* (the term *commodities* is undefined).
- Is intended for use in performance of multiple contracts with DoD and other parties.
- Is not identifiable to any particular contract.

- Agreement must not be considered a *subcontract* for a commercial item (and, therefore, is not subject to flow down of any government-unique terms and conditions).
- Is limited in its application to "this subsection."

Section 874 uses the term *commodities*. This term is undefined, and the Section 809 Panel was unable to identify an established DoD definition of the term but did identify the DoD standard definition of the term *commodity loading*, an indication of how the term might be defined:

> *commodity loading — A method of loading in which various types of cargoes are loaded together, such as ammunition, rations, or boxed vehicles, in order that each commodity can be discharged without disturbing the others.*[33]

A standard dictionary definition provides an alternative, narrower approach, defining a commodity as "a mass-produced unspecialized product: *commodity* chemicals, commodity memory chips."[34]

10 U.S.C. § 2380B and 10 U.S.C. § 2375(c)(3) are positive steps, but procurement of common commercial items and commercial services can be further simplified. The most practical approach would be to exclude from the scope of the term *subcontract* the procurement of commodities as well as commercial products and commercial services that are intended for use in multiple current or future contracts. Commercial products are, by their very nature, fungible and likely to be procured from suppliers not generally engaged in business with the federal government and consequently not subject to the burdens and risks discussed above. Likewise, commercial services are often procured to meet specialized needs that cross many products, product lines, and contracts. Exempting commercial products and common commercial services from flow down of government-unique terms makes clear to both government and industry that Congress is serious about simplifying the procurement process, especially for items that are clearly available on the commercial market, for which the burden would be the greatest.

Conclusions

The following actions would enhance the federal government's preference for acquiring commercial items:

- Bifurcate the definition of commercial items into commercial products and commercial services, creating two separate definitions.
- Incorporate in the definition of a commercial product a provision for a product that the commercial marketplace manufactures from a customer's drawings or specifications using its commercial processes.
- Remove the definitions of COTS from 41 U.S.C. § 104. Congress and DoD have avoided granting the relief from government-unique requirements needed to access the full breadth of

[33] DoD Dictionary of Military and Associated Terms, August 2017.
[34] Merriam Webster Dictionary.

the commercial marketplace, and the COTS item definition has had an unintended consequence of contributing to this problem.

- Align the definitions of commercial products and commercial services. In most instances, the variation in definitions for commercial items represent an oversight or drafting error, rather than a deliberate policy decision. This lack of definitional unity can carry real consequences, potentially generating confusion and risking disputes among stakeholders applying differing interpretations of commercial products and commercial services to the procurement process.

- Harmonize the use of terms in statute. Commercial buying processes would benefit from harmonizing all U.S. Code references to commercial products and commercial services—including 41 U.S.C., 10 U.S.C., and other miscellaneous uses of the terms in other titles of the U.S. Code—with the primary definitions of those terms in 41 U.S.C. Every use of the terms commercial item in the U.S. Code should incorporate, by reference, the primary definitions of those terms at 41 U.S.C. §§ 103, 103a, and 104, respectively. This recommendation should be implemented in accordance with the previous recommendation to split the term commercial item into commercial product and commercial service in 41 U.S.C. §§ 103 and 103a.

- Establish a uniform definition of subcontract in the U.S. Code and the FAR. The dozens of distinct definitions of the term subcontract are unnecessary. The difference between the definition of subcontract at 41 U.S.C. § 87 and the recommended U.S. Code definition is inconsequential, and using a single definition will simplify the procurement process. A few instances exist for which it is appropriate to supplement the general definition of subcontract to accommodate a unique component of the definition.

- Establish a uniform FAR definition of subcontractor. It is unnecessary to have 21 distinct definitions of the term subcontractor when the differences among them are inconsequential.

- Exclude from the definition of subcontract procurements of commodities, commercial products, and commercial services to be used on multiple contracts. The flow down of government-unique terms and conditions represents a costly and administratively complex demand on contractors engaged in the sale of commercial products to the federal government. The federal government cannot, however, expect to successfully pursue a preference for commercial products at all tiers of the supply chain and attract new, innovative commercial supplies, while still imposing a burden and risk on the procurement of commercial components. Congress should take bold steps beyond the current language of Sections 877 and 874 of the FY 2017 NDAA by adding a new definition of subcontract to 41 U.S.C. and 10 U.S.C. § 2302. The definition would exempt purchases of commodities, commercial products, and commercial services that are being procured for multiple contracts from the flow down of government-unique terms.

Implementation

Legislative Branch

- Delete the definition of *Commercial Item* at 41 U.S.C. § 103.
- Establish the definition of *Commercial Product* at 41 U.S.C. § 103, and add language to address commercial process in the definition.
- Establish the definition of *Commercial Service* at 41 U.S.C. § 103a.
- Delete the definition of *Commercially Available Off-the-Shelf Item* at 41 U.S.C. § 104.
- Revise all references in U.S. Code to the above terms.
- Revise U.S. Code to align all definitions of the above terms with the definitions at 41 U.S.C. Chapter 1.
- Revise the definition of *Commercial Component* at 41 U.S.C. § 102.
- Revise the definition of *Non-developmental item* at 41 U.S.C. § 110.
- Establish a definition of *Subcontract* at 41 U.S.C. § 115.
- Revise the references to the above terms at 10 U.S.C. § 2302.

Executive Branch

The FAR Council should do the following:

- Amend FAR 2.101, Definitions of Words and Terms, to align with the changes to U.S. Code described under Legislative Branch above.
- Modify FAR and DFARS references to align with the changes to U.S. Code described under Legislative Branch above.
- Establish the definition of subcontractor in FAR 2.101, Definitions of Words and Terms.
- Modify FAR and DFARS to align with the new definitions of subcontractor.

Note: Draft legislative text and sections affected display and consolidated FAR revisions can be found in the Implementation Details subsection at the end of Section 1.

Implications for Other Agencies

- FASA, Title VIII, placed the commercial item and COTS definitions in the OFPP Act (41 U.S.C. § 103), making the definitions applicable to all federal government agencies that are subject to the FAR. Changes to the definitions of subcontract and subcontractor would be made in the FAR and would be applied to most federal agencies.

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.[35] Today there are 165, including 122 originating in statute, 20 originating in executive orders, and 23 originating in agency-level regulations or policies.[36]

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[35] 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.

[36] 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.

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.[37] 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.[38] 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

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

[37] The total does not include any alternate clauses or the clause at 52.212-5(e)(1)(xvii), which is enjoined indefinitely.
[38] 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).

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.*[39]

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 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:

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

- 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.[40] 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

[40] 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.

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 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.

Note: See Appendix F for the recommended disposition of clauses currently applicable to contracts for commercial products and commercial 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.

Recommendation 3: Align and clarify FAR commercial termination language.

Problem

FAR 52.212-4, Contract Terms and Conditions – Commercial Items, contains a set of standard terms and conditions for the procurement of commercial items. These terms are intended to satisfy the requirement of FASA section 8002 that contracting officers use terms that "are determined to be consistent with standard commercial practice."[41] Included in 52.212-4 are terms and conditions regarding the government's ability to terminate commercial contracts under various circumstances.

The termination language has been unchanged for the past 24 years. One commenter brought to the Section 809 Panel's attention several areas where the termination-related language of Part 12 and 52.212-4 has been the subject of litigation, and recommended the language be addressed. Additionally, the policy guidance for terminations in FAR Part 49 does not properly align with the policy guidance for the termination of commercial contracts in FAR Part 12.

Background

FASA required that the FAR contain a list of contract clauses for commercial item contracts that are, to the maximum extent possible, "consistent with standard commercial practices."[42] FAR 52.212-4, Contract Terms and Conditions – Commercial Items, was established for that purpose. The language of FAR 52.212-4 is not as comprehensive and prescriptive as typical FAR clauses because it is intended to be more commercial-like. These simpler, more commercial-like terms also benefit contractors that may be unfamiliar with all the details and nuances of government contracting and associated business processes. These terms are intended to provide a framework that better reflects commercial practices without each contracting officer having to develop unique terms and conditions for each procurement.

It is impossible to establish a single set of terms and conditions that would be appropriate for every commercial product or service the federal government might procure. FAR 12.302, Tailoring of Provisions and Clauses for the Acquisition of Commercial Items, addresses this problem by stating that FAR 52.212-4 represent clauses "intended to address, to the maximum extent possible, commercial practices for a wide range of potential Government acquisitions of commercial items." [43] Recognizing that no one set of terms and conditions could be appropriate across all commercial item procurements, FAR 12.302 gives contracting officers the flexibility to tailor the majority of the terms and conditions in 52.212-4. This authority allows contracting officers to tailor the procurement to the actual product or service being procured, including the standard commercial practices for procuring that item in the commercial marketplace. Of the 21 terms and conditions in 52.212-4 (paragraphs (a) thru (u)), all but seven terms may be tailored. Among the terms the contracting officer is given the flexibility to tailor are paragraphs 52.212-4(l), Termination for the Government's Convenience, and 52.212-4(m), Termination for Cause.

[41] FASA, section 8002.
[42] Ibid.
[43] Tailoring of Provisions and Clauses for the Acquisition of Commercial Items, FAR 12.302.

Findings

Applicability of Part 49, Terminations, to Contracts for Commercial Products and Services

The FAR recognizes that government contracts for commercial products and services need a vehicle for terminations; however, it also recognizes that those clauses need to reflect, to the maximum extent possible, standard commercial practice for commercial products and services that were procured in the commercial marketplace on the basis of price and without the government-unique cost data or contractor cost accounting systems. For this reason, the standard FAR Part 49 termination clauses were not used. Much of the administrative process of termination may apply to the extent it does not conflict with the more commercial approach in FAR 52.212-4.

In reviewing the professional literature regarding the relationship between the standard FAR Part 49 clauses and processes and those in FAR 12.403 and FAR 52.212-4 intended for procurements of commercial items, it appears there has been some confusion between that language of FAR 12.403, Terminations, and the language in FAR 49.002, Applicability.[44] Specifically, the language in 12.403 states that FAR Part 49 does not apply, but 49.002 states it is to be used as guidance.

Termination for the Government's Convenience

52.212-4(l) reserves for the government the right to terminate a contract for a commercial item at its sole convenience. This is not necessarily a standard commercial practice; however, it does represent a long-standing practice in government procurement. It gives the government the unique, but necessary, flexibility to respond to changes in its mission or to a threat without the complex, time-consuming, and costly process of establishing mutual agreement to terminate a contract prior to completion. For this reason, FAR 52.212-4 includes a clause that gives the government the right to terminate at its convenience, but with more commercial-like terms than those in FAR Part 49 and associated standard FAR termination clauses.

In reviewing the professional literature related to the termination for the government's convenience clause at FAR 52.212-4(l), it appears confusion exists and some litigation has taken place regarding compensation for a terminations for convenience.[45] Central to the standard FAR policies for convenience terminations is the concept of the contractor being *compensated fairly* for the termination prior to final delivery under the contract. The existing clause is somewhat unclear about the elements of a *fair compensation*.[46]

Termination for Cause

More typical in both commercial and government contracts is a clause providing the buyer with the right to terminate the contract for cause, including late delivery and failure to provide adequate

[44] Nash & Cibinic Report, 29 N&CR ¶ 21. The Nash & Cibinic Report is a long-standing legal periodical that addresses federal government contract case law and practice
[45] Ibid.
[46] Fair Compensation is a term discussed in FAR 49.201, but not defined. The FAR states "Fair compensation is a matter of judgment and cannot be measured exactly." The issue here was that terminations under commercial terms were not required to follow Part 49, so it left open the question of whether "fair compensation" was necessary as discussed in part 49.

assurances of future performance. FAR 52.212-4(m) provides the government with the authority to terminate for cause.

FAR 12.403 (c) states "the contracting officer shall send a cure notice prior to terminating a contract for a reason other than late delivery."[47] The professional literature points out that the clause at 52.212-4(m) does not contain a similar requirement.[48] This disconnect needs to be corrected.

Conclusions

FAR 12.403 is the policy regarding terminations of commercial items, but the policies in Part 49 are intended to be used as guidance in such terminations. The lack of alignment between FAR Parts 12 and 49 should be reconciled by the elimination of the *guidance* language in Subpart 12.403.

FAR 52.212-4(l) and (m) are intended to represent standard or customary commercial practice, but both may be tailored or replaced by the contracting officer to better reflect the commercial practice for the product or service being procured. Because these two clauses are frequently used as is, it is important they reflect best practices, given their scope and intent. As a result, the language of FAR 52.212-4(l) and (m) requires further clarification to elucidate the *fair compensation* principle in paragraph (l) and the use of a *cure* notice for a termination for cause in paragraph (m).

Implementation

Legislative Branch

- No statutory changes are required.

Executive Branch

The Section 809 Panel recommends the FAR Council do the following:

- Revise FAR Subpart 12.403, Terminations, paragraph (a) to remove the reference to Part 49 as guidance.
- Revise FAR 52.212-4(l), Terminations for the Government's Convenience, to clarify the elements of *fair compensation* when a contract for commercial product or service is terminated for the government's convenience.
- Revise FAR 52.212-4(m), Termination for Cause, to include language regarding cure notices and to align this clause with the language at 12.403(c)(1).

Note: The recommended changes to FAR 12.403 and 52.212-4 can be found in the Implementation Details subsection at the end of Section 1.

Implications for Other Agencies

- The recommended changes will benefit all federal agencies that use the FAR.

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[47] Termination, FAR 49.607. Delinquency Notices, FAR 12.403.
[48] *Packer* v. *Social Security Administration,* CBCA 5038, 16-1 BCA ¶36,260.

Recommendation 4: Revise DFARS sections related to rights in technical data policy for commercial products.

Problem

DFARS clauses 252.227-7015 and 252.227-7037 establish rights in intellectual property for DoD that are not aligned with commercial practice. Both clauses deter companies that rely on their intellectual property (IP) to differentiate themselves in the marketplace from doing business with the federal government.

Background

FASA made substantial changes in policy regarding technical data for commercial products procured by the federal government. FASA set forth the following statutory changes intended to reduce barriers to the acquisition of commercial items:

- Establishment of the commercial item definition.
- A statutory preference for the acquisition of commercial items.
- Establishment of a presumption of development at private expense for commercial items.

The FASA conferees intended to exempt commercial items from requirements to provide technical data (other than data on form, fit, and function), unless the government could prove that an item was *developed* at government expense. Although Congress has amended 10 U.S.C. §§ 2320 and 2321 in the years since FASA enactment, nothing in the congressional record indicates that Congress has intended the statutes apply to commercial items that have not been proven to be *developed* at government expense. The current DFARS approach of mandating the flow down of data rights clauses to commercial items that have not been proven to be developed at government expense exceeds the express legislative intent of Congress (as originally established in FASA).

Many commercial items must be adapted in some way to meet unique DoD requirements. *Minor modifications* made to commercial items to meet unique DoD requirements do not rise to the level of new technology development. This practice is consistent with the intellectual property white paper titled, *DoD, Innovation, and Intellectual Property in Commercial and Proprietary Technologies*, which supports efforts to cultivate relationships with commercial companies and nontraditional contractors, such as those in Silicon Valley.[49] The white paper states that, "only those modifications that rise to the level of a new technology 'development' should affect the standard license rights granted to DoD in the newly developed modification."

Consistent with the express legislative intent of Congress, the technical data statutes may be applied to commercial items that will undergo of a type modifications only if the parties determine that the modifications rise to the level of new technology development. Taking into consideration the cost and business effects of mandating flow down of the data-rights clauses to all commercial contractors and

[49] OUSD(AT&L), "DoD, Innovation, and Intellectual Property in Commercial & Proprietary Technologies," accessed January 25, 2017, https://www.dau.mil/cop/stm/_layouts/15/WopiFrame.aspx?sourcedoc=/cop/stm/DAU%20Sponsored%20Documents/IP%20White%20paper%20from%20osd%20Jjan%202016.pdf&action=default.

suppliers—and to incentivize commercial and other nontraditional suppliers to do business with the DoD—it is not in the best interest of the government to apply the technical data statutes to commercial items or commercial items with *minor modifications*.

Findings

Although the FAR itself emphasizes relying on customary commercial practice, the DFARS treats IP rights acquisition as an act of the sovereign, which can grant or deny as it pleases by claiming *government purpose*. In the commercial world, assignment of IP rights is subject to negotiation, and transfer of rights typically involves fair compensation in the form of a purchase or payment of license fees. The FAR is more closely aligned to commercial practice, stating, for example, in FAR 27.102(d) that "The Government recognizes rights in data developed at private expense, and limits its demands for delivery of that data. When such data is delivered, the government will acquire only those rights essential to its needs." Other sections of the FAR are similarly circumspect when it comes to commercial practice.[50]

The basic policy at DFARS 227.7102-1 establishes what appears to be a requirement for contractors to provide three classes of technical data beyond what may be customary in commercial markets:

> *227.7102-1 Policy.*
>
> *(a) DoD shall acquire only the technical data customarily provided to the public with a commercial item or process, except technical data that—*
>
> *(1) Are form, fit, or function data;*
>
> *(2) Are required for repair or maintenance of commercial items or processes, or for the proper installation, operating, or handling of a commercial item, either as a stand alone unit or as a part of a military system, when such data are not customarily provided to commercial users or the data provided to commercial users is not sufficient for military purposes; or*
>
> *(3) Describe the modifications made at Government expense to a commercial item or process in order to meet the requirements of a Government solicitation.*

DFARS 227.7102-1 appears to acknowledge the role IP has in encouraging or discouraging commercial firms to offer solutions to DoD requirements, stating,

> *(b) To encourage offerors and contractors to offer or use commercial products to satisfy military requirements, offerors and contractors shall not be required, except for the technical data described in paragraph (a) of this subsection, to—*
>
> *(1) Furnish technical information related to commercial items or processes that is not customarily provided to the public; or*
>
> *(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose technical data pertaining to commercial items or processes except for a transfer of rights mutually agreed upon.*

[50] See, for example, FAR 12.211, FAR 12.212, and FAR 27.405-3.

And in 227.7102-2, the DFARS states,

> *a) The clause at 252.227-7015, Technical Data–Commercial Items, provides the Government specific license rights in technical data pertaining to commercial items or processes. DoD may use, modify, reproduce, release, perform, display, or disclose data only within the Government. The data may not be used to manufacture additional quantities of the commercial items and, except for emergency repair or overhaul and for covered Government support contractors, may not be released or disclosed to, or used by, third parties without the contractor's written permission. Those restrictions do not apply to the technical data described in 227.7102-1(a).*

It is the exceptions in 227.7102-1(a), and the implication that these exceptions are not negotiable, and the contractor may not propose to meet these requirements in another manner other than conveying these minimum rights (and others addressed below) that constitute overreach. In the commercial world, to the extent that the exceptions exceed normal practice, they would be subject to negotiation between the parties.

DFARS 252.227-7015, Technical Data – Commercial Items, further expands the government's assertion of rights without negotiations, stating in subsection (b):

> *License.*
>
> *(1) The Government shall have the <u>unrestricted right to use, modify, reproduce, release, perform, display, or disclose technical data, and to permit others to do so, that—</u>*
>
> *<u>(i) Have been provided to the Government or others without restrictions on use, modification, reproduction, release, or further disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party;</u> (emphasis added.)*
>
> *(ii) Are form, fit, and function data;*
>
> *(iii) Are a correction or change to technical data furnished to the Contractor by the Government;*
>
> *(iv) Are necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or*
>
> *(v) Have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired the rights to use, modify, reproduce, release, perform, display, or disclose the data without restrictions.*
>
> *(2) Except as provided in paragraph (b)(1) of this clause, the Government may use, modify, reproduce, release, perform, display, or disclose technical data within the Government only. The Government shall not—*
>
> *(i) Use the technical data to manufacture additional quantities of the commercial items; or*
>
> *(ii) Release, perform, display, disclose, or authorize use of the technical data outside the Government without the Contractor's written permission unless a release, disclosure, or permitted use is necessary for emergency repair or overhaul of the commercial items furnished under this contract, or for performance of work by covered Government support contractors.*

DFARS 227.7102-3 and 227.7102-4 compound the problem by extending policies intended to guide contracting officers in resolving issues where technical data may have been developed using government funds or a combination of government and contractor funds to commercial data items. For example, DFARS 227.7102-3 directs use of the procedures at DFARS 227.7103-13, Government Right to Review, Verify, Challenge, and Validate Asserted Restrictions. DFARS subpart 227.7103 applies to noncommercial items, not commercial products and services. Mixed funding issues arise in commercial contracts too, and they are usually resolved by negotiation between the parties. All of these assertions of rights go beyond the original intent of FASA.

Conclusions

The policies in FAR 27.102 and DFARS 227.7102-1 are generally adequate to protect DoD and balance the interests of the government and the contractor (except as noted above); however, subsequent paragraphs of DFARS 227.7102 deviate from commercial practice by requiring rights that are customarily addressed in negotiated commercial licenses. Adopting policies aligned with commercial practice will remove barriers to greater access to innovations in the commercial market. The recommendations below will enable that alignment.

Implementation

Legislative Branch

- No statutory changes are required.

Executive Branch

The DAR Council should do the following:

- Rescind DFARS 252.227-7015 and remove DFARS 252.227-7037 from DFARS 212.301. They go beyond the intent of FASA and are not representative of commercial practice, and therefore represent a disincentive for commercial firms to do business with the department.
- Rescind DFARS 227.7102-1 and move the policy contained therein to an appropriate place in DFARS 212. This change will make the processes for commercial buying easier for commercial firms to understand by collocating commercial technical data policy with other policies for commercial products and services.
- Rescind DFARS 227.7102-2 through 227.7102-4. Generally, these subsections adapt DoD policies and practices to recognize challenges contracting officers may face when transacting technical data issues in commercial environments. They do, however, attempt to shape commercial practices to fit DoD models and methods, rather than guiding contracting officers on how to operate in commercial markets. They go beyond the intent of FASA and are not representative of commercial practice; therefore, they represent a disincentive for commercial firms to do business with DoD.

Note: No additional Implementation Details are included for this recommendation.

Implications for Other Agencies

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

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Section 1
Commercial Buying

Implementation Details

Recommendation 1

LEGISLATIVE PROVISIONS — 809 PANEL STATUTORY RECOMMENDATIONS RELATING TO COMMERCIAL BUYING

TITLE III—COMMERCIAL BUYING

Sec. 301. Revision of definition of "commercial item" for purposes of Federal acquisition statutes.
Sec. 302. Definition of subcontract.
Sec. 303. Limitation on applicability to Department of Defense commercial contracts of certain provisions of law and certain Executive orders and regulations.

SEC. 301. REVISION OF DEFINITION OF "COMMERCIAL ITEM" FOR PURPOSES OF FEDERAL ACQUISITION STATUTES.

(a) DEFINITIONS IN CHAPTER 1 OF TITLE 41, UNITED STATES CODE.—

(1) SEPARATION OF "COMMERCIAL ITEM" DEFINITION INTO DEFINITIONS OF "COMMERCIAL PRODUCT" AND "COMMERCIAL SERVICE".—Chapter 1 of title 41, United States Code, is amended by **striking section 103** and inserting the following new sections:

"§ 103. Commercial product

"In this subtitle, the term 'commercial product' means any of the following:

"(1) A product, other than real property, that—

"(A) is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes; and

"(B) has been sold, leased, or licensed, or offered for sale, lease, or license, to the general public.

"(2) A product that—

"(A) evolved from a product described in paragraph (1) through advances in technology or performance; and

"(B) is not yet available in the commercial marketplace but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

"(3) A product that would satisfy the criteria in paragraph (1) or (2) were it not for—

"(A) modifications of a type customarily available in the commercial marketplace; or

"(B) minor modifications made to meet Federal Government requirements.

"(4) A product that—

"(A) is produced in response to a Federal Government drawing or specification; and

"(B) is ordinarily produced using customer drawings or specifications for the general public using the same workforce, plant, or equipment.

"(5) Any combination of products meeting the requirements of paragraph (1), (2), (3), or (4) that are of a type customarily combined and sold in combination to the general public.

"(6) A product, or combination of products, referred to in paragraphs (1) through (5), even though the product, or combination of products, is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

"(7) A nondevelopmental item if the procuring agency determines, in accordance with conditions in the Federal Acquisition Regulation, that—

"(A) the product was developed exclusively at private expense; and

"(B) has been sold in substantial quantities, on a competitive basis, to multiple State and local governments or to multiple foreign governments.

"§ 103a. Commercial service

"In this subtitle, the term 'commercial service' means any of the following:

"(1) Installation services, maintenance services, repair services, training services, and other services if—

"(A) those services are procured for support of a commercial product, regardless of whether the services are provided by the same source or at the same time as the commercial product; and

"(B) the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

"(2) Services of a type offered and sold competitively, in substantial quantities, in the commercial marketplace—

"(A) based on established catalog or market prices;

"(B) for specific tasks performed or specific outcomes to be achieved; and

"(C) under standard commercial terms and conditions.

"(3) A service, even though the service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.".

(2) REPEAL OF DEFINITION OF COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEM.—Section **104** of such title is repealed.

(3) CONFORMING AMENDMENTS TO TITLE 41 DEFINITIONS. —

(A) DEFINITION OF COMMERCIAL COMPONENT.—Section **102** of such title is amended by striking "commercial item" and inserting "commercial product".

(B) DEFINITION OF NONDEVELOPMENTAL ITEM.—Section **110(1)** of such title is amended by striking "commercial item" and inserting "commercial product".

(4) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 41, United States Code, is amended by striking the items relating to sections 103 and 104 and inserting the following new items:

"103. Commercial product.
"103a. Commercial service.".

(b) CONFORMING AMENDMENTS TO OTHER PROVISIONS OF TITLE 41, U.S.C.—Title 41, United States Code, is further amended as follows:

(1) Section **1502(b)** is amended—

(A) in paragraph (1)(A), by striking "commercial items" and inserting "commercial products or commercial services";

(B) in paragraph (1)(C)(i), by striking "commercial item" and inserting "commercial product or commercial services"; and

(C) in paragraph (3)(A)(i), by striking "commercial items" and inserting "commercial products or commercial services".

(2) Section **1705(c)** is amended by striking "commercial items" and inserting "commercial products and commercial services".

(3) Section **1708** is amended by striking "commercial items" in subsections (c)(6) and (e)(3) and inserting "commercial products or commercial services".

(4) Section **1901** is amended—

(A) in subsection (a)(2), by striking "commercial items" and inserting "commercial products or commercial services"; and

(B) in subsection (e)—

(i) by striking "COMMERCIAL ITEMS" in the subsection heading and inserting "COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES"; and

(ii) by striking "commercial items" and inserting "commercial products or commercial services".

(5) Section **1903(c)** is amended—

(A) in the subsection heading, by striking "COMMERCIAL ITEM" and inserting "COMMERCIAL PRODUCT OR COMMERCIAL SERVICE";

(B) in paragraph (1), by striking "as a commercial item" and inserting "as a commercial product or a commercial service"; and

(C) in paragraph (2), by striking "for an item or service treated as a commercial item" and inserting "for a product or service treated as a commercial product or a commercial service".

(6)(A) Section **1906** is amended by striking "commercial items" each place it appears in subsections (b), (c), and (d) and inserting "commercial products or commercial services".

(B)(i) The heading of such section is amended to read as follows:

§ 1906. List of laws inapplicable to procurements of commercial products and commercial services".

(ii) The table of sections at the beginning of chapter 19 is amended by striking the item relating to section 1906 and inserting the following new item:

"1906. List of laws inapplicable to procurements of commercial products and commercial services.".

(7)(A) Section **1907** is repealed.

(B) The table of sections at the beginning of chapter 19 is amended by striking the item relating to section 1907.

(8) Section **3304** is amended by striking "commercial item" in subsections (a)(5) and (e)(4)(B) and inserting "commercial product".

(9) Section **3305(a)(2)** is amended by striking "commercial items" and inserting "commercial products or commercial services".

(10) Section **3306(b)** is amended by striking "commercial items" and inserting "commercial products or commercial services".

(11)(A) Section **3307** is amended—

(i) in subsection (a)—

(I) by striking "COMMERCIAL ITEMS" in the subsection heading and inserting "COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES; and

(II) in paragraph (1), by striking "commercial items" and inserting "commercial products and commercial services"; and

(III) in paragraph (2), by striking "a commercial item" and inserting "a commercial product or commercial service";

(ii) in subsection (b)—

(I) in paragraph (2), by striking “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” and inserting “commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products”; and

(II) in paragraph (3), by striking “commercial items and nondevelopmental items other than commercial items” and inserting “commercial services, commercial products, and nondevelopmental items other than commercial products”;

(iii) in subsection (c)—

(I) in paragraphs (1) and (2), by striking “commercial items or nondevelopmental items other than commercial items” and inserting “commercial services or commercial products or nondevelopmental items other than commercial products”;

(II) in paragraphs (3) and (4), by striking “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” and inserting “commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products”; and

(III) in paragraphs (5) and (6), by striking “commercial items” and inserting “commercial products and commercial services”;

(iv) in subsection (d)(2), by striking “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” and inserting “commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products”; and

(v) in subsection (e)—

(I) in paragraph (1), by inserting “103a, 104,” after “sections 102, 103,”;

(II) in paragraph (2)(A), by striking “commercial items” and inserting “commercial products or commercial services”;

(III) in the first sentence of paragraph (2)(B), by striking “commercial end items” and inserting “end items that are commercial products”;

(IV) in paragraphs (2)(B)(i), (2)(C)(i) and (2)(D), by striking “commercial items or commercial components” and inserting “commercial products, commercial components, or commercial services”;

(V) in paragraph (2)(C), in the matter preceding clause (i), by striking “commercial items” and inserting “commercial products or commercial services”;

(VI) in paragraph (4)(A), by striking "commercial items" and inserting "commercial products or commercial services";

(VII) in paragraph (4)(C)(i), by striking "commercial item, as described in section 103(5)" and inserting "commercial product, as described in section 103a(1)"; and

(VIII) in paragraph (5), by striking "items" each place it appears and inserting "products".

(B)(i) The heading of such section is amended to read as follows:

§ 3307. Preference for commercial products and commercial services".

(ii) The table of sections at the beginning of chapter 33 is amended by striking the item relating to section 3307 and inserting the following new item:

"3307. Preference for commercial products and commercial services.".

(12) Section **3501** is amended—

(A) in subsection (a)—

(i) by striking paragraph (1);

(ii) by redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively; and

(iii) in paragraph (2) (as so redesignated), by striking "commercial items" and inserting "commercial products or commercial services"; and

(B) in subsection (b)—

(i) by striking "ITEM" in the heading for paragraph (1); and

(ii) by striking "commercial items" in paragraphs (1) and (2)(A) and inserting "commercial services".

(13) Section **3503** is amended—

(A) in subsection (a)(2), by striking "a commercial item" and inserting "a commercial product or a commercial service"; and

(B) in subsection (b)—

(i) by striking "COMMERCIAL ITEMS" in the subsection heading and inserting "COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES; and

(ii) by striking "a commercial item" each place it appears and inserting "a commercial product or a commercial service".

(14) Section **3505(b)** is amended by striking "commercial items" each place it appears and inserting "commercial products or commercial services".

(15) Section **3509(b)** is amended by striking "commercial items" and inserting "commercial products or commercial services".

(16) Section **3704(c)(5)** is amended by striking "commercial item" and inserting "commercial product".

(17) Section **3901(b)(3)** is amended by striking "commercial items" and inserting "commercial products or commercial services".

(18) Section **4301(2)** is amended by striking "commercial items" and inserting "commercial products or commercial services".

(19)(A) Section **4505** is amended by striking "commercial items" in subsections (a) and (c) and inserting "commercial products or commercial services".

(B)(i) The heading of such section is amended to read as follows:

§ 4505. Payments for commercial products and commercial services".

(ii) The table of sections at the beginning of chapter 45 is amended by striking the item relating to section 4505 and inserting the following new item:

"4505. Payments for commercial products and commercial services.".

(20) Section **4704(d)** is amended by striking "commercial items" both places it appears and inserting "commercial products or commercial services".

(21) Sections **8102(a)(1)**, **8703(d)(2)**, and **8704(b)** are amended by striking "commercial items (as defined in section 103 of this title)" and inserting "commercial products or commercial services (as defined in sections 103 and 103a, respectively, of this title)".

(c) AMENDMENTS TO CHAPTER **137** OF TITLE 10, UNITED STATES CODE.—Chapter 137 of title 10, United States Code, is amended as follows:

(1) Section **2302(3)** is amended—

(A) by redesignating subparagraphs (J), (K), and (L) as subparagraphs (K), (L), and (M); and

(B) by striking subparagraph (I) and inserting the following new subparagraphs (I) and (J):

"(I) The term 'commercial product'.

"(J) The term 'commercial service'.".

(2) Section **2304** is amended—

(A) in subsections (c)(5) and (f)(2)(B), by striking "brand-name commercial item" and inserting "brand-name commercial product";

(B) in subsection (g)(1)(B), by striking "commercial items" and inserting "commercial products or commercial services"; and

(C) in subsection (i)(3), by striking "commercial item" and inserting "commercial product".

(3) Section **2305** is amended—

(A) in subsection (a)(2), by striking "commercial items" and inserting "commercial products or commercial services"; and

(B) in subsection (b)(5)(B)(v), by striking "commercial item" and inserting "commercial product".

(4) Section **2306(b)** is amended by striking "commercial items" and inserting "commercial products or commercial services".

(5) Section **2306a** is amended—

(A) in subsection (b)—

(i) in paragraph (1)(B), by striking "a commercial item" and inserting "a commercial product or a commercial service";

(i) in paragraph (2)—

(I) by striking "COMMERCIAL ITEMS" in the paragraph heading and inserting "COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES"; and

(II) by striking "commercial item" each place it appears and inserting "commercial product or commercial services";

(iii) in paragraph (3)—

(I) by striking "COMMERCIAL ITEMS" in the paragraph heading and inserting "COMMERCIAL PRODUCTS"; and

(II) by striking "item" each place it appears and inserting "product"; and

(iv) in paragraph (4)—

(I) by striking "COMMERCIAL ITEM" in the paragraph heading and inserting "COMMERCIAL PRODUCT OR COMMERCIAL SERVICE";

(II) by striking "commercial item" in subparagraph (A) after "applying the";

(III) by striking "prior commercial item determination" in subparagraph (A) and inserting "prior commercial product or commercial service determination";

(IV) by striking "of such item" in subparagraph (A) and inserting "of such product or service";

(V) by striking "of an item previously determined to be a commercial item" in subparagraph (B) and inserting "of a product or service previously determined to be a commercial product or a commercial service";

(VI) by striking "of a commercial item," in subparagraph (B) and inserting "of a commercial product or a commercial service, as the case may be,";

(VII) by striking "the commercial item determination" in subparagraph (B) and inserting "the commercial product or commercial service determination"; and

(VIII) by striking "commercial item" in subparagraph (C); and

(v) in paragraph (5), by striking "commercial items" and inserting "commercial products or commercial services";

(B) in subsection (d)(2), by striking "commercial items" each place it appears and inserting "commercial products or commercial services"; and

(C) in subsection (h)—

(i) in paragraph (2), by striking "commercial items" and inserting "commercial products or commercial services"; and

(ii) by striking paragraph (3).

(6) Section **2307(f)** is amended—

(A) by striking "COMMERCIAL ITEMS" in the subsection heading and inserting "COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES";

(B) by striking "commercial items" in paragraphs (1) and (2) and inserting "commercial products and commercial services".

(7) Section **2320(b)** is amended—

(A) in paragraph (1), by striking "a commercial item, the item" and inserting "a commercial product , the product"; and

(B) in paragraph (9)(A), by striking "any noncommercial item or process" and inserting "any noncommercial product or process".

(8) Section **2321(f)** is amended—

(A) in paragraph (1)—

(i) by striking "commercial items" and inserting "commercial products"; and

(ii) by striking "the item" both places it appears and inserting "commercial products"; and

(B) in paragraph (2)(A)—

(i) in clauses (i) and (ii), by striking "commercial item" and inserting "commercial product"; and

(ii) in clause (iii), by striking "is a commercially" and all that follows and inserting "is a commercial product; and".

(9) Section **2324(l)(1)(A)** is amended by striking "commercial items" and inserting "commercial products or commercial services".

(10) Section **2335(b)** is amended—

(A) by striking "commercial items" and inserting "commercial products and commercial services"; and

(B) by striking ", the procurement of commercial-off-the-shelf-items,".

(d) AMENDMENTS TO CHAPTER **140** OF TITLE 10, UNITED STATES CODE.—Chapter 140 of title 10, United States Code, is amended as follows:

(1) Section **2375** is amended—

(A) in subsection (a)—

(i) by striking "commercial item" in paragraphs (1) and (2) and inserting "commercial product or commercial service"; and

(ii) by striking paragraph (3);

(B) in subsections (b) and (c)—

(i) by striking "COMMERCIAL ITEMS" in the subsection heading and inserting "COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES"; and

(ii) by striking “commercial items” each place it appears and inserting “commercial products and commercial services”;

(C) by striking subsection (d); and

(D) in subsection (e)(3), by striking “commercial items” and inserting “commercial products and commercial services”.

(2) Section **2376(1)** is amended—

(A) by striking “terms ‘commercial item’,” and inserting “terms ‘commercial product’, ‘commercial service’,”; and

(B) by striking “chapter 1 of title 41” and inserting “sections 103, 103a, 110, 105, and 102, respectively, of title 41”.

(3) Section **2377** is amended—

(A) in subsection (a)—

(i) in paragraph (2), by striking “commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items” and inserting “commercial services or commercial products or, to the extent that commercial products suitable to meet the agency's needs are not available, nondevelopmental items other than commercial products”; and

(ii) in paragraph (3), by striking “commercial items and nondevelopmental items other than commercial items” and inserting “commercial services, commercial products, and nondevelopmental items other than commercial products”;

(B) in subsection (b)—

(i) in paragraphs (1) and (2), by striking “commercial items or nondevelopmental items other than commercial items” and inserting “commercial services or commercial products or nondevelopmental items other than commercial products”;

(ii) in paragraphs (3) and (4), by striking “commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items” and inserting “commercial services or commercial products or, to the extent that commercial products suitable to meet the agency's needs are not available, nondevelopmental items other than commercial products”; and

(iii) in paragraphs (5) and (6), by striking “commercial items” and inserting “commercial products and commercial services”;

(C) in subsection (c)—

(i) in paragraph (2), by striking “commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items” and inserting “commercial services or commercial products or, to the extent that commercial products suitable to meet the agency's needs are not available, nondevelopmental items other than commercial products”; and

(ii) in paragraph (4), by striking “items other than commercial items” and inserting “products other than commercial products or services other than commercial services”;

(D) in subsection (d)—

(i) in the first sentence, by striking "commercial items" and inserting "commercial products or commercial services";

(ii) in paragraph (1), by striking "items" and inserting "products or services"; and

(iii) in paragraph (2), by striking "items" and inserting "products or services"; and

(E) in subsection (e)(1), by striking "commercial items" and inserting "commercial products and commercial services".

(4) Section **2379** is amended—

(A) by striking "COMMERCIAL ITEMS" in the headings of subsections (b) and (c) and inserting "COMMERCIAL PRODUCTS";

(B) by striking "commercial item" and "commercial items" **each place** they appear and inserting "commercial product" and "commercial products", respectively;

(C) in subsections (b) and (c), by striking "commercially available off-the-shelf item as defined in section 104 of title 41" and inserting "commercial product"; and

(D) in subsection (d)(3), by striking "commercially available off-the-shelf item" and inserting "commercial product".

(5) Section **2380** is amended—

(A) in subsection (a), by striking "commercial item determinations" in paragraphs (1) and (2) and inserting "commercial product and commercial service determinations"; and

(B) in subsection (b) (as added by section 848 of the National Defense Authorization Act for Fiscal Year 2018)—

(i) by striking "ITEM" in the subsection heading;

(ii) by striking "an item" each place it appears and inserting "a product or service";

(iii) by striking "item" after "using commercial" each place it appears;

(iv) by striking "prior commercial item determination" and inserting "prior commercial product or service determination";

(v) by striking "such item" and inserting "such product or service"; and

(vi) by striking "the item" both places it appears and inserting "the product or service".

(6) Section **2380a** is amended—

(A) in subsection (a)—

(i) by striking "items and" and inserting "products and"; and

(ii) by striking "commercial items" and inserting "commercial products and commercial services, respectively,"; and

(B) in subsection (b), by striking "commercial items" and inserting "commercial services".

(7) Section **2380B** is amended by striking "commercial item" and inserting "commercial product".

(8) AMENDMENTS TO HEADINGS, ETC.—

(A) The heading of such chapter is amended to read as follows:

"CHAPTER 140—PROCUREMENT OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES".

(B) The heading of section 2375 is amended to read as follows:

"§ 2375. Relationship of other provisions of law to procurement of commercial products and commercial services".

(C) The heading of section 2377 is amended to read as follows:

"§ 2377. Preference for commercial products and commercial services".

(D) The heading of section 2379 is amended to read as follows:

"§ 2379. Procurement of a major weapon system as a commercial product: requirement for prior determination by Secretary of Defense and notification to Congress".

(E) The heading of section 2380 is amended to read as follows:

"§ 2380. Commercial product and commercial service determinations by Department of Defense".

(F) The heading of section 2380a is amended to read as follows:

"§ 2380a. Treatment of certain products and services as commercial products and commercial services".

(G) Section 2380B is redesignated as section 2380b and the heading of that section is amended to read as follows:

"§ 2380b. Treatment of commingled items purchased by contractors as commercial products".

(H) The table of sections at the beginning of such chapter is amended to read as follows:

"2375. Relationship of other provisions of law to procurement of commercial products and commercial services.
"2376. Definitions.
"2377. Preference for commercial products and commercial services.
"2379. Procurement of a major weapon system as a commercial product: requirement for prior determination by Secretary of Defense and notification to Congress.
"2380. Commercial product and commercial service determinations by Department of Defense.
"2380a. Treatment of certain products and services as commercial products and commercial services.
"2380b. Treatment of commingled items purchased by contractors as commercial products.".

(e) OTHER AMENDMENTS TO TITLE 10, UNITED STATES CODE.—Title 10, United States Code, is further amended as follows:

(1) Section **2226(b)** is amended by striking "for services" and all that follows through "deliverable items" and inserting "for services or deliverable items".

(2) Section **2384(b)(2)** is amended by striking "commercial items" and inserting "commercial products".

(3) Section **2393(d)** is amended by striking "commercial items (as defined in section 103 of title 41)" and inserting "commercial products or commercial services (as defined, respectively, in sections 103 and 103a of title 41)".

(4) Section **2402(d)** is amended—

(A) in paragraph (1), by striking "commercial items" both places it appears and inserting "commercial products or commercial services"; and

(B) in paragraph (2), by striking "the term" and all that follows and inserting "the terms 'commercial product' and 'commercial service' have the meanings given those terms in sections 103 and 103a, respectively, of title 41.".

(5) Section **2408(a)(4)(B)** is amended by striking "commercial items (as defined in section 103 of title 41)" and inserting "commercial products or commercial services (as defined, respectively, in sections 103 and 103a of title 41)".

(6) Section **2410b(c)** is amended by striking "commercial items" and inserting "commercial products".

(7) Section **2410g(d)(1)** is amended by striking "Commercial items (as defined in section 103 of title 41)" and inserting "Commercial products or commercial services (as defined, respectively, in sections 103 and 103a of title 41)".

(8) Section **2447a** is amended—

(A) in subsection (a)(2), by striking "commercial items and technologies" and inserting "commercial products and technologies"; and

(B) in subsection (c), by inserting before the period at the end the following: "and the term 'commercial product' has the meaning given that term in sections103 of title 41".

(9) Section **2451(d)** is amended by striking "commercial items" and inserting "commercial products (as defined in section 103 of title 41)".

(10) Section **2464** is amended—

(A) in subsection (a)—

(i) in paragraph (3), by striking "commercial items" and inserting "commercial products"; and

(ii) in paragraph (5), by striking "commercial items" the first place it appears and all that follows in that paragraph and inserting "commercial products covered by paragraph (3) are commercial products as defined in section 103 of title 41."; and

(B) in subsection (c)—

(i) by striking "COMMERCIAL ITEMS" in the subsection heading and inserting "COMMERCIAL PRODUCTS"; and

(ii) by striking "commercial item" and inserting "commercial product".

(11) Section **2484(f)** is amended—

(A) by striking "COMMERCIAL ITEMS" in the subsection heading and inserting "COMMERCIAL PRODUCTS"; and

(B) by striking "commercial item" and inserting "commercial product".

(12) The items relating to chapter 140 in the tables of chapters at the beginning of subtitle A, and at the beginning of part IV of subtitle A, are amended to read as follows:

"140. Procurement of Commercial Products and Commercial Services …….…. 2377".

(f) AMENDMENTS TO PROVISIONS OF NATIONAL DEFENSE AUTHORIZATION ACTS.—

(1) Section 806(b) of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Public Law 102-190; **10 U.S.C. 2302 note**) is amended by striking "commercial items (as defined in section 103 of title 41, United States Code)" and inserting "commercial products or commercial services (as defined in sections 103 and 103a, respectively, of title 41, United States Code)".

(2) Section 821(e) 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. 2302 note**) is amended—

(1) by striking paragraph (2);

(2) by redesignating paragraph (3) as paragraph (2).

(3) Section 821(b) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; **10 U.S.C. 2304 note**) is amended—

(A) in paragraph (1), by striking "a commercial item" and inserting "a commercial product or a commercial service";

(B) in paragraph (2), by striking "commercial item" and inserting "commercial product "; and

(C) by adding at the end the following new paragraph"

"(3) The term 'commercial service' has the meaning provided by section 103a of title 41, United States Code.".

(4) Section 817 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314; **10 U.S.C. 2306 note**) is amended—

(A) in subsection (d)—

(i) in the subsection heading, by striking "ANNUAL REPORT ON BOTH COMMERCIAL ITEM AND EXCEPTIONAL CASE EXCEPTIONS AND WAIVERS" and inserting "ANNUAL REPORT ON COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES AND EXCEPTIONAL CASE EXCEPTIONS AND WAIVERS";

(ii) in paragraph (1), by striking "commercial item exceptions" and inserting "commercial product-commercial service exceptions"; and

(iii) in paragraph (2)(A)—

(I) by striking "commercial item exception" and inserting "commercial product-commercial service exception"; and

(II) by striking "commercial items" and inserting "commercial products or commercial services, as the case may be".

(B) in subsection (e)(2), by striking "commercial item exception" and inserting "commercial product-commercial service exception".

(5) Section 852(b)(2)(A)(ii) of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364; **10 U.S.C. 2324 note**) is amended by striking "a commercial item, as defined in section 103 of title 41" and inserting "a commercial product or a commercial service, as defined in sections 103 and 103a, respectively, of title 41".

(6) Section 805 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; **10 U.S.C. 2330 note**) is amended—

(A) in subsection (b), by striking "commercial items" in paragraphs (1) and (2)(A) and inserting "commercial services"; and

(B) in subsection (c)—

(i) by striking "ITEM" in the headings for paragraphs (1) and (2) and inserting "SERVICES";

(ii) in the matter in paragraph (1) preceding subparagraph (A), by striking "commercial item" and inserting "commercial service";

(iii) in paragraph (1)(A), by striking "a commercial item, as described in section 103(5) of title 41" and inserting "a product, as described in section 103a(1) of title 41";

(iv) in paragraph (1)(C)(i), by striking "section 103(6) of title 41" and inserting "section 103a(2) of title 41"; and

(v) in paragraph (2), by striking "item" and inserting "service".

(7) Section 849(d) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; **10 U.S.C. 2377 note**) is amended—

(A) by striking "commercial items" in paragraph (1) and inserting "commercial products";

(B) by striking "commercial item" in paragraph (3)(B)(i) and inserting "commercial product"; and

(C) by adding at the end the following new paragraph:

"(5) DEFINITION.—In this subsection, the term 'commercial product' has the meaning given that term in section 103 of title 41.".

(8) Section 856(a)(1) of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; **10 U.S.C. 2377 note**) is amended by striking "commercial items or services" and inserting "a commercial product or a commercial service, as defined in sections 103 and 103a, respectively, of title 41,".

(9) Section 879 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; **10 U.S.C. 2302 note**) is amended—

(A) in the section heading, by striking "**COMMERCIAL ITEMS**" and inserting "**COMMERCIAL PRODUCTS**";

(B) in subsection (a), by striking "commercial items" and inserting "commercial products";

(C) in subsection (c)(3)—

(i) by striking "COMMERCIAL ITEMS" in the paragraph heading and inserting "COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES"; and

(ii) by striking "commercial items" and inserting "commercial products or commercial services"; and

(D) in subsection (e)(2), by striking "item" in subparagraphs (A) and (B)

(10) Section 880 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; **41 U.S.C. 3301 note**) is amended by striking "commercial items" in subsection (a)(1) and inserting "commercial products".

(g) CONFORMING AMENDMENTS TO OTHER STATUTES.—

(1) Section 604(g) of the American Recovery and Reinvestment Act of 2009 **(6 U.S.C. 453b(g))** is amended—

(A) by striking "COMMERCIAL ITEMS" in the subsection heading and inserting "COMMERCIAL PRODUCTS";

(B) by striking "procurement of commercial" in the first sentence and all that follows through "items listed" and inserting "procurement of commercial products notwithstanding section 1906 of title 41, United States Code, with the exception of commercial products listed"; and

(C) in the second sentence—

(i) by inserting "product" after "commercial"; and

(ii) by striking "in the" and all that follows and inserting "in section 103 of title 41, United States Code.".

(2) Section 142 of the Higher Education Act of 1965 (**20 U.S.C. 1018a**) is amended—

(A) in subsection (e)—

(i) by striking "COMMERCIAL ITEMS" in the subsection heading and inserting "COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES";

(ii) by striking "that commercial items" and inserting "that commercial products or commercial services";

(iii) by striking "special rules for commercial items" and inserting "special rules for commercial products and commercial services";

(iv) by striking "without regard to—" and all that follows through "dollar limitation" and inserting "without regard to any dollar limitation";

(v) by striking "; and" and inserting a period; and

(vi) by striking paragraph (2);

(B) in subsection (f)—

(i) by striking "ITEMS" in the subsection heading and inserting "PRODUCTS AND SERVICES";

(ii) by striking "ITEMS" in the heading of paragraph (2) and inserting "PRODUCTS AND SERVICES"; and

(iii) by striking "a commercial item" in paragraph (2) and inserting "a commercial product or a commercial service";

(C) in subsection (h)—

(i) by striking "ITEMS" in the subsection heading and inserting "SERVICES"; and

(ii) by striking "commercial items" in paragraph (1) and inserting "commercial services"; and

(D) in subsection (l)—

(i) by redesignating paragraphs (2), (3), (4), and (5) as paragraphs (3), (4), (5), and (6), respectively;

(ii) by striking paragraph (1) and inserting the following new paragraphs:

"(1) COMMERCIAL PRODUCT.—The term 'commercial product' has the meaning given the term in section 103 of title 41, United States Code.

"(2) COMMERCIAL SERVICE.—The term 'commercial service' has the meaning given the term in section 103a of title 41, United States Code.";

(iii) in paragraph (3), as so redesignated, by striking "in section" and all that follows and inserting "in section 152 of title 41, United States Code.";

(iv) in paragraph (5), as so redesignated—

(I) by striking "COMMERCIAL ITEMS" in the paragraph heading and inserting "COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES";

(II) by striking "commercial items" and inserting "commercial products and commercial services"; and

(III) by striking "pursuant to" and all that follows and inserting "pursuant to sections 1901 and 3305(a) of title 41, United States Code."; and

(v) in paragraph (6), as so redesignated, by striking "pursuant to" and all that follows and inserting "pursuant to sections 1901(a)(1) and 3305(a)(1) of title 41, United States Code.".

(3) Section **3901(a)(4)(A)(ii)(II) of title 31**, United States Code, is amended by striking "commercial item" and inserting "commercial product".

(4) Section 2455(c)(1) of the Federal Acquisition Streamlining Act of 1994 (**31 U.S.C. 6101 note**) is amended—

(A) by striking "commercially available off-the-shelf items (as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))" and inserting "commercial products (as defined in section 103 of title 41, United States Code)"; and

(B) by striking "commercial items" and inserting "commercial products".

(5) Section 508(f) of the Federal Water Pollution Control Act (**33 U.S.C. 1368(f)**) is amended—

(A) in paragraph (1), by striking "commercial items" and inserting "commercial products or commercial services"; and

(B) in paragraph (2), by striking "the term" and all that follows and inserting "the terms 'commercial product' and 'commercial service' have the meanings given those terms in sections 103 and 103a, respectively, of title 41, United States Code.".

(6) Section **3707 of title 40**, United States Code, is amended by striking "a commercial item (as defined in section 103 of title 41)" and inserting "a commercial product (as defined in section 103 of title 41) or a commercial service (as defined in section 103a of title 41)".

(7) Subtitle III of **title 40**, United States Code, is amended—

(A) in section **11101(1)**, by striking "COMMERCIAL ITEM.—The term 'commercial item' has" and inserting "COMMERCIAL PRODUCT.—The term 'commercial product' has"; and

(B) in section **11314(a)(3)**, by striking "items" each place it appears and inserting "products".

(8) Section 8301(g) of the Federal Acquisition Streamlining Act of 1994 (**42 U.S.C. 7606 note**) is amended by striking "commercial items" and inserting "commercial products or commercial services".

(9) Section **40118(f) of title 49,** United States Code, is amended—

(A) in paragraph (1), by striking "commercial items" and inserting "commercial products"; and

(B) in paragraph (2), by striking "commercial item" and inserting "commercial product".

(10) **Chapter 501 of title 51**, United States Code, is amended—

(A) in sections **50113(c)**—

(i) by striking "COMMERCIAL ITEM" in the subsection heading and inserting "COMMERCIAL PRODUCT OR COMMERCIAL SERVICE"; and

(ii) by striking "commercial item" in the second sentence and inserting "commercial product or commercial service"; and

(B) in sections **50115(b)**—

(i) by striking "COMMERCIAL ITEM" in the subsection heading and inserting "COMMERCIAL PRODUCT OR COMMERCIAL SERVICE"; and

(ii) by striking "commercial item" in the second sentence and inserting "commercial product or commercial service"; and

(C) in sections **50132(a)**—

(i) by striking "COMMERCIAL ITEM" in the subsection heading and inserting "COMMERCIAL SERVICE"; and

(ii) by striking "commercial item" in the second sentence and inserting "commercial service".

(h) SAVINGS PROVISION.—Any provision of law that on the day before the effective date of this section is on a list of provisions of law included in the Federal Acquisition Regulation pursuant to section 1907 of title 41, United States Code, shall be deemed as of that effective date to be on a list of provisions of law included in the Federal Acquisition Regulation pursuant to section 1906 of such title.

SEC. 302. DEFINITION OF SUBCONTRACT.

(a) STANDARD DEFINITION IN TITLE 41, UNITED STATES CODE.—

(1) IN GENERAL.—Chapter 1 of title 41, United States Code, is amended—

(A) by redesignating sections 115 and 116 as sections 116 and 117, respectively; and

(B) by inserting after section 114 the following new section 115:

"§ 115. Subcontract

"(a) IN GENERAL.—In this subtitle, the term 'subcontract' means a contract entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract. The term includes a transfer of a

commercial product or commercial service between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

"(b) MATTERS NOT INCLUDED.—In this subtitle, the term 'subcontract' does not include—

"(1) a contract the costs of which are applied to general and administrative expenses or indirect costs; or

"(2) an agreement entered into by a contractor or subcontractor for the supply of a commodity, a commercial product, or a commercial service that is intended for use in the performance of multiple contracts.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 41, United States Code, is amended by striking the items relating to sections 115 and 116 and inserting the following new items:

"115. Subcontract.
"116. Supplies.
"117. Technical data.".

(b) CONFORMING AMENDMENTS TO TITLE 41, UNITED STATES CODE.—Title 41, United States Code, is further amended as follows:

(1) Section 1502(b)(1) is amended—

(A) by striking subparagraph (A);

(B) by redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively; and

(C) in subparagraph (B), as so redesignated, by striking "Subparagraph (B)" and inserting "Subparagraph (A)".

(2) Section 1906 is amended—

(A) in subsection (c)—

(i) by striking paragraph (1);

(ii) by redesignating paragraphs (2), (3), and (4) as paragraphs (1), (2), and (3), respectively;

(iii) in paragraph (1), as so redesignated, by striking "paragraph (3)" and inserting "paragraph (2)"; and

(iv) in paragraph (2), as so redesignated, by striking "paragraph (2)" and inserting "paragraph (1)"; and

(B) in subsection (e), by striking "(c)(3)" both places it appears and inserting "(c)(2)".

(3) Section 3307(e)(2) is amended—

(A) by striking subparagraph (A);

(B) by redesignating subparagraphs (B), (C), (D), and (E) as subparagraphs (A), (B), (C), and (D), respectively;

(C) in subparagraph (C), as so redesignated—

(i) by striking "subparagraph (B)" and inserting "subparagraph (A)"; and

(ii) by striking "subparagraph (C)" and inserting "subparagraph (B)"; and

(D) in subparagraph (D), as so redesignated, by striking "subparagraph (B)" and inserting "subparagraph (A)".

(4) Section 3501(a) is amended by striking paragraph (3).

(c) INCORPORATION OF TITLE 41 DEFINITION IN CHAPTERS 137 AND 140 OF TITLE 10, UNITED STATES CODE.—

(1) DEFINITIONS FOR PURPOSES OF CHAPTER 137.—Section 2302(3) of title 10, United States Code, is amended by adding at the end the following new subparagraph:

"(N) The term 'subcontract'.".

(2) DEFINITIONS FOR PURPOSES OF CHAPTER 140.—

(A) Section 2375(c) of title 10, United States Code, is amended—

(i) by striking paragraph (3); and

(ii) by redesignating paragraph (4) as paragraph (3).

(B) Section 2376(1) of such title is amended by striking "and 'commercial component' have" and inserting "'commercial component', and 'subcontract' have".

SEC. 303. LIMITATION ON APPLICABILITY TO DEPARTMENT OF DEFENSE COMMERCIAL CONTRACTS OF CERTAIN PROVISIONS OF LAW AND CERTAIN EXECUTIVE ORDERS AND REGULATIONS.

(a) INAPPLICABILITY OF CERTAIN PROVISIONS OF LAW.—

(1) SECTION 2375.—Section **2375** of title 10, United States Code, is amended—

(A) in subsection (b)(2), by striking "January 1, 2015" and inserting "October 13, 1994"; and

(B) in subsections (b)(2), (c)(2), and (d)(2), by striking "unless the" and all that follows and inserting a period.

(2) SECTION 2533a.—Section **2533a** of such title is amended—

(A) in subsection (a), by striking "through (h)" and inserting "through (i)"; and

(B) by striking subsection (i) and inserting the following:

"(i) EXCEPTION FOR PURCHASES OF COMMERCIAL PRODUCTS.—Subsection (a) does not apply to purchases of commercial products, as defined in section 103 of title 41.";

(3) SECTION 2533b.—Section **2533b** of such title is amended—

(A) by striking subsection (h) and inserting the following:

"(h) EXCEPTION FOR PURCHASES OF COMMERCIAL PRODUCTS.—Subsection (a) does not apply to acquisitions of commercial products.";

(B) in subsection (j)(2), by striking "commercially available off-the-shelf items" and inserting "commercials products"; and

(C) in subsection (m), by striking paragraph (5) and inserting the following:

"(5) The term 'commercial product' has the meaning provided in section 103 of title 41.".

(b) INAPPLICABILITY OF CERTAIN EXECUTIVE ORDERS AND REGULATIONS.—Chapter 140 of title 10, United States Code, is amended by inserting after section 2375 the following new section:

"§ 2375a. Applicability of certain executive orders and regulations

"(a) EXECUTIVE ORDERS.—

"(1) COMMERCIAL CONTRACTS.—No Department of Defense commercial contract shall be subject to an Executive order issued after the date of the enactment of this section unless the Executive order specifically provides that it is applicable to contracts for the procurement of commercial products and commercial services by the Department of Defense.

"(2) SUBCONTRACTS UNDER COMMERCIAL CONTRACTS.—No subcontract under a Department of Defense commercial contract shall be subject to an Executive order issued after the date of the enactment of this section unless the Executive order specifically provides that it is applicable to subcontracts under Department of Defense contracts for the procurement of commercial products and commercial services.

"(b) REGULATIONS AND POLICIES.—

"(1) COMMERCIAL CONTRACTS.—No Department of Defense commercial contract shall be subject to any Department of Defense regulation or policy prescribed after the date of the enactment of this section unless the regulation or policy specifically provides that it is applicable to contracts for the procurement of commercial products and commercial services by the Department of Defense.

"(2) SUBCONTRACTS UNDER COMMERCIAL CONTRACTS.—No subcontract under a Department of Defense commercial contract shall be subject to any Department of Defense regulation or order prescribed after the date of the enactment of this section unless the regulation or policy specifically provides that it is applicable to subcontracts under Department of Defense contracts for the procurement of commercial products and commercial services.

"(c) DEPARTMENT OF DEFENSE COMMERCIAL CONTRACTS.—In this section, the term "Department of Defense commercial contract' means a contract for the procurement of a commercial product or commercial service entered into by the Secretary of Defense.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2375 the following new item:

"2375a. Applicability of certain Executive orders and regulations.".

- Amend FAR, Subpart 2.101, Definitions of Words and Terms, to revise the following definitions:

  Commercial component means any component that is a commercial ~~item~~ product.

  Commercial computer software means any computer software that is a commercial ~~item~~ product or commercial service.

- Amend FAR, Subpart 2.101, Definitions of Words and Terms, to delete the following definition:

  ~~*Commercial item* means—~~

  ~~(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—~~

  ~~(i) Has been sold, leased, or licensed to the general public; or,~~

  ~~(ii) Has been offered for sale, lease, or license to the general public;~~

  ~~(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;~~

  ~~(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for—~~

  ~~(i) Modifications of a type customarily available in the commercial marketplace; or~~

  ~~(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;~~

  ~~(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;~~

  ~~(5) Installation services, maintenance services, repair services, training services, and other services if—~~

~~(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and~~

~~(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;~~

~~(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—~~

~~(i) "Catalog price" means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and~~

~~(ii) "Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.~~

~~(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or~~

~~(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.~~

- Amend FAR, Subpart 2.101, Definitions of Words and Terms, to add the following definitions:

Commercial product means -

(1) A product, other than real property, that—

(A) is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes; and

(B) has been sold, leased, or licensed, or offered for sale, lease, or license, to the general public.

(2) A product that—

(A) evolved from a product described in paragraph (1) through advances in technology or performance; and

(B) is not yet available in the commercial marketplace but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(3) A product that would satisfy the criteria in paragraph (1) or (2) were it not for—

(A) modifications of a type customarily available in the commercial marketplace; or

(B) minor modifications made to meet Federal Government requirements.

(4) A product that—

(A) is produced in response to a Federal Government drawing or specification; and

(B) is ordinarily produced using customer drawings or specifications for the general public using the same workforce, plant, or equipment.

(5) Any combination of products meeting the requirements of paragraph (1), (2), (3), or (4) that are of a type customarily combined and sold in combination to the general public.

(6) A product, or combination of products, referred to in paragraphs (1) through (5), even though the product, or combination of products, is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(7) A nondevelopmental item if the procuring agency determines, in accordance with conditions in the Federal Acquisition Regulation, that—

(A) the product was developed exclusively at private expense; and

(B) has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

Commercial service means -

(1) Installation services, maintenance services, repair services, training services, and other services if—

(A) those services are procured for support of a commercial product, regardless of whether the services are provided by the same source or at the same time as the commercial product; and

(B) the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

(2) Services of a type offered and sold competitively, in substantial quantities, in the commercial marketplace—

(A) based on established catalog or market prices;

(B) for specific tasks performed or specific outcomes to be achieved; and

(C) under standard commercial terms and conditions.

(3) A service, even though the service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

- Amend FAR, Subpart 2.101, Definitions of Words and Terms, to delete the following definition:

~~*Commercially available off the shelf (COTS) item*~~

~~(1) Means any item or supply (including construction material) that is—~~

~~(i) A commercial item (as defined in paragraph (1) of the definition in this section);~~

~~(ii) Sold in substantial quantities in the commercial marketplace; and~~

~~(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and~~

~~(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.~~

- Amend FAR, Subpart 2.101, Definitions of Words and Terms, to revise the following definition:

Nondevelopmental item means --

(1) A commercial ~~item~~ product;

(2) A previously developed item of supply that is in use by a department or agency of the Federal Government, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(3) An item of supply described in paragraph (1) or (2) that requires only minor modification or modifications of the type customarily available in the commercial marketplace to meet the requirements of the procuring department or agency; or

(4) An item of supply currently being produced that does not meet the requirements of paragraph (1), (2) or (3) solely because the item is not yet in use.

- Amend FAR, Subpart 2.101, Definitions of Words and Terms, to add the following definitions:

"*Subcontract* means any contract, as defined in Subpart 2.101, entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract. The term includes a transfer of commercial products or commercial services between divisions, subsidiaries, or affiliates of a contractor or subcontractor. The term does not include contracts the costs of which are normally applied to general and administrative expenses or indirect costs. The term does not include agreements entered into by a contractor or subcontractor for the supply of commodities, commercial products, or commercial services that are intended for use in the performance of multiple contracts.""

"*Subcontractor* means any person other than the prime contractor (including a supplier, distributor, vendor, consultant, or firm) furnishing supplies, materials, equipment or services under a subcontract."

Recommendation 3

Termination Clauses

FAR Subpart 12.403

(a) *General.* The clause at 52.212-4 permits the Government to terminate a contract for commercial items either for the convenience of the Government or for cause. However, the paragraphs in 52.212-4 entitled "Termination for the Government's Convenience" and "Termination for Cause" contain concepts which differ from those contained in the termination clauses prescribed in Part 49. Consequently, contracting officers shall follow the requirements and procedures in this section~~. Contracting officers may continue to use Part 49 as guidance to the extent that Part 49 does not conflict with this section~~ and the ~~language of the~~ termination paragraphs in 52.212-4.

FAR 52.212-4(l) and (m)

(l) *Termination for the Government's convenience.* The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination~~.~~ to fairly compensate the contractor. Reasonable charges include costs and reasonable profit on such costs incurred in anticipation of performing the entire contract, not adequately reflected as a percentage of the work performed. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) *Termination for cause*. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. The Government's right to terminate this contract for a reason other than late delivery may be exercised if the contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

Section 2
Contract Compliance and Audit

Improve the contract compliance and audit processes by focusing on the needs of contracting officers and acquisition team members.

RECOMMENDATIONS

Enhance DCAA's Focus on the Contracting Officer and Acquisition Team

Rec. 5: Align DCAA's mission statement to focus on its primary customer, the contracting officer.

Rec. 6: Revise the elements of DCAA's annual report to Congress to incorporate multiple key metrics.

Recommendations continued on following page.

RECOMMENDATIONS

Enhance DCAA's Focus on the Contracting Officer and Acquisition Team (Continued)

Rec. 7: Provide flexibility to contracting officers and auditors to use audit and advisory services when appropriate.

- **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.
- **7b:** Define the term *audit*.
- **7c:** DCAA should use the full range of audit and nonaudit services available.
- **7d:** Direct a review of the roles of DCAA and DCMA to ensure appropriate alignment and eliminate redundancies.

Rec. 8: Establish statutory time limits for defense oversight activities.

Rec. 9: Permit DCAA to use IPAs to manage resources to meet time limits.

Use Accepted Commercial Standards and Practices with Objective and Standardized Compliance Criteria

Rec. 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.

Rec. 11: Develop a Professional Practice Guide for DoD's oversight of contractor costs and business systems.

Rec. 12: Require DCAA to obtain peer review from a qualified external organization.

Provide More Effective and Efficient Contract Compliance Oversight

Rec. 13: Increase coverage of the effectiveness of contractor internal control audits by leveraging IPAs.

Rec. 14: Incentivize contractor compliance and manage risk efficiently through robust risk assessment.

Rec. 15: Clarify and streamline the definition of and requirements for an adequate *incurred cost proposal* to refocus the purpose of DoD's oversight.

INTRODUCTION

The DoD contract compliance oversight process is one of the barriers to entry into the DoD marketplace because DoD's oversight process is not always timely, efficient, or effective. Stakeholders argue that the costs of DoD's compliance process outweigh the benefits the government attains.

Contracting officers are the warranted agents within DoD authorized to award, administer, and terminate contracts.[1] Under this authority, contracting officers "are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships."[2] As part of their duty, contracting officers manage risk allocation between contractors and government by choosing effective contract types for the goods and services they acquire. Contract types are generally either fixed priced or flexibly priced, and the decision to use fixed priced or flexibly priced contracts directly affects what actions contracting officers can take to protect the government's interests.

A "firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss."[3] For competitively awarded contracts, the contracting officer is generally able to rely on market forces to evaluate the reasonableness of an offeror's price. For noncompetitively awarded contracts, the contracting officer relies on other means of analysis—typically historical analysis, parametric estimate, or cost and pricing data. Fixed price contracts are generally more predictable and less risky to DoD.

For flexibly priced contracts, DoD "agrees to pay those costs of the contractor that are allowable, reasonable, and allocable to the extent prescribed by the contract."[4] During the performance of the flexibly priced contract, contracting officers may decide to provide additional funding, withhold funding, or terminate the contract. The flexible nature of the contract means the government will pay all costs incurred in performance subject to the terms of the contract. The flexibility of these contracts adds risk to DoD, so only contractors with adequate accounting systems may be awarded these types of contracts.[5]

Contracting officers award more than $250 billion in contracts each year to support DoD's warfighters.[6] More than half of these awards are noncompetitive and more than a third are flexibly priced contracts.[7] The absence of market forces in noncompetitive fixed price contracts and the uncertainties of flexibly priced contracts may require that contracting officers obtain additional assurance that DoD pays

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[1] Contracting Officers: Authority, FAR 1.602-1.
[2] Ibid.
[3] Firm-fixed-price contracts: Description, FAR, 16.202-1.
[4] GAO, *Contract Audits: Role in Helping Ensure Effective Oversight and Reducing Improper Payments, GAO-11-331T,* 4, accessed October 23, 2017, http://www.gao.gov/assets/130/125445.pdf.
[5] Selecting Contract Types: Factors in Selecting Contract Types, FAR, Subpart 16.104(i). Cost-Reimbursement Contracts: Limitations, FAR 16.301-3(3).
[6] GAO, Contracting Data Analysis: Assessment of Government-wide Trends, GAO-17-244SP, 5, accessed October 24, 2017, http://www.gao.gov/assets/690/683273.pdf.
[7] Section 809 Panel staff analysis of USASpending.gov data for FY 2017: 33.6 percent or $77.8 billion of cost-type contracts out of $231.9 billion total awarded in FY 2017; 56.1 percent or $130.2 billion noncompetitive contracts out of $231.9 billion total awarded in FY 2017.

contractors fair prices. This responsibility includes ensuring that DoD is not charged inappropriate costs.

DoD contracting officers obtain this additional assurance by requiring contractors to maintain effective internal controls for defense contractor accounting systems and other business systems. The presence or absence of contractor internal controls is a critical risk factor for determining not only what gets reviewed or audited but also how, and to what extent, it must be reviewed or audited to provide contracting officers sufficient levels of assurance. Without assurance that a defense contractor has effective internal controls for its accounting system and other business systems, the reviewers and auditors default to determining virtually everything as high risk. This determination may result in more areas being reviewed than warranted and lead to performing more substantive tests than otherwise would be required. When auditors cannot obtain sufficient assurance that internal controls are effective, they must perform less efficient audits that are generally more costly and time-consuming.

The FAR directs contracting officers to "request and consider the advice of specialists in audit."[8] In practice, this generally results in contracting officers using the Defense Contract Audit Agency (DCAA) and the Defense Contract Management Agency (DCMA) for audit, advisory, and contract management services.

DCAA and DCMA are essential components of DoD's system of contracting internal controls. They provide many different services based on contract phase, need, and risk. Both DCAA and DCMA provide advisory or nonaudit services; however, only DCAA performs audits that must meet professional auditing standards. Both audit and nonaudit services can be valuable if used appropriately to meet contracting officers' needs.

Table 2-1. Example of DCAA and DCMA Audit and Nonaudit Services[9]

Contract Phase and Service	Audit and Nonaudit Services
Preaward and Award Phase	
DCMA Cost and Pricing	**Nonaudit:** DCMA Cost and Pricing Center and its integrated Cost Analysis Teams can provide complete proposal pricing reports or tailored prices on individual components of a contractor's proposal. DCMA-INST 120
Accounting System	**Audit:** DCAA determines adequacy of contractors' accounting systems prior to award of cost-reimbursable or other flexibly priced contracts. FAR § 16.301-3(a)(1).

[8] Contracting Officers: Responsibilities, FAR 1.602-2.
[9] Section 809 Panel staff analysis of audit and nonaudit services based on the following: GAO, *Contract Audits: Role in Helping Ensure Effective Oversight and Reducing Improper Payments, GAO-11-331T,* accessed October 23, 2017, http://www.gao.gov/assets/130/125445.pdf and "DCMA Policy Publications," Defense Contract Management Agency, accessed October 26, 2017, http://www.dcma.mil/POLICIES/.

Contract Phase and Service	Audit and Nonaudit Services
Contractor Accounting Disclosure Statements	**Audit:** DCAA reviews contractors' disclosure statements for adequacy and CAS compliance and determines whether contractors' disclosure statements are current, accurate, and complete. DCAA also reviews disclosure statements during the postaward phase if contractors revise them. FAR §§ 30.202-6(c), 30.202-7 and 30.601(c).
Estimating Systems	**Audit:** DCAA determines adequacy of contractor estimating systems. FAR 15.407-5 and DFARS 252.215-7002(d), (e).
Earned Value Management System (EVMS) Review	**Nonaudit:** DCMA reviews and determines whether contractors' or subcontractors' EVMS complies with American National Standards Institute/Electronic Industries Alliance Standard 748 (ANSI/EIA-748). FAR Subpart 34.2, 52.234-4, and DFARS 252.234-7002
Contract Price Proposals and Forward Pricing Proposals	**Audit:** DCAA examines contractor records to ensure that cost or pricing data are accurate, current, and complete and support the determination of fair and reasonable prices. 10 U.S.C. §§ 2306a and 2313 (DoD) and 41 U.S.C. § 254d (other agencies); FAR Subpart 15.4 (esp. FAR 15.404-2(c)) and 52.215-2(c); and DFARS 215.404-1.
Financial Liaison Advisory Services	**Nonaudit:** DCAA director establishes and maintains liaison auditors and financial advisors, as appropriate, at major procuring and contract administration offices. These services are also provided during the postaward phase, as needed. DoDD 5105.36, paras. 7.1.1 and 5.9.
	Postaward Administration and Management Phase
Purchasing Systems Review	**Nonaudit:** DCMA determines adequacy of contractors' or subcontractors' purchasing system. FAR Subpart 44.3 and DFARS 252.244-7001
Government Property System Review	**Nonaudit:** DCMA reviews and determines adequacy of contractors' or subcontractors' government property management system. FAR Part 45, 52.245-1, and DFARS 252.245-7003.
Progress Payments	**Nonaudit:** DCAA verifies amount claimed, determines allowability of contractor requests for cost-based progress payments, and determines if the payment will result in undue financial risk to the government. FAR 32.503-3, 32.503-4, and 52.232-16.
Incurred Cost Claims	**Audit:** DCAA determines acceptability of contractors' claimed costs incurred and submitted by contractors for reimbursement under cost-reimbursable, fixed-price incentive, and other types of flexibly priced contracts and compliance with contract terms, FAR, and CAS, if applicable. FAR 42.101, 42.803(b), and DFARS 242.803.
Billing Rates and Final Indirect Cost Rates	**Audit:** DCAA may establish billing rates for interim indirect costs and final indirect cost rates as well as a Contracting Officer. FAR 42.704, 42.705 and 42.705-2 and DFARS 42.705-2.
Defective Pricing	**Audit:** DCAA determines the amount of cost adjustments related to defective pricing. See above authorities to audit contractor cost and pricing data and FAR 15.407-1.

Contract Phase and Service	Audit and Nonaudit Services
CAS Compliance	**Audit:** DCAA determines contractor and subcontractor compliance with CAS set forth in 48 CFR § 9903.201 and determines cost impacts of noncompliance. FAR 1.602-2, 30.202-7, and 30.601(C).
Other Specially Requested Services	**Audit and Nonaudit:** DCAA conducts performance audits and other audits based on requests from DoD Components and requests from other federal agencies. DoD Directive 5105.36, Sec. 5
Paid Voucher Reviews	**Nonaudit:** DCAA reviews sampled vouchers after payment to approve them for provision payment. CAM 6-1007.6; FAR 42.803; DFARS 242.803; DoDD 5105.36, paras. 5.4 and 5.5; and DoD Financial Management Regulation (FMR), vol. 10, ch. 10, para. 100202.
Approval of Vouchers Prior to Payment	**Nonaudit:** DCAA reviews and approves contractor interim vouchers for payment and suspends payment of questionable costs. FAR 42.803; DFARS§ 242.803(b)(i)(B); DoD Directive 5105.36, paras. 5.4 and 5.5; and DoD FMR vol. 10, ch. 10, para. 100202.
Overpayment Reviews	**Nonaudit:** At the request of the contracting officer, DCAA reviews contractor data to identify potential contract overpayments. FAR 2.605, 52.216-7(g), (h)(2).
Closeout Phase	
Contract Closeout	**Nonaudit**: DCMA Contract Closeout Center and the Administrative Contract Officer lead the contract closeout process with the buying command, DFAS, DCAA, and other agencies as necessary. DCMA-INST 135
Contract Closeout Procedures and Audits	**Audit:** DCAA reviews final completion vouchers and the cumulative allowable cost worksheet and may review contract closing statements. DFARS 242.803(b)(i)(D).

History

Prior to 1952, the Army, Navy, and Air Force audited military contracts separately using their respective military service personnel and policies. In 1952 the services issued a contract audit manual that applied to Army, Navy, and Air Force contracts. In 1965, Secretary of Defense Robert McNamara directed establishment of DCAA to conduct all contract audits for DoD.[10] The contract auditors who previously worked for the military service audit agencies became part of DCAA.

Since the creation of DCAA, hundreds of acquisition studies and oversight reports have offered perspective, comment, and recommendations to improve contract audit and oversight. Pervasive challenges associated with contract audit and oversight exist, and these past efforts are useful in understanding where prior recommendations either succeeded or failed.

[10] GAO, *Contract Audits: Role in Helping Ensure Effective Oversight and Reducing Improper Payments, GAO-11-331T,* 5-6, accessed October 23, 2017, http://www.gao.gov/assets/130/125445.pdf.

Table 2-2. Contract Audit and Oversight Studies

Study	Perspective, Comment, or Recommendation
McNamara Initiatives, 1960s	In 1961 former Ford Motor Company executive, Robert McNamara, became the Secretary of Defense. McNamara laid the groundwork for many acquisition organizations in the early 1960's to reduce cost overruns and schedule delays, including DCAA and Defense Contract Administration Service (DCAS).[11]
The Blue Ribbon Panel, also known as the Fitzhugh Report, 1970	The Blue Ribbon Panel reported on a wide range of defense acquisition management challenges. One of the panel's conclusions was that no clear division of authority existed among the program manager, contracting officer, and contract auditor.[12]
Commission on Government Procurement, 1972	The Commission on Government Procurement recommended that OFPP set uniform CAS across government to simplify contracting with government. The commission also recommended DCAS be separated from the Defense Supply Agency (DSA) and consolidated with DCAA. This consolidation never occurred.[13]
Private Sector Survey on Cost Control, also known as the Grace Commission, 1983	The Grace Commission recommended DoD establish a procurement audit service (PAS) to review the internal controls of DoD's acquisition system. The PAS would also review the quality, accuracy, and scope of work performed by DCAA. PAS would report to the DoDIG. This recommendation was not implemented.[14]
Packard Commission, 1985	Established after years of perceived fraud, waste, and abuse, the Packard Commission concluded that: ▪ The public is "almost certainly mistaken about the extent of corruption in industry and waste in the Department." ▪ The lack of public support may actually affect important defense programs, weakening national security. ▪ Public opinion regarding runaway fraud and waste "undermines crucial support for implementing precisely those management reforms that would increase efficiency." ▪ An adversarial atmosphere will harm our defense industrial base. ▪ "Private businesses bear the brunt of public indignation over waste and fraud."[15]

[11] J. Ronald Fox, *Defense Acquisition Reform, 1960–2009: An Elusive Goal,* Center for Military History (Washington DC: United States Army Center of Military History, 2011), accessed November 24, 2017, http://www.history.army.mil/html/books/051/51-3-1/CMH_Pub_51-3-1.pdf.
[12] Gilbert W. Fitzhugh et al., Blue Ribbon Defense Panel, *Report to The President and the Secretary of Defense on the Department of Defense,* July 1, 1970, 8, accessed November 24, 2017, https://www.documentcloud.org/documents/2695392-1972-Fitzhugh-Report-1970-Blue-Ribbon-Defense.html.
[13] GAO, *Recommendations of the Commission on Government Procurement: A Final Assessment, PSAD-79-80,* May 31, 1979, 97, accessed November 24, 2017, http://www.gao.gov/assets/130/126976.pdf.
[14] Congressional Budget Office and General Accounting Office, *Analysis of the Grace Commission's Major Proposals for Cost Control,* February 1984, 73, accessed November 24, 2017, https://www.gao.gov/assets/200/190441.pdf.
[15] GAO, *Defense Management: Status of Recommendations by Blue Ribbon Commission on Defense Management, GAO/NSAID-89-19FS*, 66, accessed November 24, 2017, http://www.gao.gov/assets/90/88245.pdf.

Study	Perspective, Comment, or Recommendation
Packard Commission, 1985 (continued)	In light of these findings, the Commission recommended: ▪ The Undersecretary of Defense (Acquisition) should oversee DoD-wide establishment of contract audit policy, supervise established oversight policy for defense contractors, and recognize established GAO and professional auditing standards. GAO later noted that the Inspector General Act of 1978 and the National Defense Authorization Act of 1987 provide for the DoD Inspector General to perform this role. ▪ Audit policy should be designed to do the following: – Clearly define responsibilities and jurisdictions of DoD oversight. – Develop guidelines for oversight organizations to share contractor data to rely on each other's work. Improve audit strategies that consider contractors' past performance, effectiveness of their internal control systems, the results of prior and ongoing reviews conducted by DoD and contractors themselves, and relative costs and benefits.[16]
Defense Organization: The Need for Change, 1985	The Subcommittee on Defense Acquisition Policy of the Senate Armed Services Committee found evidence that suggested duplication of various audit and review activities among at least four different DoD Entities: DCAS, DCAA, the buying command of a Service, and DoDIG.[17]
Defense System Management College Survey, 1992	A Defense System Management College (DSMC) survey indicated that administrative costs associated with selling to the government were four times those associated with commercial sales.[18]
Integrating Civilian and Military Technologies: An Industry Survey, 1993	The Center for Strategic and International Studies (CSIS) surveyed 206 companies and found the administrative costs associated with selling to government were more than five time those when selling commercially. Government-unique accounting requirements were identified as the primary cause.[19]
Section 800 Panel, 1993	The Section 800 Panel found that commercial companies often set up separate divisions to deal with government-unique requirements. The panel recommended tailored audit and compliance requirements for commercial products or services to limit this burden.[20]

[16] Ibid.
[17] U.S. GPO, *Defense Organization: The Need for Change, Staff Report to the Committee on Armed Services, United States Senate, S. Prt. 99-86,* 559, accessed November 24, 2017, https://digitalndulibrary.ndu.edu/cdm/compoundobject/collection/goldwater/id/2160.
[18] Office of Assistant Secretary of Defense (Public Affairs), *News Release No. 517-93: DOD's Acquisition Reform Recommendations to 800 Panel Report,* 23, accessed November 24, 2017, http://www.dtic.mil/dtic/tr/fulltext/u2/a273896.pdf.
[19] Ibid.
[20] Report of the Acquisition Law Advisory Panel to the United States Congress, *Streamlining Defense Acquisition Laws: Chapter 2, Contract Administration,* January 1993, 2-6.

Study	Perspective, Comment, or Recommendation
Coopers and Lybrand Study, 1994	The 1994 joint study performed by Coopers and Lybrand and TASC found the average DoD regulatory cost premium to be 18% across 10 company facilities. There were 10 primary cost drivers identified (percentage of total DoD cost premium is noted in parenthesis) ▪ MIL-Q-9858A (10.0%) ▪ Truth in Negotiations Act (7.5%) ▪ Cost/Schedule Control System (5.1%) ▪ Configuration Management Requirements (4.9%) ▪ Contract Specific Requirements (4.3%) ▪ DCAA/DCMA Interface (3.9%) ▪ Cost Accounting Standards (3.8%) ▪ Material Management Accounting Systems (3.4%) ▪ Engineering Drawings (3.3%) ▪ Government Property Administration (2.7%)[21]
Defense Waste and Fraud Disguised as Reinvention, 1999	The Project on Government Oversight (POGO) asserted that many reforms of the 1980s established to limit fraud, waste, and abuse (False Claims Act strengthening, TINA emphasis, Procurement Integrity Statute, CAS Board reestablished, Competition in Contracting Act, and increased penalties for disallowed costs) were being bypassed as a result of early 1990's reform efforts. According to POGO and DoDIG, the pivot toward commercial practices had "come to mean subservience to contractors and blind acceptance of their claimed costs and prices" resulting in DoD overpaying. The report notes oversight agencies (DCAA) in place to prevent this abuse were reduced by 19 percent from FY 1993 to FY 1997. The report's conclusion indicates administration has pushed mergers and acquisitions—which inherently limit competition, creating an even greater need for oversight to review cost and pricing data and to ensure reasonableness.[22]

The findings and recommendations of these studies represent the swinging pendulum of public perceptions of fraud, waste, and abuse within DoD. For example, the Packard Commission in the 1980s sought to address contract oversight problems through changes to DoD's oversight structure. In the 1990s, the Section 800 Panel sought to address the contract oversight problem by limiting government involvement and relying on commercial market forces for compliance. In the last decade, DoD has witnessed a familiar scenario of widely vacillating approaches in the government contract oversight area. This situation generally leaves contracting officers, reviewers, and auditors accused of being soft on defense contractors, not properly protecting the government's interests, and performing cursory or sloppy reviews and audits. After DoD implements recommendations, allegations arise indicating the government has over-corrected and created an environment in which perfection is the standard and

[21] Coopers and Lybrand, TASC, "The DoD Regulatory Cost Premium: A Quantitative Assessment," Summary Presentation, December 1994, 12, 18, and 18A, accessed November 24, 2017, http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA295799.
[22] Project on Government Oversight, *Defense Waste and Fraud Camouflaged as Reinventing Government,* accessed November 24, 2017, http://pogoarchives.org/m/ns/camo/report-19990901.pdf.

government decisions have become increasingly arbitrary and capricious. Further attempts to resolve perceived contract audit issues primarily through congressional legislation and frequent contracting officer, reviewer, and auditor evaluations have led to confusion and uncertainty for both government personnel and defense contractors. Consequently, DoD is in a similar place identified in previous acquisition reform efforts of trying to find an oversight framework that better serves the contracting officer, protects the government's interests in a cost-effective manner, and reduces the barriers and burdens to defense contractors.

Notable reports issued by the Commission on Wartime Contracting and the GAO add context to the current state.

GAO Reports

In 2008 and 2009, GAO issued several critical reports on DCAA regarding its audit quality.[23] The 2009 report was titled *Widespread Problems with Audit Quality Require Significant Reform*.

These reports identified problems with contract audit quality, independence, and supervision. GAO noted DCAA adhered to a production-oriented mission that prioritized speedy audits for the contracting community regardless of quality and a lack of leadership emphasis on the public interest.[24] GAO highlighted several examples of DCAA auditors or supervisors of auditors taking actions perceived to benefit contractors at the expense of the public.

Congressional reaction to the GAO findings on DCAA audit problems was swift and severe. Leaders of the Senate Homeland Security and Government Affairs Committee called for drastic reforms.[25] The GAO reports and the subsequent congressional hearings set in motion changes to the areas of audit quality and auditor independence and training.

Commission on Wartime Contracting

To support combat operations in Iraq and Afghanistan, DoD used contractors at unprecedented levels, overwhelming DoD's ability to oversee this work through contract management, contract audits, and other oversight services.

The Commission on Wartime Contracting issued a special report in 2009 regarding the weakness of internal controls with contractor business systems being used in Iraq and Afghanistan.[26] According to the report, weakness in the business systems produced unreliable data and DCMA in particular was not doing enough to require contractors to improve their business systems. DCAA's role in business

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[23] GAO, *DCAA Audits: Allegations That Certain Audits at Three Locations Did Not Meet Professional Standards Were Substantiated, GAO-08-993T,* accessed September 15, 2017, http://www.gao.gov/assets/130/121069.pdf. GAO, *DCAA Audits: Widespread Problems with Audit Quality Require Significant Reform, GAO-09-468,* accessed September 15, 2017, http://www.gao.gov/assets/300/295684.pdf.
[24] GAO, *DCAA Audits: Widespread Problems with Audit Quality Require Significant Reform, GAO-09-468,* accessed September 15, 2017, http://www.gao.gov/assets/300/295684.pdf.
[25] "DCAA Called Out Again Over Mismanagement," Robert Brodsky, Government Executive, accessed September 15, 2017, http://www.govexec.com/oversight/2009/09/dcaa-called-out-again-over-mismanagement/29995.
[26] Commission on Wartime Contracting in Iraq and Afghanistan, *Special Report on Contractor Business Systems: Defense Agencies must improve their oversight of contractor business systems to reduce waste, fraud, and abuse,* accessed November 24, 2017, https://cybercemetery.unt.edu/archive/cwc/20110929221533/http://www.wartimecontracting.gov/docs/CWC_SR1_business-systems_2009-09-21.pdf.

system reviews was diminished by DCMA ignoring or overruling DCAA on the adequacy of contractor business systems. The commission found that DCAA's effectiveness decreased further in 2008 when it removed the *inadequate in part* finding for a business system and judged all systems on a pass/fail basis.

In its final report in 2011, the Commission on Wartime Contracting noted the rapidly growing incurred cost backlog at DCAA.[27] The commission found that Congress did not provide DCAA and DCMA adequate resources and staffing to accomplish their respective missions. The commission recognized the difficulty placed on defense contractors when delays in incurred cost audits leave the contractors facing cash management problems and issues with records retention.

Recent Government Contracting Audit Trends

Despite its name and home within DoD, DCAA has historically had the authority to perform contract audits and other financial services for many other federal agencies on a reimbursable basis. That authority has been modified by statute several times in the past three years to first prohibit non-defense audit work[28] and then relaxed to allow for audit support to the National Nuclear Security Administration.[29] The National Aeronautics and Space Administration (NASA) and the Department of Energy (DOE) are two large federal agencies with substantial cost-type and noncompetitive contracts awarded that have used DCAA for contract audit and other services for decades. In certain cases nondefense agencies such as NASA and DOE used third-party (nongovernment) auditors [also referred to as independent public accountants (IPAs)] to supplement their contract oversight resources.

One of the major services DCAA provides nondefense agencies is incurred cost audits. Incurred cost audit backlogs result in delays to contract closeout, which can cause problems not just for defense contractors but also contracting officers and the Military Services. A backlog of incurred cost audits has existed for some time. In 2011, Congress expressed concern regarding the backlog of incurred cost audits at DCAA and directed GAO to review reasons for the backlog and DCAA's plan to address it.[30] At the time, DCAA had a backlog of more than 24,000 incurred cost audits with 10 percent of these audits for other federal agencies.[31] DCAA also stated it would reduce the backlog by 2016 to reach a steady state of audits.

Although the incurred cost audit backlog was improved by the end of FY 2014, the backlog still included more than 10,000 audits.[32] In 2015, Congress prohibited DCAA from performing outside audit work until it cleared the backlog of all incurred cost audits older than 18 months.[33] The Senate Armed Services Committee in particular noted the need for DCAA to focus on the backlog of defense-related

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[27] Commission on Wartime Contracting, *Transforming Wartime Contracting: Controlling costs, reducing risks,* 162, accessed November 24, 2017, http://breakingdefense.sites.breakingmedia.com/wp-content/uploads/sites/3/2011/08/CWC_FinalReport-lowres.pdf?_ga=2.115803139.406810102.1505836409-450514573.1493689244.
[28] Section 893 of FY 2016 NDAA, Pub. L. No. 114-92 (2015).
[29] Section 891 of FY 2017 NDAA, Pub. L. No. 114-328 (2016).
[30] GAO, *Defense Contracting: DOD Initiative to Address Audit Backlog Shows Promise, but Additional Management Attention Needed to Close Aging Contracts, GAO-13-131,* accessed September 15, 2017, http://www.gao.gov/assets/660/650970.pdf.
[31] Defense Contract Audit Agency, *Report to Congress on FY 2016 Activities: Defense Contract Audit Agency*, 9, accessed on October 30, 2017, http://www.dcaa.mil/Content/Documents/DCAA_FY2016_Report_to_Congress.pdf.
[32] Ibid.
[33] Section 893 of FY 2016 NDAA, Pub. L. No. 114-92, 129 Stat. 952 (2015).

audits before performing reimbursable work for other federal agencies.[34] It noted delays and backlogs in other areas of DCAA's work due to DCAA shifting resources to address the incurred cost audits.[35] The FY 2016 NDAA prohibited DCAA performing non-DoD agency services, leaving agencies such as NASA and the DOE to rely exclusively on third-party auditors.

Nondefense agency officials who experienced the transition to using IPAs noted initial challenges; however, most expressed extremely positive outcomes from this move to allow third-party auditors to perform incurred cost audit work.[36] Officials stated numerous benefits to include improved timeliness of audits, greater tailoring of audit work to agency needs, and transparency on costs of audit. In some cases agencies have been able to review and oversee a higher number of contract payments faster and at lower cost.[37]

Guiding Principles

Financial and business system oversight of defense contractors is a crucial function of DoD's system of acquisition internal controls. This oversight function performs both preventive and detective control activities, designed to ensure DoD contractors comply with a variety of contract requirements. These contract requirements stipulate that DoD's procuring and administrative contracting officers comply with many terms and conditions, while ensuring delivery of timely, high-quality goods and services to warfighters and other critical operations.

In conducting stakeholder meetings and other research, the Section 809 Panel did not question DoD's need to perform financial and business system oversight activities, but instead focused on the primary problems of the *type* of oversight and *when* it is performed. Stakeholders indicated it is not important to them *who* performs the oversight activities, but they care greatly about *how* these activities are conducted. The findings are consistent with many historical studies regarding defense contract audits and oversight.

This report is different than those that preceded it because it offers holistic, practical recommendations, along with specific implementation guidance to refocus and modify the behavior of DoD's financial and business system oversight functions. These changes will improve the effectiveness and efficiency of DoD's system of acquisition internal controls, which currently act as a barrier to entry into defense contracting. The recommendations support and complement each other and speak to at least one of the following guiding principles:

- **Focus on mission.** DoD gives authority and responsibility for contract administration and compliance to its warranted contracting officers. DoD's internal controls are intended to provide timely, useful advice to contracting officers, so they can do their jobs effectively. The

[34] Senate Armed Services Committee Report 114-49, Section 878 of FY 2016 NDAA, https://www.congress.gov/congressional-report/114th-congress/senate-report/49/1?q=%7B%22search%22%3A%5B%22S.1376%22%5D%7D.
[35] Ibid.
[36] Interview of NASA employees conducted August 2017 by Section 809 Panel Team 4: Barriers to Entry.
[37] Interviews of nondefense government employees conducted from August - October 2017 by Section 809 Panel Team 4: Barriers to Entry.

mission of DoD's financial and business system oversight is to help both contracting officers and contractors improve or maintain contract compliance.

- **Value time.** DoD's oversight functions must provide timely, useful advice to contracting officers and contractors on compliance matters. They must also provide timely advice to contracting officers regarding cost/price negotiation positions. Timely execution of DoD's internal control activities will provide contracting officers and oversight professionals with insight into contractors' current operations. Timely solutions to compliance challenges will reduce future oversight burden for both contractors and oversight organizations.

- **Simplify.** DoD's oversight professionals must provide cost-effective services that incorporate (a) understanding what the contracting officer needs and when, (b) using the right tool for the job (i.e., is an *audit* necessary?), (c) assessing risk more effectively, and (d) honoring the oversight process by detaching from preconceived or desired outcomes that impair oversight professionals' objectivity, while staying vigilant to the auditing standard concept of professional skepticism.

- **Operate with a cooperative spirit.** DoD's oversight professionals are important members of the acquisition team. This team is charged with a common objective: to achieve contract compliance and, fair and reasonable prices for timely, high quality goods and services. Problem-solvers are highly valuable to the acquisition process.

These recommendations, if implemented in their entirety, will better protect the government's interests, meaningfully reduce barriers to entry into defense contracting, improve contractor compliance with contract requirements, and increase the agility of the Department's procurement process.

The Cost Accounting Standards Board (CASB) in its Statement of Objectives, increased uniformity and consistency of DoD's financial and business system oversight functions will improve understanding and communications between contractors and contracting officers, reduce the incidence of contract disputes, increase the effectiveness of both DoD's and contractors' internal controls, and improve the timeliness of contract administration.[38]

[38] GAO, *Future Role of the Cost Accounting Standards Board, Prepared for Congress by the Cost Accounting Standards Board Review Panel, April 2, 1999,* accessed on October 30, 2017, http://www.gao.gov/assets/200/199669.pdf.

RECOMMENDATIONS

RECOMMENDATIONS 5 THROUGH 9 SHARE THE COMMON THEME:
ENHANCE DCAA'S FOCUS ON THE CONTRACTING OFFICER AND ACQUISITION TEAM.

Recommendation 5: Align DCAA's mission statement to focus on its primary customer, the contracting officer.

Problem

DCAA was established to provide accounting, auditing, and financial advisory services to DoD contracting officers and acquisition teams. In 2010, DCAA changed its mission statement to emphasize the taxpayer and the public interest, which takes the focus of the agency away from its primary customer.

Background

DoDD 5105.36, revised January 4, 2010, implemented an updated DCAA mission statement.[39] Those changes shown in the highlighted text below:

> *The DCAA, while serving the public interest as its primary customer, shall perform all necessary contract audits for the Department of Defense and provide accounting and financial advisory services regarding contracts and subcontracts to all DoD Components responsible for procurement and contract administration. These services shall be provided in connection with negotiation, administration, and settlement of contracts and subcontracts to ensure taxpayer dollars are spent on fair and reasonable contract prices. DCAA shall provide contract audit and advisory services to other federal agencies, as appropriate.*

DCAA supplements its mission statement, published on its website, with the following:

> *As a key member of the government acquisition team, we are dedicated stewards of taxpayer dollars who deliver high quality contract audits and services to ensure that warfighters get what they need at fair and reasonable prices.*[40]

DCAA added the word *taxpayer* in its mission statement because of an October 2008 Defense Business Board (DBB) recommendation, which stated the following

> *[DCAA's] mission fostered the culture of supporting contracting officials, and the value system was one of quantity (number, cost, timeliness of audits) over quality (results and adherence to [Generally Accepted Government Auditing Standards] GAGAS) which was further reinforced by the performance metrics that drove the organization. To address this situation, the DCAA mission needs to be redefined to clearly establish the taxpayer as the ultimate customer and establish a core value of performing high*

[39] Defense Contract Audit Agency (DCAA), DoDD 5105.36 (2010).
[40] "About DCAA: Mission," Defense Contract Audit Agency, accessed November 1, 2017, http://www.dcaa.mil/Home/AboutDCAA?title=Mission.

> *quality, independent and objective contract audits that adhere to GAGAS and ensure that taxpayer dollars are spent on fair and reasonable contract prices.*[41]

GAO criticized DBB's findings in its 2009 audit report on DCAA's audit quality. GAO noted:

> *Our report does not endorse the specific recommendation of the DBB to focus on the taxpayer as the primary customer. As our report points out, this recommendation does not take into account the regulatory and policy requirements that establish DCAA's primary role as an advisor to government contracting officers and disbursing officers…GAGAS states the principle that 'observing integrity, objectivity, and independence in discharging [auditors'] professional responsibilities assists auditors in meeting the principle of serving the public interest and honoring public trust.'*
>
> *"In providing [assurance that contract prices are fair, reasonable and compliant with government accounting rules], DCAA audits would necessarily take into account serving the public interest. However, when DCAA audits do not meet GAGAS, they do not provide assurance and thus do not serve the public interest."*[42]

Findings

The mission of DCAA is to perform its oversight responsibilities in accordance with professional standards. Compliance with professional standards will fulfill the agency's mission, as well as provide a level of confidence in its work product that is consistent with the highest ethical and professional standards in the industry. DCAA must emphasize its mission to be a trusted advisor to contracting officers by exercising unbiased professional judgment relative to contractor compliance with government accounting laws, rules, and regulations.

Conclusions

GAO has accurately assessed that supporting the contracting officer is DCAA's primary role. Contracting officers, DCAA auditors, and acquisition team members are all responsible to the taxpayer. High quality, independent, and objective work performed by DCAA in accordance with professional standards will serve the taxpayer's interest. Contracting officers are best supported by DCAA in adhering to stringent professional standards if the organization's mission statement focuses on serving the customers. When DCAA serves contracting officers well and these individuals are able to perform quality work, taxpayers will benefit as well.

Implementation

Legislative Branch

- No statutory changes are required.

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[41] Defense Business Board, *Independent Review Panel Report on the Defense Contract Audit Agency, Report FY09-1, Recommendations for improving DCAA mission, strategic planning, culture, structure, and business practices,* accessed November 1, 2017, http://dbb.defense.gov/Portals/35/Documents/Reports/2008/FY09-1_Independent_Review_Panel_Report_Defense_Contract_Audit_2008-10.pdf.

[42] GAO, *DCAA Audits: Widespread Problems with Audit Quality Require Significant Reform, GAO-09-468,* 79-80, accessed September 15, 2017, http://www.gao.gov/assets/300/295684.pdf.

Executive Branch

- Revise DCAA's mission statement in DoDD 5105.36 to focus on its primary customer, the contracting officer.

Note: The recommended revised mission statement 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 6: Revise the elements of DCAA's annual report to Congress to incorporate multiple key metrics.

Problem

Congress's reporting requirement for DCAA lacks critical metrics to adequately measure DCAA's performance. To alter the conduct of the DoD's financial and business system oversight functions, success must be defined to be consistent with improving mission focus, valuing time, and simplifying compliance.

Background

Congress currently emphasizes the number of audit reports completed, and recovering or sustaining questioned costs, over measurements on the other advisory services DCAA provides—which are not mentioned in the report requirements today.[43] DCAA's annual report to Congress requires some measurements of delayed audits; however, the current report emphasizes the number of audits and questioned costs.

Findings

If DCAA is operating effectively, its success cannot be measured only in questioned and sustained costs. As DoD and contractor internal controls improve, there may be fewer costs to question and sustain. In contrast, worsening DoD and contractor internal controls may increase costs questioned and sustained. Similarly, DCAA's success as an organization cannot be measured by the quantity of audits at the expense of quality. Congress's current emphasis on questioned costs and DCAA's emphasis on *return on investment* alone do not adequately demonstrate performance. DCAA is not, and should not, be considered a profit center. Most importantly, the current DCAA report has no measure of DCAA's primary customers' (contracting officer or acquisition team) satisfaction with the quality and timeliness of DCAA's work.[44]

Conclusions

Congress must measure DCAA's success in a manner that helps DoD meet contract objectives. Although detecting contractor noncompliance is important, preventing noncompliance through education and training of contractors and contracting officers is DCAA's original mission and the best use of its resources.

Questioned costs and sustained costs should remain part of DCAA's report to Congress; however, these metrics alone are misleading and should not be viewed in isolation of the other key parts of DCAA's mission regarding service to the contracting offer and the acquisition team. The current report makes no mention of contracting officer or acquisition team satisfaction with the quality and timeliness of DCAA's work, yet they are DCAA's primary customer. Congress should measure DCAA using a balanced scorecard consisting of multiple key metrics to include the following:

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[43] DCAA's annual report is mandated by 10 U.S.C. § 2313a. Annual reports dating to 2011, can be accessed through the "Report to Congress" page on the DCAA website, http://www.dcaa.mil/Home/ReportToCongress?title=Report%20to%20Congress.
[44] There is no direct measure of customer satisfaction in 10 U.S.C. § 2313a (current congressional reporting requirements).

- A description of the regulatory requirements that create compliance difficulties for contractors, including an analysis of how those regulatory requirements affect contractors of different sizes and industries.
- The total number of new audit or advisory engagements, by type (preaward, incurred cost, other postaward, and business system), with time limits expiring during the fiscal year that were completed or were awaiting completion, as compared to total audit and advisory engagements completed or awaiting completion during the year.
- On-time performance relative to time limits for each type of audit or advisory engagement (shown separately for the DCAA and qualified private auditors retained by the agency).
- The time limit (expressed in days) for each type of audit or advisory engagement, along with the shortest period, longest period, and average period of actual performance (shown separately for the DCAA and qualified private auditors retained by the agency).
- For preaward audits and advisory engagements of contractor costs, sustained costs as a total number and as a percentage of total questioned costs, where questioned costs are expressed as the impact on negotiable contract costs (shown separately for the DCAA and qualified private auditors retained by the agency).
- For postaward audits and advisory engagements of contractor costs, the questioned costs accepted by the contracting officers and contractors as a total number and as a percentage of total questioned costs, where questioned costs are expressed as the impact on reimbursable contract (shown separately for the DCAA and qualified private auditors retained by the agency).
- The aggregate cost of performing audits, set forth separately by type of audit.
- The ratio of sustained questioned costs to the aggregate costs of performing audits, set forth separately by type of audit.
- The total number and dollar value of postaward audits that are pending for a period longer than 1 year as of the end of the fiscal year covered by the report, and the fiscal year in which the qualified proposal was received, set forth separately by type of audit.
- A summary of the reasons for the difference between questioned and sustained costs shown in the statistical tables.
- A description of outreach actions towards industry to promote contract compliance and professional development of the DCAA workforce (shown separately for collaborative outreach actions and other outreach actions).
- A statistically representative survey of contracting officers from DoD buying commands and the DCMA and representatives of small and large businesses to measure the timeliness and

effectiveness of audit and advisory services provided by the DCAA (shown separately for the DCAA and qualified private auditors retained by the agency).

Implementation

Legislative Branch

- Amend 10 U.S.C. § 2313a to include additional key metrics that measure cost, quality, timeliness, and customer satisfaction.

Executive Branch

- No Executive Branch changes are required.

Note: Draft legislative text and sections affected display 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 7: Provide flexibility to contracting officers and auditors to use audit and advisory services when appropriate.

Problem

Contracting officers too often request a specific service from either DCAA or DCMA without consulting internal technical specialists about the best way to meet their needs. In addition, DCAA auditors and DCMA technical specialists perform their most accustomed services without adapting their services to contracting officers' specific situations and needs. Contracting officers currently use the term *audit* in a way that conflates audit and advisory activities in their functional requests to DCAA for a wide-ranging set of technical activities.

Background

Contracting officers require input from outside advisors to make sound business decisions in the public best interest. Contracting officers express they do not believe auditors can or will tailor their services to meet contracting officer needs, especially in the preaward area relating to cost and pricing services.[45] At one stakeholder meeting, the Section 809 Panel asked a group of acquisition professionals about the specific insights DCAA provides contracting officers, and whether an *audit* is required to obtain such information. Several stakeholders stated trained and experienced contracting officers should be able to decide whether a proposed cost is fair and reasonable. Contracting officers feel they must request an audit anyway, however, because of certain dollar thresholds and to avoid criticism later.[46] Audits inappropriately requested by contracting officers or provided by DCAA delay the acquisition process and decrease their utility. It is imperative for the appropriate engagement (audit/advisory) to be performed by the most qualified compliance professional with the required expertise and skills to ensure contracting officer needs are met.

Findings

Today, contract auditors perform an attestation examination for virtually all contract audit services provided.[47] These attestation examinations "consist of obtaining sufficient, appropriate evidence to express an opinion on whether the subject matter is based on (or in conformity with) the criteria in all material respects or the assertion is presented (or fairly stated), in all material respects, based on the criteria."[48] This type of engagement can be too restrictive or irrelevant for many contract cost or price evaluation circumstances for which contracting officers look to auditors for advice, guidance, and recommendations on how to proceed.

Using an attestation examination engagement to help contracting officers develop a negotiation position illustrates this point. In an attestation examination engagement, the auditor may only attest to whether a contractor's cost estimates comply with established audit criteria (e.g., FAR and any contractor cost assumptions within the proposal). In this type of engagement, the auditor many times does not perform the work required to provide needed advice and guidance to the contracting officer beyond a statement indicating whether a contractor's proposed costs are compliant with established

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[45] Data collection interviews conducted from August – November 2017 by Section 809 Panel Team 4: Barriers to Entry.
[46] Ibid.
[47] "Services," Defense Contract Audit Agency, accessed November 17, 2017, http://www.dcaa.mil/Home/Services?title=Services.
[48] GAO, *Government Auditing Standards, 2011 Revision, GAO-12-331G*, 16, accessed November 17, 2017, http://www.gao.gov/assets/590/587281.pdf.

criteria (e.g., determining the root cause of any noncompliance incidents). This practice falls short of what contracting officers require to develop a negotiation position. Contracting officers need to know whether costs are compliant, and if not, then they need advice on how best to proceed based on audit findings.

Conclusions

Subrecommendation 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.

Contracting officers should use internal resources to understand if, and specifically where, field pricing support is required. With the help of internal resources, contracting officer requests for field pricing assistance should be tailored to the maximum extent possible—requesting only what is needed and nothing more. Over-reliance on outside support, and unnecessarily broad requests, overtax the compliance workforce and add bureaucracy to the already slow acquisition process.

Requests for field pricing support, by default, become requests to DCAA for proposal audits. A group of contracting officers told the Section 809 Panel they believe many of the questions DCAA asked later in the audit process are the same things a contracting officer could have asked earlier on. These contracting officers see value in DCAA's services, but not at the current expense of how long it takes in many situations.[49] At a separate meeting, another stakeholder told the Section 809 Panel that "DCAA is not in the fair and reasonable business," implying that other resources may be better suited for proposal support.[50] By dedicating resources to build pricing expertise, DoD could cultivate a growing culture of self-reliance and attempt to rebuild organic pricing capability at the agency level that was lost during the 1990 DoD downsizing, rather than automatically request DCAA support.

There is precedent for this model. After Congress prohibited DCAA from performing other agency audits, non-DoD agencies relying on DCAA for contract audit and oversight were forced to look elsewhere.[51] As one of the biggest non-DoD users of cost-type contracts, NASA was affected greatly by this congressional prohibition, and responded by creating a DCAA-like internal organization within NASA. After outsourcing contract audit support for 40 years, NASA was able to identify efficiencies after taking ownership of all responsibilities, and NASA officials consider the transition to internal auditing a success.[52]

Previously, when NASA relied on DCAA for audit proposal support, the agency lacked the ability to dictate what DCAA reviewed and how. Today, NASA contracting officers tailor proposal analysis requests to their internal support. NASA has invested heavily in internal cost and price analysis capabilities by developing cadres of subject matter experts, acknowledging that audits may not always be needed for purposes of proposed cost and price evaluation. One NASA official told the Section 809 Panel this approach has changed the culture from defaulting to calling DCAA first, to asking "what do

[49] Data collection interviews conducted from August – November 2017 by Section 809 Panel Team 4: Barriers to Entry.
[50] Ibid.
[51] FY 2016 NDAA, Pub. L. No. 114-92, § 893, 129 Stat. 952 (2015).
[52] Data collection interviews with NASA officials conducted August 28, 2017 by Section 809 Panel Team 4: Barriers to Entry.

I have within NASA to do this?" As a result of the efficiencies and insight gained from taking back ownership of proposal audits from DCAA, NASA has no intent to go back to DCAA.[53]

Subrecommendation 7b: Define the term audit.

The term audit is not defined in the FAR, contributing to confusion surrounding contracting officers' precise needs when requesting support services. Certain elements of FAR require an audit when other forms of reviews may be more appropriate to meet contracting officer needs and responsibilities. The level of assurance contracting officers need should dictate the service required, not the other way around. The terms audit and audits should be defined through DoDD 5105.36, which will filter into FAR Part 2 and DCAM to bring consistency to a term that is often over and inappropriately used.

Definition of audit:

> *A systematic examination, performed in accordance with Generally Accepted Government Auditing Standards (GAGAS), for the purpose of rendering professional opinions and conclusions that provide assurance to one or more third-parties regarding the reasonableness of an individual's or organization's representations or performance relative to established, objective standards or criteria..*

All instances in which the FAR currently requires an audit should be evaluated against the definition set forth above and incorporated into FAR Part 2. Such an evaluation would produce three possible outcomes:

- Keep the word audit.
- Supplement the word audit with the phrase advisory services (e.g., contracting officers will request an audit or advisory services).
- Supplant audit with advisory services.

The net result of this process would not be to preclude audits. Rather, it would provide flexibility, so DCAA can provide contracting officers the appropriate service for the level of assurance required. For example, FAR 42.101 directs contract auditors to perform "analysis of the contractor's financial and accounting records or other related data."[54] The current FAR language provides for a variety of different services depending on the circumstances—not solely a GAGAS audit.

Subrecommendation 7c: DCAA should use the full range of audit and nonaudit services available.

In almost every situation for which DCAA provides an audit level of assurance to contracting officers, DCAA auditors perform an attestation examination engagement regardless of the contracting officer's needs.[55] Contract auditors should perform services other than attestation engagement based on the requirements of contracting officers as appropriate. If the audit objectives overlap with different types of audit services, contract auditors should evaluate the needs of contracting officers to determine which

[53] NASA officials, interview conducted August 28, 2017 by Section 809 Panel Team 4: Barriers to Entry.
[54] Contract audit responsibilities, FAR 42.101.
[55] "Services," Defense Contract Audit Agency, accessed November 17, 2017, http://www.dcaa.mil/Home/Services?title=Services.

engagement type is best suited. DCAA should encourage its contract auditors to review the needs of contracting officers to determine the audit or advisory service most appropriate to the objectives of contracting officers.

According to GAGAS, the types of engagements auditors may use include those listed in Table 2-3 below:

Table 2-3. Types of GAGAS Audits and Attestation Engagements[56]

Service Type	Description
Financial Audits	Financial audits provide an independent assessment of whether an entity's reported financial information (e.g., financial condition, results, and use of resources) is presented fairly in accordance with recognized criteria. Financial audits performed in accordance with GAGAS include financial statement audits and other related financial audits.
Attestation Examination Engagement	Attestation examination engagement consists of obtaining sufficient, appropriate evidence to express an opinion on whether the subject matter is based on (or in conformity with) the criteria in all material respects or the assertion is presented (or fairly stated), in all material respects, based on the criteria.
Attestation Review Engagement	Consists of sufficient testing to express a conclusion about whether any information came to the auditors' attention on the basis of the work performed that indicates the subject matter is not based on (or not in conformity with) the criteria or the assertion is not presented (or not fairly stated) in all material respects based on the criteria. Auditors should not perform review-level work for reporting on internal control or compliance with provisions of laws and regulations.
Attestation Agreed-Upon Procedures	Agreed-upon procedures consist of auditors performing specific procedures on the subject matter and issuing a report of findings based on the agreed-upon procedures. In an agreed-upon procedures engagement, the auditor does not express an opinion or conclusion, but only reports on agreed-upon procedures in the form of procedures and findings related to the specific procedures applied.
Performance Audits	Performance audits are defined as audits that provide findings or conclusions based on an evaluation of sufficient, appropriate evidence against criteria. Performance audits provide objective analysis to assist management and those charged with governance and oversight in using the information to improve program performance and operations, reduce costs, facilitate decision making by parties with responsibility to oversee or initiate corrective action, and contribute to public accountability. The term *program* is used in GAGAS to include government entities, organizations, programs, activities, and functions.

[56] GAO, *Government Auditing Standards, 2011 Revision, GAO-12-331G,* 14-17, accessed November 17, 2017, http://www.gao.gov/assets/590/587281.pdf.

Subrecommendation 7d: Direct a review of the roles of DCAA and DCMA to ensure appropriate alignment and eliminate redundancies.

A group of contracting officers told Section 809 Panel staff "the distinction between DCMA and DCAA is not always clear—they sometimes look at the same thing."[57] One contracting officer suggested there needs to be more collaboration and communication between DCAA and DCMA and that "If you align the priorities, the agencies can work together to achieve overarching desired results faster."[58]

Given the continued scrutiny around audit requirements, it is critical that DoD use its oversight resources as efficiently as possible. The professional skills of auditors should not be inappropriately used to perform nonaudit work if it can be effectively performed in other ways or by other organizations. For example, the DCMA Cost and Pricing Center and DCMA's Integrated Cost Analysis Teams (ICATs) are already able to assist with business and technical proposal pricing support for the contracting officer and acquisition team.[59] It is possible that some functions performed in DCAA could be accomplished by the DCMA Pricing Center to include the ICATs.

The Chief Management Officer (CMO) should direct a review of the work performed by DCAA and DCMA to identify services that are redundant between the two agencies and then to take targeted action to improve contract audit and advisory services. The connection between audit work and nonaudit work has benefits associated with the knowledge gained from each and that knowledge supports some of the other process controls. Real opportunities exist, however, to consider how the work of DCAA and DCMA could be more complementary and avoid the current inclination to use audits to solve every problem. In support of moving forward with IPAs and driving down DCAA work backlog, this review by DoD should be a priority and completed within 180 days, but either way prior to execution of the IPA contracts as recommended in Recommendation 9.

Implementation

Legislative Branch

- Require in statute that DoD CMO will direct USD(A&S) and the Comptroller to conduct a joint review of the DCAA and DCMA contract compliance mission requirements for the purpose of determining if there are functions performed in either DCAA or DCMA that would be more appropriately aligned in the other Agency. The review shall be complete within 180 days of assignment and prior to execution of the IPA contracts as recommended in Recommendation 9. The review will include appropriate statutory or regulatory language as needed to execute any recommendations emerging from the review.

Executive Branch

- Amend FAR 15.404-2(a)(1) and PGI 215.404-2 to ensure contracting officers fully understand and clarify their needs prior to requesting outside support.

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[57] Data collection interviews conducted from August – November 2017 by Section 809 Panel Team 4: Barriers to Entry.
[58] Ibid.
[59] DoD Memorandum from USD(AT&L), *Integrated Cost Analysis Team Support to Major Proposals*, accessed November 17, 2017, https://www.acq.osd.mil/dpap/policy/policyvault/D_DP_Signed_ICAT_Memo_Oct_2014.pdf.

- Define the term *audit* in DoDD 5105.36, FAR Part 2, and the DCAM. Use the definition to determine if an *audit* is the appropriate activity in all instances where FAR and DFARS currently require an *audit*.

- Modify DoDD 5105.36 to encourage DCAA to consider different types of audit engagements where and when appropriate.

Note: Recommended modifications to the FAR 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 8: Establish statutory time limits for defense oversight activities.

Problem

Financial and business system oversight of DoD's contractors often starts too late and takes too long. These delays cause problems for both contracting officers and defense contractors and reduce the utility of oversight findings. To be effective and efficient, DoD's system of internal controls must operate in a timely manner.

Background

Time limits are commonplace in both private industry and the federal government concerning performance of audits and other forms of advisory engagements. IPAs must complete audits by financial reporting deadlines established by the Securities Exchange Commission.[60]

Auditors for federal agencies must complete agency financial statement audits under deadlines established by the Chief Financial Officers Act of 1990.[61] GAO must also complete congressionally-requested audits and reviews in accordance with statutory due dates.[62] These professional service providers both in and out of government complete their work in accordance with professional standards within timeframes established before work begins.

Findings

DCAA's work is untimely, which causes delays in contract awards, as well as other negative effects on the contract life cycle, through and including contract closeout. For example, in FY 2016, DCAA did not begin work on final indirect cost rate proposals until more than 2 years after contractors' submissions.[63] Contracting officers need DCAA's work to close out flexibly priced contracts.

Conclusions

DoD's system of acquisition internal controls operates most effectively when controls are applied in a timely way. Statutory time limits for various oversight activities will improve their effectiveness. Currently, contractors must submit to DoD a wide variety of reports and other documents in accordance with strict regulatory time limits.[64] There are fewer time limits for DoD to perform its oversight responsibilities.

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[60] Financial Industry Regulatory Authority (FINRA) Information Notice, *2017 and First Quarter 2018 Report Filing Due Dates,* accessed November 17, 2017, http://www.finra.org/sites/default/files/notice_doc_file_ref/Information-Notice-120516.pdf.
[61] "OMB BULLETIN NO. 98-08 – Audit Requirements for Federal Financial Statements," OMB, accessed November 17, 2017, https://www.whitehouse.gov/omb/bulletins_98-08.
[62] For examples of statutory due dates for Comptroller General (GAO) audits and reviews, see sections 147, 224, 235, 238, 536, 578, 751, and 1670 et al. in the FY 2017 NDAA, Pub. L. No. 114-328 (2016). https://www.congress.gov/114/bills/s2943/BILLS-114s2943enr.pdf.
[63] GAO, *Federal Contracting: Additional Management Attention and Action Needed to Close Contracts and Reduce Audit Backlog, GAO-17-738,* 27, accessed November 17, 2017, https://www.gao.gov/assets/690/687497.pdf.
[64] For example, Final indirect costs rates, FAR 42.705 and Contracting officer determination procedure, FAR 42.705-1.

Congress should establish basic statutory oversight time limits for each of the following contractor submissions to accomplish the following:

- Focus on the oversight function's mission by providing contracting officers what they need to do their jobs in a timely manner.
- Focus on what matters most (i.e., risk management, rather than risk avoidance) by exercising reasonable professional judgment.
- Better manage audits, engagements, and other services.
- Forge more cooperative working relationships among contracting officers, compliance professionals, and contractors. The expectation is that both contractor and government actions will be consistent with the objective of completing audits and advisory services within established time limits.

On-Demand Activities

DoD's oversight activities, relative to contractor submissions, are either on-demand or predictable. These oversight activities are necessary to provide timely information to a *procuring* contracting officer in connection with awarding or administering a particular contract. To ensure contracting officers can help prioritize work requested of DCAA, time limits should be established during which the activities must be completed.

Table 2-4. On-Demand Oversight Time Limits

Matter for DCAA Review	DCAA Time Limit
Contractor submission of preaward cost proposal	90 days from date of contracting officer request for review
Contractor submission of invoices for direct contract costs	90 days from date of contracting officer request for review
Any other contractor submission in connection with awarding, administering, or terminating a particular contract	180 days from date of contracting officer request for review

Predictable Activities

These oversight activities are necessary to provide timely information to an *administrative* contracting officer in connection with administering compliance requirements that affect contractors' portfolio of contracts.

Table 2-5. Predictable Oversight Time Limits

Matter for DCAA Review	DCAA Time Limit
Contractor submission of forward pricing rate proposal	90 days from date of contracting officer request for review

Matter for DCAA Review	DCAA Time Limit
Contractor submission of provisional billing rate proposal	30 days from date of receipt of the contractor submission
CAS disclosure statement	If the contracting officer requests DCAA review of the adequacy of the CAS disclosure statement, 60 days from date of contracting officer request for review
Contractor submission of cost accounting practice changes referred to as a General Dollar Magnitude (GDM) proposal	90 days from date of contracting officer request for review
Contractor submission of cost accounting practice changes referred to as a Detailed Cost Impact (DCI) proposal	180 days from date of contracting officer request for review
Contractor compliance with CAS in accordance with the contractor's CAS disclosure statement	90 days from date of contracting officer request for review
Contractor compliance with an CAS	90 days from date of contracting officer request for review
Matter for DCAA review	DCAA time limit

Contracting officers should possess the ability to extend time limits, but extensions should be recorded separately from the original required or agreed-upon time limit. Extensions should be categorized as shown below:

- Contracting officer timing changed
- DCAA/DCMA requested
- Contractor requested/caused

No extensions should be categorized as *contractor requested/caused* without the contractor's express knowledge. If contractors disagree that they caused the delay, their disagreement should be noted. This information will be important in determining certain elements of DCAA's annual report to Congress.

Time limits should become effective October 1, 2019. DCAA and DCMA should be encouraged to adopt these time limits sooner to accommodate engagement, resource staffing, and estimated funding levels for IPA support.

Implementation

Legislative Branch

- In accordance with the requirements of DoD and the Section 809 Panel, set forth in Section 803 (a) of the FY 2018 NDAA, Performance of Incurred Cost Audits, amending 10 U.S.C 2313b (g), establish statutory time limits for audit and advisory services.

- Revise 10 U.S.C. § 2313b(g) to correspond with statutory time limits recommended above.

Executive Branch

- No Executive Branch changes are required.

Note: Draft legislative text and sections affected display 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 9: Permit DCAA to use IPAs to manage resources to meet time limits.

Problem

DCAA cannot eliminate its current backlog of unaudited final indirect cost rate proposals (i.e., incurred cost audits) while providing timely financial oversight and advisory services to contracting officers. DCAA needs additional resources to get and stay current with its oversight responsibilities.

Background

DCAA has reduced the backlog of incurred cost audits from more than 20,000 to around 4,500 but still has a sizeable number of current incurred cost audits in its inventory.[65] According to a recent GAO report, DCAA possesses nearly 10,000 unaudited final indirect cost rate proposals that are not currently included in its backlog, many of which will be subject to an audit in accordance with DCAA's risk assessment approach.[66] It currently takes DCAA an average of 747 days to begin its work on a final indirect cost rate proposal once it is received.[67]

Findings

GAO concluded in this report that "the primary reason for the delay is due to the availability of DCAA staff to begin the audit work."[68] Because DCAA lacks sufficient capacity to perform the current needs of DoD contracting officers and eliminate its backlog of unaudited final indirect cost rate proposals, the time it is taking for DCAA to start its nonbacklogged incurred cost audits is growing.

Due to the backlog and previous legislation that prohibited DCAA's provision of audit services to nondefense agencies,[69] NASA now allows its contracting officers to use IPAs to conduct incurred cost audits as well as other financial services.[70]

Conclusions

DCAA should use IPAs to provide timely audit and advisory services in accordance with statutory time limits. This approach will assist DCAA in eliminating its final indirect cost rate proposal backlog and provide better coverage and more responsiveness in other audits and advisory services. The contracting community will benefit from increased use of IPAs by DCAA to perform oversight functions. Timely performance of necessary risk management activities allows oversight professionals and contracting officers to gain insights into current contractor operations. This insight facilitates faster corrective actions (if necessary), which, in turn, reduces risks of noncompliance and DoD's oversight burden.

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[65] Defense Contract Audit Agency, *Report to Congress on FY 2016 Activities: Defense Contract Audit Agency*, 9, accessed on October 30, 2017, http://www.dcaa.mil/Content/Documents/DCAA_FY2016_Report_to_Congress.pdf.
[66] GAO, *Federal Contracting: Additional Management Attention and Action Needed to Close Contracts and Reduce Audit Backlog, GAO-17-738,* 30, accessed November 2, 2017, http://www.gao.gov/assets/690/687497.pdf.
[67] Ibid, 27.
[68] Ibid, 32.
[69] FY 2016 NDAA, Pub. L. No. 114-92, § 893, 129 Stat. 952 (2015).
[70] "Procurement Notice PN 15-11: Revision to NFS 1815.404-2: Use of Contractor to Perform Contract Audit Services, NFS Case 2015-N020," dated December 16, 2015, National Aeronautics and Space Administration, accessed November 2, 2017, https://www.hq.nasa.gov/office/procurement/regs/pn15-11.htm.

DCAA is responsible for managing its oversight workload and will need to leverage IPAs to become and remain current relative to established time limits. IPAs and other professional services firms are accustomed to performing their work under time limits, in accordance with professional standards, and delivering useful information to their customers. Once DCAA eliminates its backlog of oversight responsibilities it is possible DCAA will no longer need to leverage IPAs if DCAA is able to embrace a more robust risk assessment process, adopt commercial engagement management and materiality approaches, and focus on the contracting officer as its customer.

Contracting officers should have the authority to request from DCAA the services of an IPA or other qualified professional services firm if DCAA cannot accommodate contracting officers' needs.

The DCAA budget request should include increased appropriated funding for DCAA to contract with IPAs. To address the backlog of work and provide timely assistance to contracting officers and the acquisition team, this appropriation must be in addition to DCAA's current budget. Decreases to DCAA's budget to use IPA's will not address the backlog and timeliness issues facing the acquisition system. Funding should be made available each year for a 5-year period beginning with FY 2019. Extension of this initial period should be subject to DCAA justification.

Implementation

Legislative Branch

- Provide appropriated funds beyond DCAAs current budget, so DCAA can contract with IPAs to address the backlog of work and provide timely assistance to contracting officers and the acquisition team.

Executive Branch

- Modify DoDD 5105.36 to enable use of IPAs (a) to provide timely audit and advisory services in accordance with statutory time limits and (b) to become and remain current relative to established time limits.

Note: Detailed modifications to DoDD 5105.35 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.

RECOMMENDATIONS 10 THROUGH 12 SHARE THE COMMON THEME: USE ACCEPTED COMMERCIAL STANDARDS AND PRACTICES WITH OBJECTIVE AND STANDARDIZED COMPLIANCE CRITERIA.

Recommendation 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.

Problem

The DoD is not obtaining timely assurance that internal controls for defense contractors' accounting systems are properly designed and functioning.[71] Ensuring effective internal controls is one of the most efficient ways to protect the government's interest, reduce risk, and improve performance.

Background

The Committee of Sponsoring Organizations (COSO) of the Treadway Commission has developed an Internal Control—Integrated Framework (May 2013) that has gained broad acceptance in the private sector and is widely used around the world.[72] COSO is a private-sector initiative that was jointly sponsored by the American Accounting Association (AAA), American Institute of Certified Public Accountants (AICPA), Financial Executives International (FEI), Institute of Management Accountants (IMA), and the Institute of Internal Auditors (IIA).[73] COSO is dedicated to providing thought leadership through the development of a comprehensive framework and guidance on internal control, enterprise risk management, and fraud deterrence designed to improve organizational performance and oversight and to reduce the extent of fraud in organizations. Its integrated framework of internal controls enables organizations to develop systems of internal control that adapt to changing business and operating environments, mitigate risks to acceptable levels, and support sound decision-making and governance of the organization.

The federal government has developed a similar framework that adapts the COSO Internal Control – Integrated Framework principles and addresses the unique government environment in the *Standards for Internal Control in the Federal Government* (GAO-14-704G), which is commonly referred to as the *Green Book*.[74] The U.S. Comptroller General developed the *Green Book* to set forth the internal control standards for federal entities. The *Green Book* defines the standards through components and principles and explains why they are integral to entities' internal control system.

Internal control also is defined as a process used by management to help an entity meet its objectives. Internal control helps an entity run its operations efficiently and effectively, report reliable information about its operations, and comply with applicable laws and regulations. Intended users of the *Green Book* are program managers, independent public accountants conducting audits of federal

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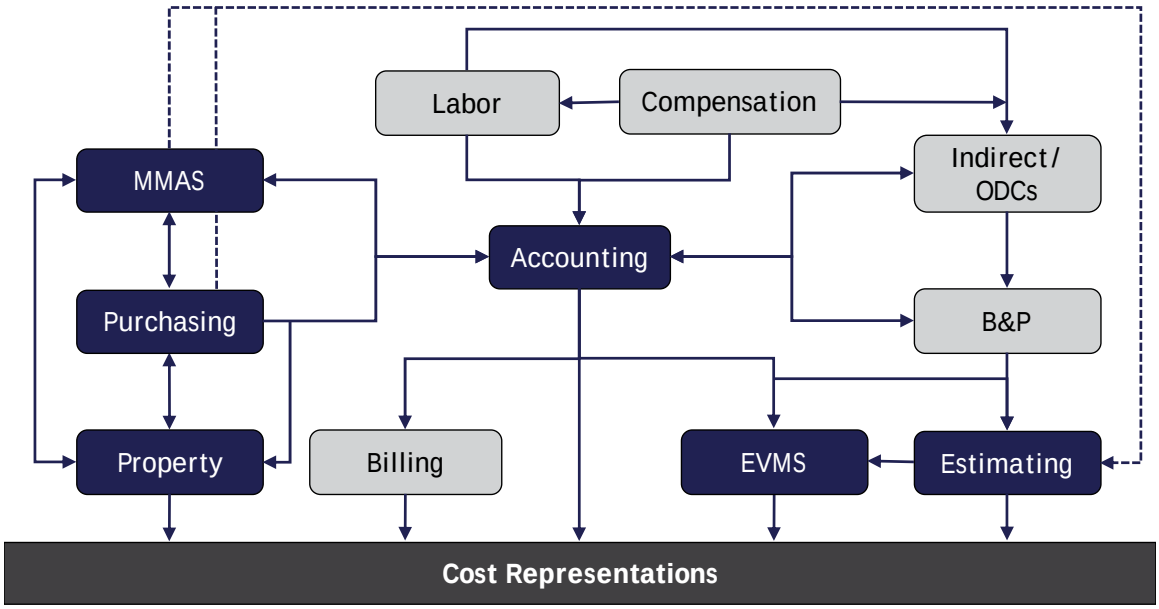
[71] DCAA, email to Section 809 Panel Staff, December 18, 2017. The email indicated that DCAA completed eight accounting system audits in FY 2016.
[72] Committee of Sponsoring Organizations of the Treadway Commission, *Internal Control – Integrated Framework, Executive Summary*, i, accessed October 30, 2017, https://www.coso.org/Documents/990025P-Executive-Summary-final-may20.pdf.
[73] "Guidance on Internal Control," COSO: Committee of Sponsoring Organizations of the Treadway Commission, accessed October 30, 2017 https://www.coso.org/Pages/ic.aspx.
[74] GAO, *Standards for Internal Control in the Federal Government, GAO-14-704G,* accessed October 30, 2017, http://www.gao.gov/assets/670/665712.pdf.

expenditures, and IG staff conducting financial or performance audits. Assurance of an effective internal control system provides management with added confidence that it can adapt to shifting environments, evolving demands, changing risks, and new priorities.

Accounting business systems make up much of the business systems in the DoD's Contract Business Analysis Repository (CBAR). In addition to being the most prevalent contractor system, it is the most critical system for ensuring the government's interests are protected. The accounting system is the central and integral internal control system that enables companies to successfully conduct business with the federal government.

Figure 2-1. Business System Relationships



FAR 16.301-3, Limitations, recognizes the criticality of the accounting system by requiring the contractor to maintain an adequate accounting system for determining cost applicable to contracts awarded on the basis of cost.[75] In addition, FAR subpart 32.5, Progress Payments Based on Costs, and FAR 32.503, Postaward Matters, contain multiple provisions requiring an adequate accounting system and controls.[76] Even prospective contractors wanting to do business with the federal government must have the necessary accounting and operational control structure to be deemed responsible in accordance with FAR 9.104-1, General Standards.[77]

This requires prospective contractors to demonstrate capability to meet the requirements outlined in the Standard Form 1408, Pre-Award Survey of a Prospective Contractor Accounting System.[78] This pre-award system review should not be confused with the reviews required by the DFARS Business System

[75] Cost-Reimbursement Contracts: Limitations, FAR 16.301-3.
[76] Progress Payments Based on Costs, FAR 32.5.
[77] Responsible Prospective Contractors: Standards, FAR 9.104-1.
[78] Defense Contract Audit Agency, *Preaward Survey of Prospective Contractor Accounting System, Version 6.13, dated April 2017,* accessed November 20, 2017, http://www.dcaa.mil/Content/Documents/sap/17740_AP_NA.pdf.

rule that test the design and capability of the system, as well whether the controls are in place and functioning properly.

Findings

The Sarbanes–Oxley Act (SOX) established the first mandated audit of Internal Controls over Financial Reports (ICFR) to determine the effectiveness of controls (SOX 404(b)).[79] Most publicly traded companies, with the exception of those with a market capitalization of $75 million or less, are required to have an annual audit of ICFR.[80]

As a result of SOX, in the last 15 years, industry organizations have established a framework with standards, objective criteria, and defined terminology. The Public Company Accounting Oversight Board (PCAOB) has established Auditing Standard 2201 (AS 2201), and the American Institute of Certified Public Accountants (AICPA) has developed AU-C Section 940 auditing standards. Both documents are titled *An Audit of Internal Control over Financial Reporting That is Integrated with an Audit of Financial Statements*.[81] Refinements over the last 15 years have brought about reliable, consistent, and well-understood guidance for private-sector auditors.

Conclusions

DoD should build on the established and well-understood internal control audit framework provided by SOX to cover DoD's contractor accounting system requirements. SOX 404(b) serves as a foundation to help meet the government's objectives to obtain assurance that contractors have effective internal controls for their business systems. Starting with this framework eliminates the need to develop uniquely defined criteria and terminology, which in turn reduces the time needed to make this framework operational.

DoD should use the SOX internal control audit framework and adapt it to meet the government's objectives for contractor accounting-system oversight. Audits of internal controls designed to assess controls over financial reporting (the SOX mandate) cannot meet the government's contracting audit needs without some adjustments to the scope of the engagement. Using the current audit of internal controls over financial reporting as a basis to certify that the government's control objectives are adequately addressed and satisfy the intent of the current business is an insufficient approach because it would not address all of the relevant control objectives. The audit of ICFR addresses some of government's objectives, but comes woefully short of addressing all of them.

Adapting the current internal control framework would address a shortcoming in the FY 2017 NDAA Section 893 (c)(1) that states "if a registered public accounting firm attests to the internal control

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[79] Securities and Exchange Commission, Office of Economic Analysis, *Study of the Sarbanes-Oxley Act of 2002 Section 404 Internal Control over Financial Reporting Requirements,* 3, accessed November 20, 2017, https://www.sec.gov/news/studies/2009/sox-404_study.pdf.
[80] Securities and Exchange Commission, *Final Rule – Internal Control Over Financial Reporting In Exchange Act Periodic Reports of Non-Accelerated Filers, Effective Date: September 21, 2010,* accessed November 20, 2017, https://www.sec.gov/rules/final/2010/33-9142.pdf.
[81] Public Company Accounting Oversight Board, *Auditing Standard No. 5 – An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements and Related Independence Rule and Conforming Amendments, PCAOB Release No. 2007-005A, June 12, 2007,* accessed November 20, 2017, https://pcaobus.org/Rulemaking/Docket%20021/2007-06-12_Release_No_2007-005A.pdf. American Institute of Certified Public Accountants (AICPA), *AU-C Section 940 – An Audit of Internal Control Over Financial Reporting That Is Integrated With an Audit of Financial Statements*, accessed November 20, 2017, https://www.aicpa.org/content/dam/aicpa/research/standards/auditattest/downloadabledocuments/au-c-00940.pdf.

assessment of a contractor pursuant to section 404(b) of the Sarbanes-Oxley Act of 2002 allow the contractor … to submit certified documentation … that the contractor business systems of the contractor meet the business system requirements referred in subsection (b)(1) and to thereby eliminate the need for further review of the contractor business system by the Secretary of Defense."[82]

The envisioned internal control audits will focus on assessing the key controls that ensure government objectives are being met. Auditors' conclusions on the effectiveness of the key controls are essential information for contracting officers and contractors to evaluate whether the government's interests are adequately protected. Specifically, auditors will evaluate whether key internal controls are in place and operating to do the following:

- Ensure a sound internal control environment and accounting framework.
- Appropriate classification of direct costs from indirect costs.
- Allocate indirect costs properly.
- Exclude unallowable costs.
- Confirm costs by contract.
- Reconcile subsidiary cost ledgers to general ledger accounts.
- Ensure periodic posting of books of account at least monthly for contract billings.
- Certify proper controls over adjusting entries.
- Ensure timekeeping and labor distribution controls are proper.
- Comply with contract terms.
- Ensure accordance with Cost Accounting Standards if applicable and GAAP.
- Monitor the internal control environment.

Under the internal control audit engagement, auditors will determine whether reasonable assurance exists that controls will prevent any significant or material mischarge from occurring. This is in contrast to the current evaluation criteria that determine compliance by using an inspection-like pass or fail for each of the 18 requirements. In many instances, the current engagement fails to consider a holistic view of the system of controls and the significance of a noncompliance and the likelihood that a significant noncompliance could actually occur.

Using the private-sector-established internal control audit framework can resolve a consistent complaint expressed in Section 809 Panel meetings with stakeholders that the accounting system criteria were not objective and measureable because of the current terminology used in the business system rule.[83] Internal control audits should be performed as the basis for assessing the adequacy of defense contractors' accounting systems because these audits provide the following:

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[82] Section 893 of FY 2017 NDAA, Pub. L. No. 114-328 (2016).
[83] Defense Industry officials, interview conducted July 25, 2017 by Section 809 Panel Team 4: Barriers to Entry. American Institute of CPAs, *DoD Comment Letter Finbal-AICPA*, https://www.regulations.gov/document?D=DARS-2014-0047-0020.

- An engagement framework used in the private sector that is well established and understood.
- More useful and relevant information to the acquisition team, contracting officer, and contractor.
- Clear and objective criteria for accounting system requirements.

The framework's standards and criteria would satisfy the FY 2017 NDAA Section 893 (a) requirement to develop "clear and specific business system requirements that are identifiable and made publicly available."[84]

Implementation

Legislative Branch

- No statutory changes are required.

Executive Branch

- Revise DFARS 252.242-7006 to allow DoD use of internal control audits conducted by contractors for accounting system oversight.

Note: Detailed modification of DFARS 252.242-7006 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.

[84] Section 893 of FY 2017 NDAA, Pub. L. No. 114–328 (2016).

Recommendation 11: Develop a Professional Practice Guide for DoD's oversight of contractor costs and business systems.

Problem

DoD's oversight functions within DCAA provide professional services and skilled advice to contracting officers. The quality and consistency of this advice is highly dependent on the quality and consistency of foundational standards that guide the professionals' work.

Background

Although professional standards are common in the accounting and auditing profession, none have been collaboratively developed or interpreted for the unique purpose of federal government contract oversight. DCAA's *Contract Audit Manual* provides a good foundation, but it lacks the collaborative inputs, perspectives, and interpretations of knowledgeable professionals outside DCAA and the government. This point is important because IPAs and other qualified professional services firms are playing an increasingly important role in the government's oversight of federal government contractors.

Findings

Professional standards represent principles rather than rules and are thus subject to interpretation. DoD's oversight professionals will benefit from a uniform, collaborative interpretation of applicable professional standards. Without a Professional Practice Guide, contracting officers will be underserved and likely confused by inevitable inconsistencies among audit and advisory reports issued by DCAA, DCMA, and IPAs. Professional standards of particular importance that require a collaborative interpretation include (among many others) independence, objectivity, materiality, sufficient evidence, and reliance on the work of others.

Conclusions

A Professional Practice Guide will clarify the types of engagements (tools in the toolbox) that may be performed to accomplish DoD's contract compliance oversight objectives. Currently, the government's oversight lexicon consists of the term audit to describe nearly every type of oversight activity (see Recommendation 7b). DoD does not need this level of assurance in connection with every oversight activity. Audits are appropriate in certain circumstances, but other types of advisory engagements (which may include other forms of audit) may be better suited to provide the information contracting officers need, when they need it (given the nature and extent of potential risks). For DoD's internal controls over contractor costs and business systems to be effective and efficient, DoD's oversight professionals must have more tools in their toolboxes.

Performance audits should be used more extensively to meet the contracting officers' need for a high level of assurance. Performance audits provide oversight professionals with more flexibility and the ability to deliver more valuable information without sacrificing the same high level of assurance.

The Professional Practice Guide should set forth clear materiality guidelines that focus oversight professionals on providing the information contracting officers need to make reasonable business decisions. What may be material to a particular business decision will be influenced by a variety of qualitative and quantitative considerations, recognizing that contracting officers' role is to manage DoD's risk (rather than avoid it). The cost of DoD's oversight, including adverse effects on the

timeliness of decision-making, must be balanced with expected benefits of that oversight. The CASB's administrative regulations establish a variety of *qualitative* materiality considerations appropriate for and applicable to any business decision affecting contract costs/prices.[85]

For instance, materiality is a well-established concept in the auditing professional standards, and its application is well understood in financial statement audits. How the materiality concept applies to contract audits, however, has not been thoroughly examined and defined. The materiality concept is based on the premise that an amount is material if it would change or influence the view or decision of a reasonable person. With respect to contract audits, contracting officers and their teams use the audited information as the basis for negotiating contract prices and reimbursing contractors' costs. Thus, to address the user's needs in this regard, auditors must consider materiality from both *qualitative* (nature) and *quantitative* (dollar amount) perspectives. The considerations at 48 CFR 9903.305 provide a sound foundation for assessing qualitative aspects of materiality. Establishing quantitative materiality thresholds for audit planning, determining fair and reasonable contract prices, and settling contract cost reimbursements would improve the efficiency and effectiveness of the DoD's oversight function. Quantitative materiality thresholds represent a margin of permissible imperfection in the potential expenditure of tax dollars. Accordingly, the quantitative materiality thresholds must be calibrated to a reasonable users' expectations concerning the nature and amount of unallowable costs that would influence or change their decisions. The Section 809 Panel expects the Professional Practice Group to not only establish quantitative thresholds for various contract audit, contract award, and cost settlement situations, but also provide guidance and examples on how to apply these thresholds in these specific situations consistent with the following examples. For individual contract pricing actions, the procuring contracting officer is primarily concerned about the affect unallowable costs may have on contract price. Contract type and the degree of competition are also significant considerations bearing on cost/price risk.

> **Example 1a:** Competition is the largest influence in contract price determination. Cost allowability is an ongoing requirement for payment during contract performance on cost-type contracts. Thus, any unallowable costs that may have been included in the initial contract price can be identified and removed at any time prior to contract close-out. Higher preaward materiality thresholds do not adversely affect the Government's ability to manage cost risk. An appropriate quantitative materiality threshold could be 10 percent of the total proposed contract price.
>
> **Example 1b:** Negotiation of non-competitive fixed prices represents the highest degree of cost risk for contracting officers. Unlike cost type contracts, the Government generally cannot detect and remove unallowable costs after contract award. This circumstance suggests a progressively lower materiality level is appropriate as contract value increases as envisioned below:

[85] Materiality, 48 CFR 9903.305.

Up to $100k	Up to $500k	Up to $1m	Up to $5m	Up to $10m	Up to $50m	Up to $100m	Up to $500m	Over $500m
5%	5%	5%	3% Step-down 0.5% per $1m	2.5% Step-down 0.1% per $1m	2% Step-down 0.1% per $10m	1.5% Step-down 0.1% per $10m	1% Step-down 0.1% per $100m	0.5%

Certain contract requirements affect the cost/price of more than one contract. These matters are often managed by administrative contracting officers, who are concerned with the total aggregate impact on contract costs/prices as well as those of individual contracts.

Example 2: Potential materiality thresholds for annual final indirect cost rate settlements will reflect the effect on total reimbursable contract costs for the contractor's fiscal year. The thresholds should provide a useful point of reference to guide audit planning and the nature of final indirect cost rate settlements. A formulaic approach to determine a contractor's annual aggregate materiality level is compatible with, and supportive of, the Government's materiality thresholds for contract quick-closeouts (see FAR 42.708). The formulaic approach below replicates the quantitative materiality thresholds for ranges of reimbursable incurred costs proposed in the House version of the FY 2018 NDAA.

ADV								
Up to $100k	Up to $500k	Up to $1m	Up to $5m	Up to $10m	Up to $50m	Up to $100m	Up to $500m	Over $500m
Materiality Threshold = $5,000 x ((Total ADV/$100,000)^.75)								
$5,000	Up to $16,719	Up to $28,117	Up to $94,015	Up to $158,114	Up to $528,686	Up to $889,140	Up to $2,973,018	Up to See formula

In addition to each of the examples, the Section 809 Panel recognizes and endorses that a different and significantly lower planning materiality would be used for expressly unallowable costs and sensitive audit areas.

Implementation

Legislative Branch

- No statutory changes are required.

Executive Branch

- In accordance with the statutory requirements of DoD and the Section 809 Panel, set forth in Section 803 of the FY 2018 NDAA, the Section 809 Panel will establish a team (to include at a minimum GAO, DCAA, AICPA, and industry) to develop a Professional Practice Guide, which includes materiality standards, for contract auditing to be completed prior to the sunset of the Section 809 Panel in January 2019.

- Require GAO to maintain the Professional Practice Guide, according to best practices.

Note: There are no additional Implementation Details for this recommendation.

Implications for Other Agencies

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

Recommendation 12: Require DCAA to obtain peer review from a qualified external organization.

Problem

Peer reviews are designed to validate a professional service organization's compliance with professional standards. The peer review process can provide valuable outside perspectives and insights to the organization. According to GAGAS, the peer reviewer must (a) understand GAGAS, (b) be independent from the organization subject to peer review, and (c) collectively have enough knowledge to perform the peer review.[86]

DoDIG currently performs the peer review for DCAA; however, DoDIG's mission is vastly different than DCAA's and as a result the two organizations do not perform similar services. The audits DoDIG conducts are FAR different in scope, method, and purpose than contract audits conducted by DCAA.

Background

According to the Inspector General (IG) Act of 1978 (as amended), DoDIG is required to:

> *(10)* ***conduct, or approve arrangements for the conduct of, external peer reviews of Department of Defense audit agencies*** *in accordance with and in such frequency as provided by Government auditing standards as established by the Comptroller General of the United States.*[87]

DoDIG has not exercised the option to use another organization to conduct peer review of DCAA. In addition to the peer review, the IG Act directs DoDIG to directly "monitor and evaluate" DCAA for its work, as well as checking DoD organizations' responses to contract audit recommendations.[88]

Findings

DoDIG cannot serve as an independent, qualified peer reviewer of DCAA while supervising DCAA in oversight of contract audits. More importantly, DoDIG auditors do not perform contract audits, do not advise contracting officers during preaward contract activity, and are not part of the acquisition team. For a peer review to be useful, the reviewer must be well-versed on how the professional standards apply to the services provided. The effect of the DoDIG peer review of DCAA is to further remove DCAA auditors from being advisors to contracting officers and members of the acquisition team.

The Blue Ribbon Commission on Defense Management (also referred to as the Packard Commission) recommended the Undersecretary of Defense (Acquisition) provide overall policy guidance for contract audits.[89] At the time of the recommendation (and continuing to today), the DoDIG has the role of developing policy for contract audit and evaluating audit performance as well as the peer review of

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[86] GAO, *Government Auditing Standards, 2011 Revision, GAO-12-331G,* accessed November 20, 2017, http://www.gao.gov/assets/590/587281.pdf.
[87] Inspector General Act of 1978, as amended, "Section 8, subsection (10)", accessed November 20, 2017, https://www.ignet.gov/sites/default/files/files/igactasof1010(1).pdf.
[88] Ibid.
[89] GAO, *Defense Management: Status of Recommendations by Blue Ribbon Commission on Defense Management, GAO/NSIAD-89-19FS,* 66, accessed November 24, 2017, http://www.gao.gov/assets/90/88245.pdf.

DCAA.[90] GAO noted that DoD did not adopt the Packard Commission recommendation to improve the acquisition system by reforming contract audit performance due to the statutory assignment of contract audit policy development and oversight to DoDIG through the IG Act.[91]

Conclusions

DCAA peer review should be performed by an organization other than DoDIG. Congress should amend the targeted DoD-specific portions of the IG Act and other relevant sections of U.S. Code to DoDIG as the peer reviewer for DCAA.

DoDIG's continued monitoring and evaluation of DCAA's contract audits is problematic because DoDIG, as an enforcement agency, is not DCAA's peer. The conduct of a peer review by the IG creates a natural conflict and is not conducive to independent peer review espoused by audit standards. In contrast, an IPA can provide a peer review to DCAA that will accomplish the mission of a periodic peer review: professional review from similarly trained experts not otherwise responsible for the agency's day-to-day operations.

Implementation

Legislative Branch

- Revise 10 U.S.C. § 2313b(e) to require periodic peer review of DCAA by a commercial auditor.

Executive Branch

- Amend the targeted DoD-specific portions of the IG Act to remove DoDIG as the peer reviewer for DCAA.

Note: Draft legislative text and sections affected display 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.

[90] Inspector General Act of 1978, as amended, "Section 8, subsection (10)", accessed November 20, 2017, https://www.ignet.gov/sites/default/files/files/igactasof1010(1).pdf.
[91] GAO, *Defense Management: Status of Recommendations by Blue Ribbon Commission on Defense Management, GAO/NSIAD-89-19FS,* 66, accessed November 24, 2017, http://www.gao.gov/assets/90/88245.pdf.

RECOMMENDATIONS 13 THROUGH 15 SHARE THE COMMON THEME: PROVIDE MORE EFFECTIVE AND EFFICIENT CONTRACT COMPLIANCE OVERSIGHT.

Recommendation 13: Increase coverage of the effectiveness of contractor internal control audits by leveraging IPAs.

Problem

In recent years, DoD has not provided sufficient reviews and audits of contractor business systems that would satisfy the DFARS Business Systems requirements under DFAR clause 252.242-7005.

Background

As shown in the chart below, the coverage varies by business system, but no system is receiving extensive coverage. The lack of coverage of these systems prevents DoD from obtaining assurance that contractors' business systems have effective controls and can be relied on when deciding what to review or audit and how much substantive test of details to perform. The absence of assurance causes auditors to consider most areas high risk resulting in less efficient and less timely audits.

Findings

The deficiency reports shown in the chart below indicate the system has a significant deficiency. Currently the identification of significant deficiencies almost always occurs in a nonsystem audit. During a nonsystem audit, an alleged finding is identified and a determination is made that the finding results from weak internal controls within the business system. In this current scenario, DoD only becomes aware of business system vulnerabilities when a significant deficiency already has occurred. By obtaining positive assurance of the system's effectiveness, an opportunity exists to prevent or correct vulnerabilities before there is any adverse effect on DoD interests.

Table 2-6. DCAA Business System Coverage[92]

Type of System	Approximate Total Systems	2016 Audits	% of 2016 Coverage
Accounting	3,786	8	0.2%
MMAS	373	7	1.9%
Estimating	774	7	0.9%
Business System Deficiency Reports		78	

Conclusions

Obtaining timely assurance that defense contractors have effective internal controls is an essential component of all cost-effective compliance frameworks. Timely audits of controls can prevent or resolve problems before they become significant. Having a recent assessment is a critical part of the risk model stated in Recommendation 14, and confirming effective internal controls exist will permit all

[92] Data under "Total Systems" is from DCMA CBAR and was provided to the Section 809 Panel by DCAA. The data in the other two columns is from DCAA, email to Section 809 Panel Staff, December 18, 2017.

additional contract audits to be performed more efficiently and timely. However, none of the benefits can currently be attained because adequate coverage has not been accomplished in several years.

Implementation

Legislative Branch

- No statutory changes are required.

Executive Branch

- Revise DFARS 242.7501(a) to define auditor for the purpose of permitting contracting officers to rely on the work of an IPA to determine the adequacy of a contractor's accounting system.

Note: Detailed modifications to DFARS 242.7501(a) 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 14: Incentivize contractor compliance and manage risk efficiently through robust risk assessment.

Problem

DCAA uses a simple risk assessment to prioritize workload. Because DCAA bears all oversight responsibilities regarding contractor costs and related business systems, and it will be affected by recommended oversight time limits. DCAA needs a more robust risk assessment approach.

Background

DCAA plays an important role within DoD's system of acquisition internal controls. When these controls are operating effectively and efficiently, they provide DoD reasonable assurance that contract prices and cost reimbursements are *free of material unallowable costs*. This concept, established by the COSO Internal Control Framework and incorporated into the GAO's Standards for Internal Control in the Federal Government (i.e., *Green Book*), is fully compatible with the FAR guiding principle of shifting focus from *risk avoidance* to *risk management*.[93] To accomplish the desired outcome of both the federal government's internal control framework and the FAR's Guiding Principles, DCAA must embrace a more insightful risk assessment process.

Findings

DCAA has made progress in the last 7 years to better focus the agency's resources based on risk. Currently, the agency uses Auditable Dollar Volume (ADV) as its primary risk consideration to determine which contractors' costs will be subject to oversight.[94] With the recommended expansion of the types of oversight tools available in DCAA's toolbox (see Recommendation 7), the agency will no longer need to perform full-scope financial statement-like audits as its only means to deliver information and assurance to contracting officers. The oversight agility provided by a wider variety of oversight tools necessitates a more insightful view of contractor cost risk. Although ADV is an important measure of potential risk—arguably the most important—consideration of other important risk measures will help DCAA better focus its resources on the contractors and cost areas that present meaningful risk to DoD.

Contractors whose final indirect cost rate proposals exceed DCAA's *high risk* ADV threshold (i.e., $250 million) cannot reduce their risk profile to anything less than high risk due to DCAA's limited risk assessment processes.[95] Defense contractors should have the opportunity to reduce their risk profile by demonstrating their commitment to consistent compliance through their own robust systems of internal control. This is precisely the objective of DoD's system of acquisition internal controls.

In the late 1980s, DoD and contractors worked together to create the Contractor Risk Assessment Guide (CRAG) Program with the intent of contractors implementing and monitoring systems of internal

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[93] Performance Standards, FAR 1.102-2(c)(2).
[94] DoD, Defense Contract Audit Agency Memorandum 12-PPD-023(R), *Audit Guidance on Revised Policy and Procedures for Sampling Low-Risk Incurred Cost Proposals, dated September 6, 2012*, accessed November 20, 2017, https://www.dcaa.mil/Content/Documents/MMR/12-PPD-023.pdf.
[95] Ibid.

control to improve contract cost compliance.[96] Improved contractor internal controls ideally yield more effective government oversight. Some participating contractors still did not experience reduced oversight despite demonstrated improvements in compliance during the CRAG program,[97] although the program is no longer even active.

Conclusions

It is unclear why DoD's oversight has not changed when contractors invest in stronger systems of internal control; however, a clear path to that desired outcome is needed. With a refocused mission, oversight time limits, more tools in the oversight professional's toolbox, and more robust risk assessments, DCAA can become more effective and efficient.

DoD should implement a risk assessment approach whereby weightings are assigned to a variety of fact-based risk considerations. Risk weights, based on objective criteria aligned with low, medium, and high risk classifications, are assigned for each risk consideration. See Table 2-7 for proposed risk considerations and potential objective criteria for each risk classification.

Table 2-7. Risk Assessment Matrix

Risk Considerations	Low Risk Score = 1 *(unless otherwise noted)*	Medium Risk Score =2	High Risk Score =3 *(unless otherwise noted)*
Total Auditable Dollar Volume (ADV) *Cost reimbursable direct and indirect costs*	Less than $50m *(0 for less than $15m)*	Between $50m-250m	Over $250m *(4 for more than $500m; 5 for more than $1.0b)*
Total ADV as a % of business unit total costs	Less than 20% *(0 for less than 10%)*	Between 20%- 60%	More than 60% *(4 for more than 80%)*
Overall Government Participation in Indirect Costs *% of indirect costs allocable to cost-reimbursable contracts from indirect cost pools in which the government participates*	Less than 20%	Between 20%- 60%	More than 60%
Highest Participation among all allocable Indirect Cost Pools *% of indirect costs allocable to cost-reimbursable contracts from the indirect cost pool with the highest government participation*	Less than 20%	Between 20%- 60%	More than 60%

[96] Department of Defense, *The DoD Contractor Risk Assessment Guide (AD-A203 565)*.
[97] U.S. Congress, Office of Technology Assessment, *Building Future Security,* OTA-ISC-530, accessed December 29, 2017, https://www.ota.fas.org/reports/9205.pdf.

Risk Considerations	Low Risk Score = 1 *(unless otherwise noted)*	Medium Risk Score =2	High Risk Score =3 *(unless otherwise noted)*
Number of Final Indirect Cost Rates Applicable to Government Contracts	Less than 4	Between 4-8	More than 8
Number of Intermediate Cost Pools	Less than 4	Between 4-8	More than 8
Net Annual Indirect Cost True-up *Most-recently closed contractor fiscal year – Total true-up amount (provisionally-billed vs. proposed final) as a percent of total final proposed indirect costs*	Less than 1%	Between 1% and 3%	More than 3%
Adequacy of Final Indirect Cost Rate Proposals	All required in last 3 years	More than 50% in last 3 years	Less than 50% in last 3 years
Cost Accounting Practice Changes *Most-recently closed Fiscal Year, as reported on Schedule M; exclude organizational changes and adoption of new practices*	None	Less than 2	More than 1
Prior Fiscal Year Sustained Questioned Costs *Net impact to cost-reimbursable contracts of questioned costs agreed upon or accepted by the contracting officer*	Less than 1% or N/A	Between 1% and 3%	More than 3%
Business Unit CAS-Covered Contracts *Modified Coverage, Full Coverage, Neither, or Both*	Neither *(Small Business = 0)*	Modified coverage	Full coverage or both
Accounting System Status *Within last three contractor fiscal years*	Approved with no significant deficiencies	Approved w/ one or more significant deficiencies or not evaluated	Disapproved (i.e., one or more material weaknesses)

These recommended risk considerations provide meaningful insight into contractors' business and contract profiles, how much the government participates in indirect cost pools, the complexity of a contractors' indirect cost structure, the status of contractors' business systems, and whether contractors must comply with CAS, among other things.

The sum of all risk weightings for a particular contractor business unit (as determined by the contractor organization responsible for submitting an annual final indirect cost rate proposal), should be used to make an initial objective determination of that business unit's overall risk profile.

- *High risk* business units should be subject to the most robust oversight, which may include the broadest scope and the oversight agency's highest level of assurance. High risk contractor business units will have an overall risk score greater than 30.
- *Medium risk* business units will be subject to oversight in targeted areas (i.e., cost items that represent the most significant cost risk to the department). The agency may not need to perform oversight on all contractor cost representations if prior oversight activities demonstrate a high degree of contractor compliance. Medium risk contractor business units will have an overall risk score between 25 and 30.
- *Low risk* business units will be subject to periodic oversight pursuant to DCAA's current low risk sampling approach. Low risk contractor business units will have an overall risk score less than 25.

The table below illustrates the level of oversight for each of the above risk categories. Most small businesses would receive a low risk score, and thus receive the most-targeted and least burdensome oversight.

Table 2-8. Examples of Envisioned Oversight Levels by Risk Category

Contractor Submission	Low Risk	Medium Risk	High Risk
Final Indirect Cost Rate Proposal	May be selected for analysis on a sample basis. Analysis limited to material indirect cost accounts that may contain unallowable costs, or other procedures designed to address potential material indirect cost allocation risks	May be selected for limited-scope audit on a sample basis. Audit procedures limited to material indirect cost accounts and evaluation of cost allocation bases with over 50 percent government participation	Full-scope audit of material indirect costs, as well as the completeness and accuracy of cost allocation bases.
Forward Pricing Rate Proposal	Analyze historical trends and review of contractor explanation for material rate changes	Analyze historical trends and year-over-year variances in material indirect cost elements	Analyze historical trends, year-over-year cost variances, and evaluate bases of estimates for material cost elements and business volume

This risk assessment process will allow certain otherwise high-risk business units (in terms of ADV) to migrate into medium-risk with strong past performance and sound accounting system internal controls. Conversely, otherwise low-risk business units may migrate into medium or high risk with poor prior compliance history, poor internal controls, and overly complex cost accounting structures relative to their size. As shown in Table 2-9, 81 percent of DoD's contractors that are required to submit final indirect cost proposals have an ADV of less than $15 million and will generally receive a low risk score, and thus receive the most targeted and least burdensome oversight (see Table 2-9).

Table 2-9. CFY 2016 Incurred Cost Proposals Auditable Dollar Value (ADV) Strata[98]

ADV Strata	Contractors		Total ADV ($000)	Percent Total ADV $
$1 to $15M	2,961	81.0%	$ 9,172,162	5.8%
$15M to $100M	525	14.4%	$ 23,103,974	14.6%
> $100M	154	4.2%	$ 52,334,571	33.1%
> $1B	17	0.5%	$ 73,684,447	46.5%
Total	**3,657**	**100.0%**	**$ 158,295,154**	**100.0%**

All of the data necessary for the risk considerations exist within a contractor business unit's final indirect cost rate proposal, or are otherwise readily available. To facilitate consistent, reliable data-gathering across all contractors, a new summary schedule should be added to each required Final Indirect Cost Rate Proposal (FAR 52.216-7(d)) to assist DCAA with capturing this necessary information. DCAA should share its annual risk assessments with contractor business units, upon their request, to ensure the agency's data are accurate and to create transparency.

Implementation

Legislative Branch

- No statutory changes are required.

Executive Branch

- DoD should implement a risk assessment approach.
- In accordance with the statutory requirements of DoD and the Section 809 Panel, and as set forth in Section 803 of the FY 2018 NDAA, the Section 809 Panel will deliberate on the draft risk matrix shown in Table 2-7 and provide definitive recommendations prior to the sunset of the panel in January 2019.

Note: There are no additional Implementation Details for this recommendation.

Implications for Other Agencies

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

[98] DCAA, emails to the Section 809 Panel staff, September8, 2017 and September 17, 2017.

Recommendation 15: Clarify and streamline the definition of and requirements for an adequate *incurred cost proposal* to refocus the purpose of DoD's oversight.

Problem

The term *incurred cost proposal* is not defined within federal acquisition regulations, the effect of which has been to create unnecessary burdens on both the Government and contractors.[99] Incurred cost proposal is the government contracting community's shorthand way of referring to a contractor's *final indirect cost rate proposal*. An annual final indirect cost rate proposal, the elements of which are defined in FAR 52.216-7(d), is necessary for the contractor and the government to establish final indirect cost rates for purposes of settling provisionally billed (i.e., estimated) indirect costs on flexibly priced contracts. The government's responsibilities for negotiating or establishing final indirect cost rates is set forth in FAR 42.705.

Although the final indirect cost rate proposal necessarily includes details regarding all contract costs (indirect and direct), direct costs are included because (a) the government needs to verify the completeness and accuracy of the contractor's total costs to avoid double-counting and (b) direct costs are the most common means by which contractors allocate indirect costs to contracts. A final indirect cost rate proposal is not a claim for direct costs incurred and billed during contract performance. FAR 42.702 indicates that an audit of the final indirect cost rate proposal is performed for the sole purpose of negotiating final indirect cost rates.[100]

In recent years, DCAA began auditing direct costs, as well as indirect costs, during its *incurred cost audits*. Before then, DCAA's audit procedures concerning direct costs were limited to verifying their completeness such that final indirect cost rates are calculated accurately. In general, expanding the scope of incurred costs audits may increase the time it takes DCAA to complete incurred cost audits and increase the time it takes contracting officers to address and resolve the results of DCAA's audits.

Background

The government added new requirements of an *adequate* final indirect cost rate proposal to FAR 52.216-7(d)(2)(iii) in 2011.[101] These newly required elements of a final indirect cost rate proposal were directly based on DCAA's incurred cost electronic model, which DCAA created many years ago to help contractors prepare their final indirect cost rate proposals in a consistent manner and provide appropriate cost detail to make DCAA's audit oversight more efficient. Many of the required elements of an adequate final indirect cost rate proposal have no bearing on calculating, understanding, auditing, and negotiating final indirect cost rates. This collection of unnecessary data has contributed to DCAA losing its focus on the purpose and scope of contractors' final indirect cost rate proposal and has created unnecessary work for contractors, DCAA, and especially contracting officers.

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[99] Definitions of Word and Terms, FAR Part 2. Contract Administration and Audit Services, FAR Part 42.
[100] Indirect Cost Rates: Purpose, FAR 42.702.
[101] "Federal Acquisition Regulation; Contract Closeout," Federal Register, accessed November, 2017, https://www.federalregister.gov/documents/2011/05/31/2011-12852/federal-acquisition-regulation-contract-closeout.

Findings

The timeliness of final rate settlements and consequent contract closeouts will substantially improve if DCAA refocuses its oversight on the purpose of the final indirect cost rate proposal to reasonably ensure the allowability of contractors' actual indirect costs, not direct costs. The term incurred cost proposal is not defined anywhere in the FAR, it must be made clear it is the same as—not different from—a final indirect cost rate proposal. This small change will help DCAA and contracting officers refocus on the purpose of FAR 52.216-7(d) and FAR 42.705.

Conclusions

Reviewing and settling contractor final indirect cost rates as a reform measure may raise concern among some stakeholders about DCAA's oversight of contractor direct costs. The allowability of contractor direct costs is also an important compliance requirement. It is not, however, the purpose of DCAA's evaluation of contractor final indirect cost rate proposal. Rather, a contracting officer may request DCAA to audit the direct costs of a contract pursuant to FAR 52.216-7(g), which is an entirely different oversight request than a final indirect cost rate proposal audit.[102] If DCAA performs adequate voucher reviews, which has always been one of DCAA's important responsibilities, there should be no cause for concern.

DCAA must refocus on its mission of providing contracting officers with the information they need to do their jobs as prescribed in contracts and by the FAR. DCAA should not be auditing direct contract costs unless requested to do so by the contracting officer as set forth in FAR 52.216-7(g).

Several final indirect cost rate proposal schedules that have no bearing on evaluating or settling final indirect cost rates should be removed. These schedules are currently *required*; they should be made *optional* information that may be required, if necessary, during the audit process. This relatively minor adjustment will meaningfully reduce contractors' burden to prepare its final indirect cost rate proposal and help DCAA stay focused on the purpose of contractors' proposals and contracting officers' responsibility to settle indirect cost rates.

Implementation

Legislative Branch

- No statutory changes are required.

Executive Branch

- Define *incurred cost proposal* in FAR 52.216-7 as being synonymous with a final indirect cost rate proposal, and make some elements (I-M and O) of the indirect cost rate proposal in FAR 52.216-7(d)(2)(iii) optional.

[102] Allowable Cost and Payment: Audit, FAR 52.216-7(g), states: "At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be: (1) reduced by amounts found by the Contracting Officer not to constitute allowable costs; or (2) Adjusted for prior overpayments or underpayments."

Note: Detailed modifications to FAR 52.216-7 can be found in the Implementation Details subsection at the end of Section 2.

Implications for Other Agencies

- Because the FAR pertains to agencies across the federal government, any changes to the FAR would affect other agencies in that they would be expected to implement the changes, as would DoD.

Section 2
Contract Compliance and Audit

Implementation Details

Recommendation 5

Revised DCAA Mission Statement

DCAA shall perform all necessary accounting and financial advisory services and contract audits for the Department of Defense. DCAA will be a trusted advisor to all contracting officers of DoD Components responsible for procurement and contract administration. These services shall be provided in connection with negotiation, administration, and settlement of contracts and subcontracts to assist contracting officers as they protect the public interest by establishing fair and reasonable prices in accordance with contract terms. DCAA shall provide contract audit and advisory services to other federal agencies, as appropriate.

Recommendations 6, 7, 8, and 12

LEGISLATIVE PROVISIONS — 809 PANEL STATUTORY RECOMMENDATIONS RELATING TO CONTRACTOR AUDITS

[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 below.]

TITLE II—CONTRACTOR AUDITING

Sec. 201. Time limits for Defense Contract Audit Agency review of certain contractor submissions and contractor compliance.
Sec. 202. Peer review of Defense Contract Audit Agency.
Sec. 203. Defense Contract Audit Agency annual report.
Sec. 204. Review of roles of Defense Contract Audit Agency and Defense Contract Management Agency.

SEC. 201. TIME LIMITS FOR DEFENSE CONTRACT AUDIT AGENCY REVIEW OF CERTAIN CONTRACTOR SUBMISSIONS AND CONTRACTOR COMPLIANCE.

(a) TIME LIMITS.—

(1) IN GENERAL.—Chapter 137 of title 10, United States Code, is amended by inserting after section 2313b the following new section:

''§ 2313c. DCAA review of contractor submissions and contractor compliance: time limits

''(a) TIME LIMITS FOR DCAA REVIEW.—The Secretary of Defense shall require the Director of the Defense Contract Audit Agency (in this section referred to as 'DCAA') to prescribe procedures to ensure that DCAA, upon receipt of a contractor submission, or of a request from a contracting officer, that is specified in a table in subsection (b), completes the DCAA review within the time limit specified in the table or, in the case of a review requested by a contracting officer, within any shorter time limit agreed to by DCAA at the time of the request

from the contracting officer (and subject to any extension authorized pursuant to subsection (c)). The time limits in subsection (b) shall take effect on October 1, 2019.

"(b) TIME LIMITS.—

"(1) ON-DEMAND ACTIVITIES.—The following time limits shall apply under the procedures prescribed under subsection (a):

Matter for DCAA review	**DCAA time limit**
Contractor submission of pre-award cost proposal	90 days from date of contracting officer request for review
Contractor submission of invoices for direct contract costs	90 days from date of contracting officer request for review
Any other contractor submission in connection with awarding, administering, or terminating a particular contract	180 days from date of contracting officer request for review

"(2) PREDICTABLE ACTIVITIES.—The following time limits shall apply under the procedures prescribed under subsection (a):

Matter for DCAA review	**DCAA time limit**
Contractor submission of forward pricing rate proposal	90 days from date of contracting officer request for review
Contractor submission of provisional billing rate proposal	30 days from date of receipt of the contractor submission
Contractor submission of Cost Accounting Standards (CAS) disclosure statement	If the contracting officer requests DCAA review of the adequacy of the CAS disclosure statement, 60 days from date of contracting officer request for review

Contractor submission of cost accounting practice changes referred to as a General Dollar Magnitude (GDM) proposal	90 days from date of contracting officer request for review
Contractor submission of cost accounting practice changes referred to as a Detailed Cost Impact (DCI) proposal	180 days from date of contracting officer request for review
Contractor compliance with Cost Accounting Standards in accordance with the contractor's CAS disclosure statement	90 days from date of contracting officer request for review
Contractor compliance with an individual Cost Accounting Standard	90 days from date of contracting officer request for review

"(c) EXTENSIONS.—

"(1) AUTHORITY FOR EXTENSIONS.—The procedures prescribed under subsection (a) shall provide that a contracting officer may grant an extension of a time limit under this section (whether the applicable time limit is prescribed under subsection (b) or was agreed to by DCAA at the time of the request from the contracting office). Those procedures shall require that any such extension be recorded separately from the original time limit.

"(2) TYPES OF EXTENSIONS.—Any such extension shall be categorized as one of the following:

"(A) Contracting officer change.

"(B) DCAA request.

"(C) Contractor request or contractor caused.

"(3) REQUIREMENT AS TO CONTRACTOR REQUESTED OR CAUSED EXTENSIONS.—An extension may not be categorized as having been requested or caused by a contractor

unless the contractor is informed that the extension will be so categorized. If the contractor disagrees with that categorization, the contracting officer shall record such disagreement.”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2313b the following new item:

‘‘2313c. DCAA review of contractor submissions and contractor compliance: time limits.’’.

(b) TIMELINESS OF INCURRED COST AUDITS.—

(1) CONSISTENCY WITH NEW SECTION 2313C.—Subsection (g) of section 2313b of title 10, United States Code, is amended—

(A) by striking paragraph (2);

(B) by redesignating paragraph (3) as paragraph (2) and in that paragraph—

(i) by striking “qualified” both places it appears; and

(ii) by striking “on or after the date of the enactment of this section” and inserting “after December 11, 2017,”;

(C) by redesignating paragraph (4) as paragraph (3) and in that paragraph—

(i) by striking “paragraph (5)” and inserting “paragraph (4)”; and

(ii) by striking “qualified”; and

(D) by redesignating paragraph (5) as paragraph (4) and in that paragraph—

(i) by striking “The Under Secretary of Defense (Comptroller) may waive the requirements of paragraph (4) on a case-by-case basis” and

inserting "(A) The contracting officer (or an official within the contracting activity senior to the contracting officer) may grant an extension of the time limit under paragraph (2) for issuance of audit findings for an incurred cost submission and may waive the requirements of paragraph (3) with respect to the period of any such extension. Any such extension and waiver may only be made on a case-by-case basis and only";

(ii) by designating the sentence beginning "The Director of" as subparagraph (B) and in that subparagraph—

(I) by inserting "for any fiscal year" after "of this title"; and

(II) by inserting "under this paragraph during such fiscal year" after "waivers issued"; and

(iii) by adding at the end the following new subparagraphs:

"(C) The provisions of section 2313c(c) of this title shall apply to an extension granted under this paragraph.

"(4) A time limit under this subsection for issuance of audit findings for an incurred cost submission does not apply in a case in which the contractor requests a multiyear audit and the contracting officer (or an official within the contracting activity senior to the contracting officer) approves.".

(b) CONFORMING AND TECHNICAL AMENDMENTS.—Such section is further amended—

(1) in subsection (b)(1)—

(A) in subparagraph (B), by striking "a qualified incurred" and inserting "an incurred"; and

(B) in subparagraph (E)—

(i) by redesignating clauses (A) and (B) as clauses (i) and (ii), respectively;

(ii) by striking "a qualified incurred" in clause (i) (as so redesignated) and inserting "an incurred"; and

(iii) by striking "more than 12 months before the date of the enactment of this section" and inserting "before December 12, 2016"; and

(2) in subsection (i)—

(A) by striking paragraph (6); and

(B) by redesignating paragraph (7) as paragraph (6).

SEC. 202. PEER REVIEW OF DEFENSE CONTRACT AUDIT AGENCY.

(a) REMOVAL OF DCAA PEER REVIEWS FROM DOD IG. —Section 8(c)(10) of the Inspector General Act of 1978 (5 U.S.C. App) is amended by inserting before the period at the end the following: ", except that this paragraph does not apply to the Defense Contract Audit Agency".

(b) REQUIREMENT FOR DCAA PEER REVIEW BY COMMERCIAL AUDITOR.—Section 2313b(e) of title 10, United States Code, is amended—

(1) by redesignating paragraph (2) as paragraph (3);

(2) by designating the second sentence of paragraph (1) as paragraph (2) ; and

(3) in paragraph (2), as so designated, by inserting before "Such peer review" the following: "The Secretary of Defense shall provide for periodic peer review of the Defense Contract Audit Agency by a commercial auditor.".

SEC. 203. DEFENSE CONTRACT AUDIT AGENCY ANNUAL REPORT.

(a) REVISIONS TO REPORT ELEMENTS.—Subsection (a) of section 2313a of title 10, United States Code, is amended—

(1) in paragraph (1), by striking "significant" and all that follows and inserting "the regulatory requirements that create compliance difficulties for contractors, including an analysis of how those regulatory requirements affect contractors of different sizes and industries;";

(2) in paragraph (2)—

(A) by striking subparagraphs (A) through (E) and inserting the following:

"(A) the total number of new audit or advisory engagements, by type (pre-award, incurred cost, other post-award, and business system), with time limits expiring during the fiscal year that were completed or were awaiting completion, as compared to total audit and advisory engagements completed or awaiting completion during the year;

"(B) on-time performance relative to time limits for each type of audit or advisory engagement (shown separately for the Defense Contract Audit Agency and qualified private auditors retained by the agency);

"(C) the time limit (expressed in days) for each type of audit or advisory engagement, along with the shortest period, longest period, and average period of actual performance (shown separately for the Defense Contract Audit Agency and qualified private auditors retained by the agency);

"(D) for pre-award audits and advisory engagements of contractor costs, sustained costs as a total number and as a percentage of total questioned costs, where questioned costs are expressed as the impact on negotiable contract costs

(shown separately for the Defense Contract Audit Agency and qualified private auditors retained by the agency);

"(E) for post-award audits and advisory engagements of contractor costs, the questioned costs accepted by the contracting officers and contractors as a total number and as a percentage of total questioned costs, where questioned costs are expressed as the impact on reimbursable contract (shown separately for the Defense Contract Audit Agency and qualified private auditors retained by the agency);''; and

(B) in subparagraph (H)—

(i) by inserting "post-award" after "dollar value of"; and

(ii) by striking "submission" and inserting "proposal";

(3) by redesignating paragraphs (3), (4), (5), (6), and (7) as paragraphs (4), (5), (6), (7), and (9), respectively;

(4) by inserting after paragraph (2) the following new paragraph (3):

"(3) A summary of the reasons for the difference between questioned and sustained costs shown in the statistical tables under paragraph (2).";

(5) in paragraph (4) (as redesignated by paragraph (3) of this subsection), by striking "needed to improve the audit process;" and inserting "needed by the Defense Contract Audit Agency to improve the audit process or that would enhance compliance with regulatory requirements.";

(6) in paragraph (7) (as redesignated by paragraph (3) of this subsection), by striking "more effective use of audit resources;" and inserting "contract compliance and

professional development of the Defense Contract Audit Agency workforce (shown separately for collaborative outreach actions and other outreach actions).”; and

(7) by inserting after paragraph (7) (as redesignated by paragraph (3) of this subsection) the following new paragraph:

“(8) A statistically representative survey of contracting officers form Department of Defense buying commands, the Defense Contract Management Agency, and small and large business representatives from industry to measure the timeliness and effectiveness of audit and advisory services provided (shown separately for the Defense Contract Audit Agency and qualified private auditors retained by the Defense Contract Audit Agency).”.

(b) CONFORMING AMENDMENTS.—Subsection (a) of such section is further amended—

(1) in the matter preceding paragraph (1), by striking “shall include, at a minimum—“ and inserting “shall include the following:”;

(2) by capitalizing the first letter following the paragraph designation in each of paragraphs (1), (2), (4), (5), (6), (7), and (9); and

(3) by striking the semicolon at the end of each of paragraphs (1), (2), (5), and (6) and inserting a period.

(c) DEFINITIONS.—Subsection (d)(1) of such section is amended by striking “qualified incurred cost submission” and inserting “qualified private auditor”.

(d) EFFECTIVE DATE.—The amendments made by this section shall take effect on October 1, 2020.

SEC. 204. REVIEW OF ROLES OF DEFENSE CONTRACT AUDIT AGENCY AND DEFENSE CONTRACT MANAGEMENT AGENCY.

(a) REVIEW.—The Secretary of Defense, acting through the Chief Management Officer of the Department of Defense, shall direct the Under Secretary of Defense for Acquisition and Sustainment and the Under Secretary of Defense (Comptroller) to conduct a joint review of the functions of the Defense Contract Management Agency and the Defense Contract Audit Agency to determine whether there are functions being performed by either Agency that could more appropriately be performed by the other Agency. The review shall consider the extent to which redundancies exist between the two Agencies and how best to align the functions and workload of the two Agencies to best serve the acquisition community.

(b) REPORT.—The Under Secretaries shall submit to the Secretary of Defense a report with the results of the review under subsection (a) not later than 180 days after the date of the enactment of this Act. The report shall include a draft of any statutory or regulatory change needed to implement recommendations of the review.

SECTIONS AFFECTED BY THE PROPOSAL

[The material below shows changes proposed to be made by the proposal 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*. (Where an amendment in the proposal would add a full new section to existing law, the text of that proposed new section is NOT set forth below since it is set out in full in the legislative text above.)]

[NOTE: Text shown as current law incorporates amendments made by the FY2018 NDAA, Public Law 115-91, enacted Dec. 12, 2017]

Section 8 of the Inspector General Act of 1978

SEC. 8. ADDITIONAL PROVISIONS WITH RESPECT TO THE INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE.

(a) No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense.

(b)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Secretary of Defense with respect to audits or investigations, or the issuance of subpoenas, which require access to information concerning—

(A) sensitive operational plans;

(B) intelligence matters;

(C) counterintelligence matters;

(D) ongoing criminal investigations by other administrative units of the Department of Defense related to national security; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described in paragraph (1) the Secretary of Defense may prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, from accessing information described in paragraph (1), or from issuing any subpoena, after the Inspector General has decided to initiate, carry out or complete such audit or investigation, access such information, or to issue such subpoena, if the Secretary determines that such prohibition is necessary to preserve the national security interests of the United States.

(3) If the Secretary of Defense exercises any power under paragraph (1) or (2), the Inspector General shall submit a statement concerning such exercise within thirty days to the Committees on Armed Services and Governmental Affairs of the Senate and the Committee on Armed Services and the Committee on Government Reform and Oversight of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(4) The Secretary shall, within thirty days after submission of a statement under paragraph (3), transmit a statement of the reasons for the exercise of power under paragraph (1) or (2) to the congressional committees specified in paragraph (3) and to other appropriate committees or subcommittees.

(c) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall—

(1) be the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department;

(2) initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate;

(3) provide policy direction for audits and investigations relating to fraud, waste, and abuse and program effectiveness;

(4) investigate fraud, waste, and abuse uncovered as a result of other contract and internal audits, as the Inspector General considers appropriate;

(5) develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs;

(6) monitor and evaluate the adherence of Department auditors to internal audit, contract audit, and internal review principles, policies, and procedures;

(7) develop policy, evaluate program performance, and monitor actions taken by all components of the Department in response to contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States;

(8) request assistance as needed from other audit, inspection, and investigative units of the Department of Defense (including military departments);

(9) give particular regard to the activities of the internal audit, inspection, and investigative units of the military departments with a view toward avoiding duplication and insuring effective coordination and cooperation; and

(10) conduct, or approve arrangements for the conduct of, external peer reviews of Department of Defense audit agencies in accordance with and in such frequency as provided by Government auditing standards as established by the Comptroller General of the United States***, except that this paragraph does not apply to the Defense Contract Audit Agency***.

(d) ***

****

Title 10, United States Code

§ 2313a. [current law shown as in effect on October 1, 2018] Defense Contract Audit Agency: annual report

(a) REQUIRED REPORT.—The Director of the Defense Contract Audit Agency shall prepare an annual report of the activities of the Agency during the previous fiscal year. The report shall include~~, at a minimum—~~***the following:***

(1) [~~a~~] ***A*** description of ~~significant problems, abuses, and deficiencies encountered during the conduct of contractor audits~~ ***the regulatory requirements that create compliance difficulties for contractors, including an analysis of how those regulatory requirements affect contractors of different sizes and industries***[;] .

(2) [~~s~~]***S***statistical tables showing—

~~(A) the total number and dollar value of audit reports completed and pending, set forth separately by type of audit;~~

~~(B) the priority given to each type of audit;~~

~~(C) the length of time taken for each type of audit, both from the date of receipt of a qualified incurred cost submission and from the date the audit begins;~~

~~(D) the sustained questioned costs, set forth separately by type of audit, both as a total value and as a percentage of the total questioned costs for the audit;~~

~~(E) the total number and dollar value of incurred cost audits completed, and the method by which such incurred cost audits were completed;~~

(A) the total number of new audit or advisory engagements, by type (pre-award, incurred cost, other post-award, and business system), with time limits expiring during the fiscal year that were completed or were awaiting completion, as compared to total audit and advisory engagements completed or awaiting completion during the year;

(B) on-time performance relative to time limits for each type of audit or advisory engagement (shown separately for the Defense Contract Audit Agency and qualified private auditors retained by the agency);

(C) the time limit (expressed in days) for each type of audit or advisory engagement, along with the shortest period, longest period, and average period of actual performance (shown separately for the Defense Contract Audit Agency and qualified private auditors retained by the agency);

(D) for pre-award audits and advisory engagements of contractor costs, sustained costs as a total number and as a percentage of total questioned costs, where questioned costs are expressed as the impact on negotiable contract costs (shown separately for the Defense Contract Audit Agency and qualified private auditors retained by the agency);

(E) for post-award audits and advisory engagements of contractor costs, the questioned costs accepted by the contracting officers and contractors as a total number and as a percentage of total questioned costs, where questioned costs are expressed as the impact on reimbursable contract (shown separately for the Defense Contract Audit Agency and qualified private auditors retained by the agency);

(F) the aggregate cost of performing audits, set forth separately by type of audit;

(G) the ratio of sustained questioned costs to the aggregate costs of performing audits, set forth separately by type of audit; and

(H) the total number and dollar value of ***post-award*** audits that are pending for a period longer than one year as of the end of the fiscal year covered by the report, and the fiscal year in which the qualified ~~submission~~ ***proposal*** was received, set forth separately by type of audit[;] .

(3) A summary of the reasons for the difference between questioned and sustained costs shown in the statistical tables under paragraph (2).

~~(3)~~ ***(4)*** [a] ***A*** summary of any recommendations of actions or resources needed by ***the Defense Contract Audit Agency*** to improve the audit process ***or that would enhance compliance with regulatory requirements***[;] .

~~(4)~~ ***(5)*** [a] ***A*** summary, set forth separately by dollar amount and percentage, of indirect costs for independent research and development incurred by contractors in the previous fiscal year[;] .

~~(5)~~ ***(6)*** [a] ***A*** summary, set forth separately by dollar amount and percentage, of indirect costs for bid and proposal costs incurred by contractors in the previous fiscal year[;] .

~~(6)~~ ***(7)*** [a] ***A*** description of outreach actions toward industry to promote ~~more effective use of audit resources;~~ ***contract compliance and professional development of the Defense Contract Audit Agency workforce (shown separately for collaborative outreach actions and other outreach actions).***

(8) A statistically representative survey of contracting officers from Department of Defense buying commands and the Defense Contract Management Agency and representatives of small and large businesses to measure the timeliness and effectiveness of audit and advisory services provided by the Defense Contract Audit

Agency(shown separately for the Defense Contract Audit Agency and qualified private auditors retained by the agency).

~~(7)~~ ***(9)*** [a]***A***ny other matters the Director considers appropriate.

(b) SUBMISSION OF ANNUAL REPORT.—Not later than March 30 of each year, the Director shall submit to the congressional defense committees the report required by subsection (a).

(c) PUBLIC AVAILABILITY.—Not later than 60 days after the submission of an annual report to the congressional defense committees under subsection (b), the Director shall make the report available on the publicly available website of the Agency or such other publicly available website as the Director considers appropriate.

(d) DEFINITIONS.—

(1) The terms "incurred cost audit" and "~~qualified~~ ~~incurred cost submission~~ ***qualified private auditor***" have the meaning given those terms in section 2313b of this title.

(2) The term "sustained questioned costs" means questioned costs that were recovered by the Federal Government as a result of contract negotiations related to such questioned costs.

§ 2313b. Performance of incurred cost audits

(a) COMPLIANCE WITH STANDARDS OF RISK AND MATERIALITY.—Not later than October 1, 2020, the Secretary of Defense shall comply with commercially accepted standards of risk and materiality in the performance of each incurred cost audit of costs associated with a contract of the Department of Defense.

(b) CONDITIONS FOR THE USE OF QUALIFIED AUDITORS TO PERFORM INCURRED COST AUDITS.—(1) To support the need of the Department of Defense for timely and effective incurred cost audits, and to ensure that the Defense Contract Audit Agency is able to allocate resources to higher-risk and more complex audits, the Secretary of Defense shall use qualified private auditors to perform a sufficient number of incurred cost audits of contracts of the Department of Defense to—

(A) eliminate, by October 1, 2020, any backlog of incurred cost audits of the Defense Contract Audit Agency;

(B) ensure that incurred cost audits are completed not later than one year after the date of receipt of **~~a qualified~~** ***an*** incurred cost submission;

(C) maintain an appropriate mix of Government and private sector capacity to meet the current and future needs of the Department of Defense for the performance of incurred cost audits;

(D) ensure that qualified private auditors perform incurred cost audits on an ongoing basis to improve the efficiency and effectiveness of the performance of incurred cost audits; and

(E) limit multiyear auditing to ensure that multiyear auditing is conducted only—

~~(A)~~ ***(i)*** to address outstanding incurred cost audits for which **~~a qualified~~** ***an*** incurred cost submission was submitted to the Defense Contract Audit Agency

~~more than 12 months before the date of the enactment of this section~~ ***before December 12, 2016***; or

~~(B)~~ ***(ii)*** when the contractor being audited submits a written request, including a justification for the use of multiyear auditing, to the Under Secretary of Defense (Comptroller).

(2) The Secretary of Defense shall consult with Federal agencies that have awarded contracts or task orders to qualified private auditors to ensure that the Department of Defense is using, as appropriate, best practices relating to contracting with qualified private auditors.

(3) The Secretary of Defense shall ensure that a qualified private auditor performing an incurred cost audit under this section—

(A) has no conflict of interest in performing such an audit, as defined by generally accepted government auditing standards;

(B) possesses the necessary independence to perform such an audit, as defined by generally accepted government auditing standards;

(C) signs a nondisclosure agreement, as appropriate, to protect proprietary or nonpublic data;

(D) accesses and uses proprietary or nonpublic data furnished to the qualified private auditor only for the purposes stated in the contract;

(E) takes all reasonable steps to protect proprietary and nonpublic data furnished during the audit; and

(F) does not use proprietary or nonpublic data provided to the qualified private auditor under the authority of this section to compete for Government or nongovernment contracts.

(c) PROCEDURES FOR THE USE OF QUALIFIED PRIVATE AUDITORS.—(1) Not later than October 1, 2018, the Secretary of Defense shall submit to the congressional defense committees a plan to implement the requirements of subsection (b). Such plan shall include, at a minimum—

(A) a description of the incurred cost audits that the Secretary determines are appropriate to be conducted by qualified private auditors, including the approximate number and dollar value of such incurred cost audits;

(B) an estimate of the number and dollar value of incurred cost audits to be conducted by qualified private auditors for each of the fiscal years 2019 through 2025 necessary to meet the requirements of subsection (b); and

(C) all other elements of an acquisition plan as required by the Federal Acquisition Regulation.

(2) Not later than April 1, 2019, the Secretary of Defense or a Federal department or agency authorized by the Secretary shall award a contract or issue a task order under an existing contract to two or more qualified private auditors to perform incurred cost audits of costs associated with contracts of the Department of Defense. The Defense Contract Management Agency or a contract administration office of a military department shall use a contract or a task order awarded or issued pursuant to this paragraph for the performance of an incurred cost audit, if doing so will assist the Secretary in meeting the requirements in subsection (b).

(3) To improve the quality of incurred cost audits and reduce duplication of performance of such audits, the Secretary of Defense may provide a qualified private auditor with information on past or ongoing audit results or other relevant information on the entities the qualified private auditor is auditing.

(4) The Secretary of Defense shall consider the results of an incurred cost audit performed under this section without regard to whether the Defense Contract Audit Agency or a qualified private auditor performed the audit.

(5) The contracting officer for a contract that is the subject of an incurred cost audit shall have the sole discretion to determine what action should be taken based on an audit finding on direct costs of the contract.

(d) QUALIFIED PRIVATE AUDITOR REQUIREMENTS.—(1) A qualified private auditor awarded a contract or issued an task order under subsection (c)(2) shall conduct an incurred cost audit in accordance with the generally accepted government auditing standards.

(2) A qualified private auditor awarded a contract or issued an task order under subsection (c)(2) shall develop and maintain complete and accurate working papers on each incurred cost audit. All working papers and reports on the incurred cost audit prepared by such qualified private auditor shall be the property of the Department of Defense, except that the qualified private auditor may retain a complete copy of all working papers to support such reports made pursuant to this section.

(3) A breach of contract by a qualified private auditor with respect to use of proprietary or nonpublic data may subject the qualified private auditor to–

(A) criminal, civil, administrative, and contractual actions for penalties, damages, and other appropriate remedies by the United States; and

(B) civil actions for damages and other appropriate remedies by the contractor or subcontractor whose data are affected by the breach.

(e) PEER REVIEW.—(1) Effective October 1, 2022, the Defense Contract Audit Agency may issue unqualified audit findings for an incurred cost audit only if the Defense Contract Audit Agency is peer reviewed by a commercial auditor and passes such peer review.

(2) The Secretary of Defense shall provide for periodic peer review of the Defense Contract Audit Agency by a commercial auditor. Such peer review shall be conducted in accordance with the peer review requirements of generally accepted government auditing standards, including the requirements related to frequency of peer reviews, and shall be deemed to meet the requirements of the Defense Contract Audit Agency for a peer review under such standards.

~~(2)~~ ***(3)*** Not later than October 1, 2019, the Secretary of Defense shall provide to the Committees on Armed Services of the Senate and the House of Representatives an update on the process of securing a commercial auditor to perform the peer review referred to in paragraph (1).

(f) NUMERIC MATERIALITY STANDARDS FOR INCURRED COST AUDITS.—(1) Not later than October 1, 2020, the Department of Defense shall implement numeric materiality standards for incurred cost audits to be used by auditors that are consistent with commercially accepted standards of risk and materiality.

(2) Not later than October 1, 2019, the Secretary of Defense shall submit to the congressional defense committees a report containing proposed numeric materiality standards required under paragraph (1). In developing such standards, the Secretary shall consult with commercial auditors that conduct incurred cost audits, the advisory panel authorized under section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 129 Stat. 889), and other governmental and nongovernmental entities with relevant expertise.

(g) TIMELINESS OF INCURRED COST AUDITS.—(1) The Secretary of Defense shall ensure that all incurred cost audits performed by qualified private auditors or the Defense Contract Audit Agency are performed in a timely manner.

~~**(2) The Secretary of Defense shall notify a contractor of the Department of Defense within 60 days after receipt of an incurred cost submission from the contractor whether the submission is a qualified incurred cost submission.**~~

~~(3)~~ ***(2)*** With respect to ~~**qualified**~~ incurred cost submissions received ~~on or after the date of the enactment of this section~~ ***after December 11, 2017***, audit findings shall be issued for an incurred cost audit not later than one year after the date of receipt of such ~~**qualified**~~ incurred cost submission.

~~(4)~~ ***(3)*** Not later than October 1, 2020, and subject to paragraph ~~(5)~~ ***(4)***, if audit findings are not issued within one year after the date of receipt of a ~~**qualified**~~ incurred cost submission, the audit shall be considered to be complete and no additional audit work shall be conducted.

~~(5)~~ ***(4)(A)*** ~~The Under Secretary of Defense (Comptroller)~~ ***The contracting officer (or an official within the contracting activity senior to the contracting officer) may grant an extension of the time limit under paragraph (2) for issuance of audit findings for an incurred cost submission and*** may waive the requirements of paragraph ~~(4)~~ ***(3) with respect to the period of any such extension. Any such extension and waiver may only be made*** on a case-by-case basis ***and only*** if the Director of the Defense Contract Audit Agency submits a written request.

(B) The Director of the Defense Contract Audit Agency shall include in the report required under section 2313a of this title ***for any fiscal year*** the total number of waivers issued ***under this paragraph during such fiscal year*** and the reasons for issuing each such waiver.

(C) The provisions of section 2313c(c) of this title shall apply to an extension granted under this paragraph.

(5) A time limit under this subsection for issuance of audit findings for an incurred cost submission does not apply in a case in which the contractor requests a multiyear audit and the contracting officer (or an official within the contracting activity senior to the contracting officer) approves.

(h) REVIEW OF AUDIT PERFORMANCE.—Not later than April 1, 2025, the Comptroller General of the United States shall submit to the congressional defense committees a report that evaluates for the period beginning on October 1, 2019, and ending on August 31, 2023—

(1) the timeliness, individual cost, and quality of incurred cost audits, set forth separately by incurred cost audits performed by the Defense Contract Audit Agency and by qualified private auditors;

(2) the cost to contractors of the Department of Defense for incurred cost audits, set forth separately by incurred cost audits performed by the Defense Contract Audit Agency and by qualified private auditors;

(3) the effect, if any, on other types of audits conducted by the Defense Contract Audit Agency that results from incurred cost audits conducted by qualified private auditors; and

(4) the capability and capacity of qualified private auditors to conduct incurred cost audits for the Department of Defense.

(i) DEFINITIONS.—In this section:

(1) The term “commercial auditor” means a private entity engaged in the business of performing audits.

(2) The term “incurred cost audit' means an audit of charges to the Government by a contractor under a flexibly priced contract.

(3) The term “flexibly priced contract” has the meaning given the term “flexibly-priced contracts and subcontracts” in part 30 of the Federal Acquisition Regulation (section 30.001 of title 48, Code of Federal Regulations).

(4) The term “generally accepted government auditing standards” means the generally accepted government auditing standards of the Comptroller General of the United States.

(5) The term “numeric materiality standard” means a dollar amount of misstatements, including omissions, contained in an incurred cost audit that would be material if the misstatements, individually or in the aggregate, could reasonably be expected to influence the economic decisions of the Government made on the basis of the incurred cost audit.

~~**(6) The term “qualified incurred cost submission” means a submission by a contractor of costs incurred under a flexibly priced contract that has been qualified by the Department of Defense as sufficient to conduct an incurred cost audit.**~~

~~(7)~~ ***(6)*** The term “qualified private auditor” means a commercial auditor—

(A) that performs audits in accordance with generally accepted government auditing standards; and

(B) that has received a passing peer review rating, as defined by generally accepted government auditing standards.

———

Recommendation 7

- Add words to the effect of the following to DoDD 5105.36:

  Establish and maintain indefinite delivery, indefinite quantity contracts with qualified Independent Public Accounting (IPA) firms. DCAA will use IPAs to meet statutory time limits for contract audit and oversight services.

  (1) IDIQ contracts will require that IPAs:

  (a) Make work papers available to DCAA and GAO upon request.

  (b) Be responsible for their own peer reviews. Failure to pass a peer review may subject the IPA to a default termination of its contract.

  (2) As part of administering IPA contracts, DCAA will:

  (a) Maintain copies of all accepted work products from IPAs and other professional services firms (whether retained by the agencies or contractors) to maintain a complete oversight record for each contractor.

  (b) Ensure the end-user of deliverables (e.g., administrative contracting officer) is named the contracting officer technical representative (COTR) in all task order awards; responsible for accepting the work of IPAs.

  (c) Honor contracting officer requests to use IPAs, but remain responsible for determining the nature and scope of work to be performed with each respective contracting officer.

  a. DCAA has not been able to complete the work within timeframes needed by contracting officers.

  (d) Honor contractor's request to retain IPAs (where the contract privity is between the contractor and IPA) as an allowable expense if:

  a. DCAA has not been able to complete the work within timeframes needed by contracting officers.

  b. DCAA has not been able to issue a task order to complete the work.

Recommendation 9

- Add words to the effect of the following to DoDD 5105.36:

  Establish and maintain indefinite delivery, indefinite quantity contracts with qualified Independent Public Accounting (IPA) firms. DCAA will use IPAs to meet statutory time limits for contract audit and oversight services.

  (1) IDIQ contracts will require that IPAs:

  (a) Make work papers available to DCAA and GAO upon request.

  (b) Be responsible for their own peer reviews. Failure to pass a peer review may subject the IPA to a default termination of its contract.

  (2) As part of administering IPA contracts, DCAA will:

  (a) Maintain copies of all accepted work products from IPAs and other professional services firms (whether retained by the agencies or contractors) to maintain a complete oversight record for each contractor.

  (b) Ensure the end-user of deliverables (e.g., administrative contracting officer) is named the contracting officer technical representative (COTR) in all task order awards; responsible for accepting the work of IPAs.

  (c) Honor contracting officer requests to use IPAs, but remain responsible for determining the nature and scope of work to be performed with each respective contracting officer.

  (d) Honor contractor's request to retain IPAs (where the contract privity is between the contractor and IPA) as an allowable expense if:

  a. DCAA has not been able to complete the work within timeframes needed by contracting officers.

  b. DCAA has not be able to issue a task order to complete the work.

Recommendation 10

- Revise DFARS 252.242-7006 to allow DoD to use internal control audits.

252.242-7006 Accounting System Administration.
As prescribed in 242.7503, use the following clause:

ACCOUNTING SYSTEM ADMINISTRATION (FEB 2012)

(a) *Definitions*. As used in this clause—

(1) "Acceptable accounting system" means a system that has an effective internal control structure ~~complies with the system criteria in paragraph (c) of this clause~~ to provide reasonable assurance that—

(i) Applicable laws and regulations are complied with;

(ii) The accounting system and cost data are reliable;

(iii) Risk of misallocations and mischarges are minimized; and

(iv) Contract allocations and charges are consistent with billing procedures.

(2) "Accounting system" means the Contractor's system or systems for accounting methods, procedures, and controls established to gather, record, classify, analyze, summarize, interpret, and present accurate and timely financial data for reporting in compliance with applicable laws, regulations, and management decisions, and may include subsystems for specific areas such as indirect and other direct costs, compensation, billing, labor, and general information technology.

(3) "Significant deficiency" means a shortcoming in the system that materially affects the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes. In the context of an audit of internal control over a contractor's accounting system, a significant deficiency is equivalent to a "material weakness," which means a deficiency, or a combination of deficiencies, in internal control, such that there is a reasonable possibility that a material unallowable cost (see FAR 31.201-2, Determining allowability) or misstatement will not be prevented or detected on a timely basis

"Reasonable possibility", as used in this definition of significant deficiency, means when the likelihood of an event is either "reasonably possible" or "probable," as those terms are used in Financial Accounting Standards Board Statement No. 5, Accounting for Contingencies ("FAS 5").

(b) *General*. The Contractor shall establish and maintain an acceptable accounting system. Failure to maintain an acceptable accounting system, as defined in this clause, shall result in the

withholding of payments if the contract includes the clause at 252.242-7005, Contractor Business Systems, and also may result in disapproval of the system.

(c) *System criteria*. The Contractor's accounting system shall be evaluated by an internal control audit that provides reasonable assurance that government reporting objectives are met. The auditor will evaluate whether key internal controls are in place and operating in order to – ~~provide for —~~

(1) Ensure a sound Internal Control Environment and Accounting Framework ~~A sound internal control environment, accounting framework, and organizational structure;~~

(2) Appropriate classification of direct costs from indirect costs ~~Proper segregation of direct costs from indirect costs;~~

(3) Allocate indirect costs properly ~~Identification and accumulation of direct costs by contract;~~

(4) Exclude unallowable costs ~~A logical and consistent method for the accumulation and allocation of indirect costs to intermediate and final cost objectives;~~

(5) Confirm costs by contract ~~Accumulation of costs under general ledger control;~~

(6) Reconcile subsidiary cost ledgers to general ledger accounts ~~Reconciliation of subsidiary cost ledgers and cost objectives to general ledger;~~

(7) Ensure period posting of books of account at least monthly for contract billings ~~Approval and documentation of adjusting entries;~~

(8) Certify proper controls over adjusting entries ~~Management reviews or internal audits of the system to ensure compliance with the Contractor's established policies, procedures, and accounting practices;~~

(9) Ensure timekeeping and labor distribution controls are proper ~~A timekeeping system that identifies employees' labor by intermediate or final cost objectives;~~

(10) Comply with contract terms ~~A labor distribution system that charges direct and indirect labor to the appropriate cost objectives;~~

(11) Ensure accordance with Cost Accounting Standards if applicable and GAAP ~~Interim (at least monthly) determination of costs charged to a contract through routine posting of books of account;~~

(12) Monitor the Internal Control Environment ~~Exclusion from costs charged to Government contracts of amounts which are not allowable in terms of Federal Acquisition Regulation (FAR) part 31, Contract Cost Principles and Procedures, and other contract provisions;~~

~~(13) Identification of costs by contract line item and by units (as if each unit or line item were a separate contract), if required by the contract;~~

~~(14) Segregation of preproduction costs from production costs, as applicable;~~

~~(15) Cost accounting information, as required—~~

~~(i) By contract clauses concerning limitation of cost (FAR 52.232-20), limitation of funds (FAR 52.232-22), or allowable cost and payment (FAR 52.216-7); and~~

~~(ii) To readily calculate indirect cost rates from the books of accounts;~~

~~(16) Billings that can be reconciled to the cost accounts for both current and cumulative amounts claimed and comply with contract terms;~~

~~(17) Adequate, reliable data for use in pricing follow-on acquisitions; and~~

~~(18) Accounting practices in accordance with standards promulgated by the Cost Accounting Standards Board, if applicable, otherwise, Generally Accepted Accounting Principles.~~

(d) *Significant deficiencies*. (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, of any significant deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies significant deficiencies in the Contractor's accounting system. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing.

(3) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining significant deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval, if the Contracting Officer determines that one or more significant deficiencies remain.

(e) If the Contractor receives the Contracting Officer's final determination of significant deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies.

(f) *Withholding payments*. If the Contracting Officer makes a final determination to disapprove the Contractor's accounting system, and the contract includes the clause at 252.242-7005, Contractor Business Systems, the Contracting Officer will withhold payments in accordance with that clause.

(End of clause)

Recommendation 13

- Revise DFARS 242.7501(a) to define auditor for the purpose of permitting contracting officers to rely on the work of an IPA to determine the adequacy of a contractor's accounting system.

  Modify DFARS 242.7501 – Definitions to:

  242.7501 Definitions.

  As used in this subpart——

  "Acceptable accounting system," and "accounting system" are defined in the clause at 252.242-7006, Accounting System Administration.

  "Significant deficiency" is defined in the clause at 252.242-7006, Accounting System Administration.

  "Auditor" is the assigned and responsible party, to include independent public accountants, auditing the accounting system in accordance with DFARS 252.242-7006.

Recommendation 15

- Define *incurred cost proposal* in FAR 52.216-7 as being synonymous with a final indirect cost rate proposal, and make some elements (I-M and O) of the indirect cost rate proposal in FAR 52.216-7(d)(2)(iii) optional.

Modify standard clause FAR 52.216-7 as follows:

(d) Final indirect cost rates.

(1) Final annual indirect cost rates and the appropriate bases shall be established in accordance with Subpart 42.7 of the Federal Acquisition Regulation (FAR) in effect for the period covered by the indirect cost rate proposal.

(2)

(i) The Contractor shall submit an adequate final indirect cost rate proposal (i.e., an "incurred cost proposal") to the Contracting Officer (or cognizant Federal agency official) and auditor within the 6-month period following the expiration of each of its fiscal years. Reasonable extensions, for exceptional circumstances only, may be requested in writing by the Contractor and granted in writing by the Contracting Officer. The Contractor shall support its proposal with adequate supporting data.

(ii) The proposed rates shall be based on the Contractor's actual cost experience for that period. The appropriate Government representative and the Contractor shall establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.

(iii) An adequate indirect cost rate proposal shall include the following data unless otherwise specified by the cognizant Federal agency official:

(A) Summary of all claimed indirect expense rates, including pool, base, and calculated indirect rate.

(B) *General and Administrative expenses (final indirect cost pool)*. Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts).

(C) *Overhead expenses (<u>and/or other</u> final indirect cost pool).* Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts) for each final indirect cost pool.

(D) *Occupancy expenses (<u>and/or other</u> intermediate indirect cost pool)*. Schedule of claimed expenses by element of cost as identified in

accounting records (Chart of Accounts) and expense reallocation to final indirect cost pools.

(E) Claimed allocation bases, by element of cost, used to distribute indirect costs.

(F) Facilities capital cost of money factors computation.

(G) Reconciliation of books of account (*i.e.*, General Ledger) and claimed direct costs by major cost element.

(H) Schedule of direct costs by contract and subcontract and indirect expense applied at claimed rates, as well as a subsidiary schedule of Government participation percentages in each of the allocation base amounts.

~~(I) Schedule of cumulative direct and indirect costs claimed and billed by contract and subcontract.~~

~~(J) *Subcontract information*. Listing of subcontracts awarded to companies for which the contractor is the prime or upper-tier contractor (include prime and subcontract numbers; subcontract value and award type; amount claimed during the fiscal year; and the subcontractor name, address, and point of contact information).~~

~~(K) Summary of each time-and-materials and labor-hour contract information, including labor categories, labor rates, hours, and amounts; direct materials; other direct costs; and, indirect expense applied at claimed rates.~~

~~(L) Reconciliation of total payroll per IRS form 941 to total labor costs distribution.~~

~~(M) Listing of decisions/agreements/approvals and description of accounting/organizational changes.~~

(H)~~(N)~~ Certificate of final indirect costs (see 52.242-4, Certification of Final Indirect Costs).

~~(O) Contract closing information for contracts physically completed in this fiscal year (include contract number, period of performance, contract ceiling amounts, contract fee computations, level of effort, and indicate if the contract is ready to close).~~

(iv) The following supplemental information is not required to determine if a proposal is adequate, but may be required during the evaluation of proposed final indirect costs rates or other cost evaluations applicable under this clause. ~~audit process:~~

(A) Comparative analysis of indirect expense pools detailed by account to prior fiscal year and budgetary data.

(B) General organizational information and limitation on allowability of compensation for certain contractor personnel. See 31.205-6(p). Additional salary reference information is available at http://www.whitehouse.gov/omb/procurement_index_exec_comp/ .

(C) Identification of prime contracts under which the contractor performs as a subcontractor.

(D) Description of accounting system (excludes contractors required to submit a CAS Disclosure Statement or contractors where the description of the accounting system has not changed from the previous year's submission).

(E) Procedures for identifying and excluding unallowable costs from the costs claimed and billed (excludes contractors where the procedures have not changes from the previous year's submission).

(F) Schedule of cumulative direct and indirect costs claimed and billed by contract and subcontract.

(G) *Subcontract information*. Listing of subcontracts awarded to companies for which the contractor is the prime or upper-tier contractor (include prime and subcontract numbers; subcontract value and award type; amount claimed during the fiscal year; and the subcontractor name, address, and point of contact information).

(H) Summary of each time-and-materials and labor-hour contract information, including labor categories, labor rates, hours, and amounts; direct materials; other direct costs; and, indirect expense applied at claimed rates.

(I) Reconciliation of total payroll per IRS form 941 to total labor costs distribution.

(J) Listing of decisions/agreements/approvals and description of accounting/organizational changes.

(K) Contract closing information for contracts physically completed in this fiscal year (include contract number, period of performance, contract ceiling amounts, contract fee computations, level of effort, and indicate if the contract is ready to close).

(L)~~(F)~~ Certified financial statements and other financial data (e.g., trial balance, compilation, review, etc).

(M)~~(G)~~ Management letter from outside CPAs concerning any internal control weaknesses.

(N)~~(H)~~ Actions that have been and/or will be implemented to correct the weaknesses described in the management letter from subparagraph (G) of this section.

(O)~~(I)~~ List of all internal audit reports issued since the last disclosure of internal audit reports to the Government.

(P)~~(J)~~ Annual internal audit plan of scheduled audits to be performed in the fiscal year when the final indirect cost rate submission is made.

(Q)~~(K)~~ Federal and State income tax returns.

(R)~~(L)~~ Securities and Exchange Commission 10-K annual report.

(S)~~(M)~~ Minutes from board of directors meetings.

(T)~~(N)~~ Listing of delay claims and termination claims submitted which contain costs relating to the subject fiscal year.

(U)~~(O)~~ Contract briefings, which generally include a synopsis of all pertinent contract provisions, such as: Contract type, contract amount, product or service(s) to be provided, contract performance period, rate ceilings, advance approval requirements, pre-contract cost allowability limitations, and billing limitations.

(v) The Contractor shall update the billings on all contracts to reflect the final settled rates and update the schedule of cumulative direct and indirect costs claimed and billed, as required in paragraph (d)(2)(iii)(I) of this sections, within 60 days after settlement of final indirect cost rates.

(3) The Contractor and the appropriate Government representative shall execute a written understanding setting forth the final indirect cost rates. The understanding shall specify

(i) the agreed-upon final annual indirect cost rates,

(ii) the bases to which the rates apply,

(iii) the periods for which the rates apply,

(iv) any specific indirect cost items treated as direct costs in the settlement, and

(v) the affected contract and/or subcontract, identifying any with advance agreements or special terms and the applicable rates.

The understanding shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The understanding is incorporated into this contract upon execution.

(4) Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause.

(5) Within 120 days (or longer period if approved in writing by the Contracting Officer) after settlement of the final annual indirect cost rates for all years of a physically complete contract, Contractor shall submit a completion invoice or voucher to reflect the settled amounts and rates. The completion invoice or voucher shall include settled subcontract amounts and rates. The prime contractor is responsible for settling subcontractor amounts and rates included in the completion invoice or voucher and providing status of subcontractor audits to the contracting officer upon request.

(6)

(i) If the Contractor fails to submit a completion invoice or voucher within the time specified in paragraph (d)(5) of this clause, the Contracting Officer may--

(A) Determine the amounts due to the Contractor under the contract; and

(B) Record this determination in a unilateral modification to the contract.

(ii) This determination constitutes the final decision of the Contracting Officer in accordance with the Disputes clause.

Section 3
Defense Business Systems: Acquisition of Information Technology Systems

Increase use of commercial best practices and business processes to deliver capability faster and keep DoD's technology current and supportable.

RECOMMENDATIONS

Rec. 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.

Rec. 17: Eliminate the separate requirement for annual IRB certification of DBS investments.

Rec. 18: Fund DBSs in a way that allows for commonly accepted software development approaches.

INTRODUCTION

Defense Business Systems

A defense business system (DBS) is any information system DoD uses to run itself as an organization. DBSs support functions such as finance, logistics, human resources, and contracting. DBSs generally do not include national security systems or internal information systems that use nonappropriated funds (such as commissary and exchange systems).[1]

The legal requirements for DBSs, established at 10 U.S.C. § 2222, Defense Business Systems: Business Process Reengineering; Enterprise Architecture; Management, include requirements for initial approval, annual certification, and investment reviews prior to obligation of funds.[2] At the department level, the Deputy Chief Management Officer (DCMO) issues guidance to manage DBS investments.[3] In addition, the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)), the DoD Chief Information Officer (CIO), and the Chief Management Officer (CMO) of each service issue and maintain supporting guidance within their respective areas of responsibility. DCMO, Defense Business Council (DBC), and service CMOs work together to implement guidance.[4]

DBSs are managed as the portfolio of information technology (IT) investments that enable and support the DoD business mission area (BMA). The DoD business enterprise architecture (BEA) guides decisions regarding business processes and enabling systems in the BMA portfolio. BEA primarily serves as a blueprint to guide transition of legacy business systems to interoperable DBSs using standardized business processes. For example, as new finance systems replace predecessors, they must comply with the standard financial information structure contained in the BEA to ensure consistent financial reporting across DoD.

DBSs are primarily intended to be implemented using COTS software solutions. This acquisition preference for commercial IT solutions first appeared in legislation in the 1996 Clinger–Cohen Act, which built on the general preference for COTS in the 1994 FASA.[5] The current DBS portfolio includes a spectrum ranging from decades-old, custom-coded (i.e., developed from scratch) legacy systems, to customized COTS, and, rarely, pure COTS. Despite laws and regulations that dictate a strong

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[1] Defense Business Systems: Business Process Reengineering; Enterprise Architecture; Management, 10 U.S.C. § 2222 (i)(1). Deputy Chief Management Officer, *Defense Business Systems Investment Management Guidance, Version 4.0*, accessed April 2017, http://dcmo.defense.gov/Portals/47/Documents/Governance/DBS%20Investment%20Management%20Guidance%20Version%204.0%20-%20April%202017.pdf?ver=2017-05-30-110052-673.

[2] FY 2005 NDAA, Pub. L. No. 108–375, 118 Stat. 1851, Section 332 (2004). Defense Business Systems: Business Process Reengineering; Enterprise Architecture; Management, 10 U.S.C. § 2222 (g).

[3] Deputy Chief Management Officer, *Defense Business Systems Investment Management Guidance, Version 4.0,* April 2017, accessed November 28, 2017, http://dcmo.defense.gov/Portals/47/Documents/Governance/DBS%20Investment%20Management%20Guidance%20Version%204.0%20-%20April%202017.pdf?ver=2017-05-30-110052-673.

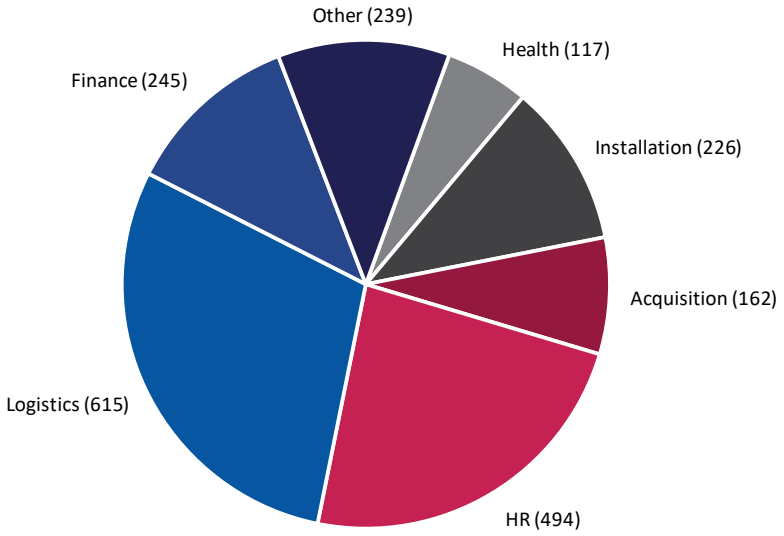
[4] "Defense Business Council and Investment Management," DoD Deputy Chief Management Officer, accessed May 31, 2017, http://dcmo.defense.gov/Governance/Defense-Business-Council.

[5] FY 1996 NDAA, Pub. L. No. 104–106, 110 Stat. 670. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103–355 (1996).

preference for COTS software, over-customized COTS solutions and custom developed systems are still common.[6] Some argue that substantial customization is necessary to meet mission requirements.

As of August 22, 2017, DoD had 2,098 active DBSs, and of that total, 1,253 were certified in accordance with the certification and approval requirements in 10 U.S.C. § 2222.[7] Figure 3-1 below provides a breakdown of these systems by functional area. For FY 2017, DoD requested $7.5 billion for its BMA investments.[8]

Figure 3-1. DoD Active-Record Defense Business Systems by Functional Area



Problems with DBSs

The basic premise of DBSs was that DoD should adopt COTS software solutions to run its business operations, implement interoperable systems, and replace outdated legacy systems, and that those solutions could be implemented relatively quickly at a reasonable and predictable cost. This strategy did not come to fruition. In fact, the opposite happened. Most large DBS programs have taken a decade or more to implement and optimistic efforts to replace legacy systems lag behind schedule. Interoperability and integrated systems are not the norm, nor are enterprisewide views of timely, reliable, and accurate integrated data. The analysis below details the main reasons for these challenges.

[6] According to a Gartner Report conducted for the U.S. Army Office of Business Transformation, *TIME Findings and Lessons Learned*, August 2016, of 659 Army DBSs analyzed, 14 percent were unmodified COTS, 15 percent were partially modified COTS, 8 percent were heavily modified COTS, and 63 percent were custom developed applications.
[7] Data extracted from DoD Information Technology Portfolio Repository (DITPR) and DoD IT Investment Portal (DITIP) on August 22, 2017.
[8] "Defense Business Council and Investment Management," DoD Deputy Chief Management Officer, accessed May 31, 2017, http://dcmo.defense.gov/Governance/Defense-Business-Council. *FY2017 IT President's Budget Request Reports*, accessed August 22, 2017, https://snap.pae.osd.mil/snapit/budgetDocs2017.aspx.

Customization

Although there is debate as to whether DoD is unique when it comes to adopting commercial software, heavy customizations to DBSs are frequently requested by users.[9] The default justifications for this customizing are capability requirements and mission imperatives. Interview data analyzed by the Section 809 Panel indicate that although some customizations were necessary to support government- and defense-unique requirements (e.g., *color of money* in the financial system, a concept commercial industry does not have), others were based on user preference or *the way we have always done it*, rather than on laws, regulations, or critical mission requirements.[10]

Customization is typically accomplished through custom coding of reports, interfaces, conversions, extensions, forms, and workflows (RICEFW) software objects. These objects take longer and cost more to develop and test than configuring standard out-of-the-box functionality; they are also more expensive to sustain. Further, customization can limit the ability to upgrade to the vendor's new releases without additional work, which has both cost and schedule implications.

The premise that DoD could implement COTS products without extensive customization led to awards of firm-fixed-price contracts to implement some DBSs. This approach was unsuccessful because the department lacked sufficient understanding of its requirements; consequently, the contractors did not have an accurate basis for their cost estimates. For several major DBS programs based on COTS enterprise resource planning (ERP) software, this situation led to contract changes and substantial cost and schedule growth.[11] For the Logistics Modernization Program (LMP), the Army awarded a firm-fixed-price contract to a lead systems integrator that said the Army Materiel Command (AMC) would *adopt* the commercial business processes embedded in SAP's (the software vendor's) software, but the user community insisted the lead systems integrator *adapt* SAP to the way AMC did business. This situation ultimately caused the Army to pay $277 million to the contractor to settle numerous claims and execute a sole-source extension with the lead systems integrator for 5 years of additional work.[12]

Lead systems integrator contracts normally require the contractor to work with the government to maximize use of COTS functionality. In practice, when government program managers request change orders to provide the functionality end users want, the contractors typically oblige. These changes frequently result in schedule extensions and cost overruns. Congress and DoD have attempted to address these problems in statutory requirements and associated regulations that mandate business process reengineering as a key step in the DBS approval process, but DBS customization remains

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[9] The Logistics Modernization Program (LMP), which is based on the commercial product SAP, has more than 3,000 customizations. Specifically, these customizations are implemented as reports, interfaces, conversions, extensions, forms, and workflows (RICEFW) development objects.

[10] DoD Inspector General, *Logistics Modernization Program System Procure-to-Pay Process Did Not Correct Material Weaknesses, DODIG-2012-087,* 19, accessed November 28, 2017, http://www.dtic.mil/dtic/tr/fulltext/u2/a561589.pdf. "Army managers did not perform sufficient business process reengineering to implement the BEA's P2P business process within LMP successfully. Instead, the Army recreated most of the legacy business processes within LMP, which did not correct the long-standing material weaknesses within the P2P business process."

[11] DoD, Performance Assessment and Root Cause Analysis (PARCA) Root Cause Analysis for Enterprise Resource Planning Systems, Information Memorandum (2011).

[12] Alternative Dispute Resolution Settlement Agreement between the United States Department of the Army and Computer Sciences Corporation, September 20, 2011. "CSC takes $250M hit in contract settlement," Nick Wakeman, Washington Technology, accessed July 3, 2017, https://washingtontechnology.com/articles/2011/08/24/csc-contract-dispute-settled.aspx.

common.[13] Business process reengineering is intended to streamline the user organization's business processes (i.e., the steps required to complete a particular transaction or activity) to fit the COTS software, as opposed to modifying the software to fit the existing business process.

Linear Lifecycle

Initially, the same DoDI 5000.02 lifecycle that governed MDAPs governed DBSs.[14] MDAPs often entail developing a new product or platform from scratch, require special testing, and include a manufacturing phase. DBSs, by contrast, usually implement an existing software product with some customizations. Many of the concepts applied to MDAPs were wrongly applied to DBSs. DoD continues to use this linear model, most frequently with the waterfall approach to development, even though the IT industry started aggressively moving to Agile methods a decade ago.[15]

The Agile model assumes software developers will create a minimum viable product in close collaboration with end users, and the product will continually evolve to provide additional capabilities and adapt to changes in technology over time. Agile does not rely on complete requirements as a prerequisite for development. This iterative and dynamic model is quite different from the rigid DoD linear lifecycle that includes, in order, concept, requirements, development, test, and deployment. There is currently a concept for iterative development in DoD (known as spirals), but these spirals repeat the linear lifecycle over years, and sometimes decades. By contrast, a typical Agile model delivers software releases much more frequently; some commercial companies using Agile practices release software enhancements to their products every day.[16]

In DoD's linear lifecycle, the requirements process alone can take years. By the time those requirements are documented, approved, and funded, the technology has changed. Once a DBS program has a baseline cost and schedule (a process that can take years for acquisition category [ACAT] I DBS programs), it is difficult to accommodate changes in requirements or to adopt new, better commercial solutions. The linear model's constraints run counter to a key characteristic of technology innovation—it changes rapidly and constantly.[17] This mismatch between technology and the acquisition process leads to unnecessary costs and extended schedules.

DBS stakeholders generally want a more responsive acquisition process that can quickly accommodate new requirements and capabilities, but the linear lifecycle does not typically permit program changes.

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[13] Defense Business Systems: Business Process Reengineering; Enterprise Architecture; Management, 10 U.S.C. § 2222 (g)(1)(C). Business Systems Requirements and Acquisition, DoDI 5000.75 (2017). Logistics Modernization Program System Procure-to-Pay Process Did Not Correct Material Weaknesses, DODIG-2012-087, 19 (2012). "Army managers did not perform sufficient business process reengineering to implement the BEA's P2P business process within LMP successfully. Instead, the Army recreated most of the legacy business processes within LMP, which did not correct the long-standing material weaknesses within the P2P business process."

[14] Operation of the Defense Acquisition System, DoDI 5000.02 (2017).

[15] Agile methods have been used commonly since the early 2000s, following the 2001 publication of the Agile Manifesto. The concepts and practices now known as Agile have been around much longer, starting in the 1960s. Software Engineering Institute, *Agile Methods: Selected DoD Management and Acquisition Concerns,* 11, accessed November 9, 2017, https://resources.sei.cmu.edu/asset_files/TechnicalNote/2011_004_001_15335.pdf. "Agile Practices Timeline," AgileAlliance.org, accessed November 9, 2017, https://www.agilealliance.org/agile101/practices-timeline/.

[16] "Uber Engineering's Micro Deploy: Deploying Daily with Confidence," Mathias Schwarz, accessed July 3, 2017, https://eng.uber.com/micro-deploy/.

[17] Jacques S. Gansler, Commercial Off The Shelf (COTS): Doing It Right, presentation for Acquisition Research Symposium, May 14–15, 2008.

The requested changes can include mandated compliance changes (e.g., reducing cyber vulnerabilities, updating financial standards) as well as capability changes. Compliance changes, paid for *out of hide*, compromise the programs' ability to deliver their original requirements and make it nearly impossible to take on other capability changes that may come with funding. In either case, the linear lifecycle thwarts flexibility and often pushes new requirements into future increments that are years away.

In 2011, DoD formally recognized that DBS programs were different, and published the Business Capability Lifecycle (BCL) as an alternative lifecycle for DBSs.[18] Although many in the DBS community found the concepts in the BCL encouraging, it was rescinded less than 3 years later in November 2013, and DBS acquisition guidance was incorporated back into DoDI 5000.02.[19] DoD eventually published the successor to the BCL, DoDI 5000.75, in February 2017.[20] DoDI 5000.75 establishes the Business Capability Acquisition Cycle (BCAC) for DBSs with the intent to streamline decision-making, allow for flexibility in the upfront requirements process, and use an information-centric approach for evaluating programs. These changes go a long way toward providing flexibility to programs, yet DoDI 5000.75 still relies on a predominantly linear lifecycle that requires programs to do heavy tailoring to achieve an Agile model.

Culture

The intent of BCL was good, but its fate is an example of the cultural challenges DoD faces in adapting its acquisition system to DBSs and other IT. One prominent aspect of BCL was that it was an attempt to streamline the process by using a major summary document called the *business case.* Although the business case was supposed to supplant numerous, more detailed acquisition documents, the various communities involved in the review and approval process continued to request the full, separate documents they had seen before (e.g., acquisition strategy, test and evaluation master plan, systems engineering plan). Such strategies and plans should not be eliminated or excessively abbreviated as they are important parts of the rigor and discipline necessary to execute a complex undertaking such as a DBS program. These requirements, however, should be tailored appropriately. Cultural resistance to change and pushback against tailoring ultimately led to BCL being rescinded. The root of the problem appears to be a cultural divide between the acquisition and IT disciplines, and until these communities find common ground on the success factors for IT programs, the department will continue to struggle with reforming the IT acquisition process.

Oversight

Oversight regimes put in place by Congress, and implemented by DoD and the Military Services, further complicate efforts to quickly adopt commercial software to run DoD's business processes. These include the Defense Business Systems Management Committee (DBSMC) in 2004,[21] later replaced by the Defense Business Council (DBC); DoD CMO and DCMO in 2008;[22] an Investment Review Board (IRB) in 2011; and the military department CMOs with the DBC in 2016.[23] When combined with the

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[18] Acquisition Policy for Defense Business Systems (DBS), DTM 11-009 (2011).
[19] Operation of the Defense Acquisition System, Interim DoDI 5000.02 (2013).
[20] Business Systems Requirements and Acquisition, DoDI 5000.75 (2017).
[21] FY 2005 NDAA, Pub. L. No. 108–375, 118 Stat. 1855, Section 186 (2004).
[22] FY 2008 NDAA, Pub. L. No. 110–181, 122 Stat. 273, Section 904 (2008).
[23] FY 2012 NDAA, Pub. L. No. 112–81, 125 Stat. 1530, Section 901 (g). FY 2016 NDAA, Pub. L. No. 114-92, 129 Stat. 946, Section 883 (a)(1).

regular DoD acquisition governance and oversight structures, these oversight processes represent what one program manager called a *parallel acquisition system*[24] that is a substantial burden on DBSs and has reached crippling levels of bureaucracy for some programs. One DBS program management office support contractor described the related frustration to the Section 809 Panel as follows, and clarified that many of these activities are based on service-specific policy and culture issues:

> *Our program office maintains a staff of 15 people just to comply with all of the oversight and decision processes, which include never-ending briefings to intermediate bodies that may or may not add value or provide advice reflective of the ultimate decision maker's thinking. It is not unusual to produce 50 different versions of a PowerPoint briefing over the course of several months before getting a decision. What value is DoD getting out of that exercise?*[25]

The FY 2016 NDAA provided some relief from these oversight requirements by delegating funds certification down to the Military Services for DBS investments less than $250 million over the Future Years Defense Program (FYDP) and increasing the threshold of a covered DBS from $1 million to $50 million.[26] Some Military Services quickly implemented this new delegation authority, yet others decided to use lower thresholds or have not updated guidance and are still using the $1 million threshold.[27] Other efforts to *power down* decision authority include the delegation of milestone decision authority (MDA) for several DBSs from the USD(AT&L) to the Military Services in 2015 and similar changes for MDAPs in Section 901 of the FY 2017 NDAA.[28] Although these steps are improvements, they constitute only an incremental change to one part of the process, and more changes are needed to realize a modern, flexible DBS acquisition process that quickly delivers capabilities to users.

Approach to DBS Problems

The Section 809 Panel organized its research and analysis of the problems with DBSs around three main areas and corresponding issues:

- Agile delivery of business capabilities: The current acquisition process inhibits use of modern methodologies and commercial best practices.
- Requirements process and DoDI 5000.75: Creation and approval of DBS requirements take too long and need a more flexible and dynamic lifecycle.
- Oversight and compliance processes: Dissect the many layers of reviews and approvals required for DBS investments to determine whether they are contributing to better outcomes.

To study the acquisition process for DBSs, the Section 809 Panel reviewed and analyzed current laws; regulations; policies; previous reform initiatives; and studies conducted by government, industry, federally funded research and development centers, and universities. The panel held more than

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[24] Captain Michael Abreu (USN), meeting with Section 809 Panel Staff, June 20, 2017.
[25] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, from March to July 2017.
[26] FY 2016 NDAA, Pub. L. No. 114–92, 129 Stat. 946, Section 883 (a)(1) (2016).
[27] Air Force – issued a guidance memorandum in October 2016 implementing the new delegation authority for systems funded under $50 million across the FYDP; Navy – has issued temporary implementing guidance that uses a threshold of $5 million rather than the allowable $50 million; Army – has not yet updated guidance and therefore still using the $1 million threshold in the meantime.
[28] USD(AT&L), Program Delegation Decisions Acquisition Decision Memorandum, (2015).

30 separate interviews with relevant government stakeholders and commercial companies, and conducted a series of workshops to distill the information collected and formulate succinct, direct recommendations that address the systemic shortcomings of DBS programs in the department.[29] The themes that emerged from this research provide the basis for the panel's DBS findings and recommendations.

Using this approach, the Section 809 Panel developed three recommendations for the DBS acquisition process:

- Combine authority for requirements, resources, and acquisition in a single, empowered entity to govern DBS portfolios separate from the existing acquisition chain of command.
- Eliminate the separate requirement for annual IRB certification of DBS investments.
- Fund DBSs in a way that allows for commonly accepted software development approaches.

The first recommendation is overarching and lays the groundwork for the following two recommendations, which are complementary to the first and will further streamline the DBS acquisition process.

[29] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, from March to July 2017.

RECOMMENDATIONS

Recommendation 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.

Problem

Responsibility for acquisition of DBSs is diffused across DoD, with no single entity accountable for results. Consequently, DBS programs take too long and cost too much to implement. Extended implementation timelines prolong use of legacy systems at a substantial cost and delay migration to more modern business capabilities to support the warfighting mission.[30] Second-order effects include managing a large, burdensome portfolio of aging systems and interfaces—reducing DoD's ability to become financially auditable and increasing cyber risk. Billions of dollars have been spent to modernize DoD's business operations with only limited success to date.[31]

Background

Nearly 20 years ago, the challenge of modernizing DoD's business systems and processes was formally recognized, and since then Congress and department leadership have established a progressively more complex set of acquisition rules and oversight bodies. Today, the cumulative effect is that DBS programs fail to operate with the speed and agility needed to keep pace with commercial technology advances.

The initial catalyst for a major DoD business modernization effort was the 2001 Quadrennial Defense Review (QDR), which stated, "While America's business[es] have streamlined and adopted new business models to react to fast-moving changes in markets and technologies, the Defense Department has lagged behind without an overarching strategy to improve its business practices."[32] A key theme from the 2001 QDR was to "Modernize DoD business processes and infrastructure," which led to the creation of the Financial Management Modernization Program (FMMP). Recognizing that financial management overhauls alone would not resolve broader business challenges, in May 2003 DoD expanded FMMP and renamed it the Business Management Modernization Program (BMMP). One of the key concepts that came from BMMP was the DoD BEA. BEA was intended "to provide a blueprint for the end state of successful business transformation—the 'to-be' environment for business systems."[33]

It was in these early stages of BMMP that Congress enacted the first legislation specific to defense business modernization. The FY 2005 NDAA created a new section in Title 10—Defense Business

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[30] GAO testimony before the House Committee on Oversight and Government Reform, May 25, 2016. The testimony stated: "The federal government spent more than 75 percent of the total amount budgeted for information technology (IT) for fiscal year 2015 on operations and maintenance (O&M) investments. Such spending has increased over the past 7 fiscal years, which has resulted in a $7.3 billion decline from fiscal years 2010 to 2017 in development, modernization, and enhancement activities."
[31] GAO, *DOD Business Systems Modernization: Additional Action Needed to Achieve Intended Outcomes, GAO-15-627*, accessed November 9, 2017, https://www.gao.gov/products/GAO-15-627.
[32] DoD, *Quadrennial Defense Review Report, September 30, 2001*, 49, accessed November 9, 2017, https://www.documentcloud.org/documents/2695397-2001-Quadrennial-Defense-Review.html.
[33] "History," Deputy Chief Management Officer, accessed August 11, 2017, http://dcmo.defense.gov/About/History.

Systems: Architecture, Accountability and Modernization.[34] This new legislation (10 U.S.C. § 2222) did the following:

- Defined the term *defense business system modernization*.
- Set forth conditions for certification and approval of funds for any DBS modernization with a cost exceeding $1 million.
- Established the Defense Business Systems Management Committee (DBSMC)—chaired by the Deputy Secretary of Defense—as the entity responsible for certification and approval of funds for DBS investments, among other duties.
- Required (a) development of an enterprise architecture to cover all DBSs and the functions and activities supported by DBSs and (b) development of a transition plan for implementing the enterprise architecture for DBSs.
- Required DoD to establish an investment review process consistent with 40 U.S.C. § 11312, Capital Planning and Investment Control.
- Required DoD to submit specific DBS budget information and reports to Congress.

As BMMP progressed, the program's leadership was realigned from the USD(Comptroller) to the USD(AT&L) in March 2005. In October of the same year, the Deputy Secretary of Defense established the DoD Business Transformation Agency (BTA) with the mission to reengineer and integrate the core business activities of the department. DoD submitted the first enterprise transition plan to Congress in September 2005. The plan provided an overview of business transformation at the DoD and component levels, and established a set of priorities for new systems and capabilities to guide further development of the enterprise architecture.[35]

BMMP eventually dissolved primarily due to a focus on building an enterprise architecture rather than delivering business capabilities.[36] The broader business system modernization effort continued under numerous separate DBS programs. Many, but not all, of these programs were under the purview of the Defense Business Systems Acquisition Executive (DBSAE), a newly created acquisition executive position within BTA. According to the DoD DCMO:

> *In May 2007, the Secretary of Defense used his discretionary authority to designate the Deputy Secretary of Defense as the CMO of the Department of Defense. Subsequently, Congress codified the department's action in the FY 2008 NDAA, formally acknowledging the deputy secretary of defense as DoD CMO, establishing a new Principal Staff Assistant position, the Deputy Chief Management Officer (DCMO), to*

[34] FY 2005 NDAA, Pub. L. No. 108–375, 118 Stat. 1851, Section 332 (2004).
[35] Defense Business Board, *Report to the Secretary of Defense, Business Management Modernization Program Task Group*, accessed November 9, 2017, http://dbb.defense.gov/Portals/35/Documents/Reports/2005/FY05-2_Business_Management_Modernization_Program_2005-5.pdf.
[36] Jacques S. Gansler and William Lucyshyn, *Defense Business Transformation*, 4, accessed November 9, 2017, http://www.cpppe.umd.edu/publications/defense-business-transformation.

> *assist the Deputy Secretary, and naming the Under Secretaries of the Military Departments as CMOs of their respective organizations.*[37]

In March 2009, BTA released BEA version 6.0 and DoD decided that updates to BEA would only be released on an annual basis (as opposed to semiannual). At the same time, BTA released its required *Congressional Report on Defense Business Operations* and the department continued to invest in DBS modernization but demonstrated limited progress in modernizing DBS and business capabilities.[38]

Congress continued to monitor the department's progress with DBS in particular, and with IT acquisition in general. Section 804 of the FY 2010 NDAA required the Secretary of Defense to

> *develop and implement a new acquisition process for information technology systems…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 Report to Congress…on the new acquisition process developed.*[39]

The department submitted the required report to Congress in November 2010, titled *A New Approach for Delivering Information Technology Capabilities in the Department of Defense*. Although the 2010 DoD report was consistent with the IT acquisition reforms from the Defense Science Board report, many of these concepts were never fully implemented (see details in *Findings* below).

Congress continued to update 10 U.S.C. § 2222 through NDAAs. For example, the FY 2010 NDAA requires DoD to ensure appropriate business process reengineering (BPR) occurs for each DBS investment, and the BPR must be certified as a condition of funds certification and approval.[40]

In August 2010 the Secretary of Defense announced elimination of BTA and the transfer of its functions to the DCMO and USD(AT&L), which occurred in October 2011.[41] Since 2010, the department has continued its multibillion-dollar annual investment in DBSs, and after years of difficulties, some of the larger DBS programs are now fully deployed and operational. These programs include Defense Logistics Agency's Enterprise Business System (EBS) and Defense Agencies Initiative (DAI), Navy ERP, and Army's LMP and General Fund Enterprise Business System (GFEBS). Despite this progress, criticism from Congress and the GAO continue, making it clear that more needs to be done to realize the benefits of the department's substantial investment in business transformation and DBSs.[42]

In February 2017, DoD published DoDI 5000.75, which established the business capability acquisition cycle (BCAC) for DBSs with the intent to streamline decision-making, allow for flexibility in the upfront requirements process, and use an information-centric instead of a document-centric approach for

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[37] "History," Deputy Chief Management Officer, accessed August 11, 2017, http://dcmo.defense.gov/About/History.
[38] Jacques S. Gansler and William Lucyshyn, D*efense Business Transformation*, 33, accessed November 9, 2017, http://www.cpppe.umd.edu/publications/defense-business-transformation. Between 2004 and 2009 a total of 581 new DBSs were registered in the DoD Information Technology (IT) Portfolio Repository database. GAO, *DOD Business Systems Modernization: Recent Slowdown in Institutionalizing Key Management Controls Needs to Be Addressed, GAO-09-586*, accessed November 9, 2017, http://www.gao.gov/products/GAO-09-586.
[39] FY 2010 NDAA, Pub. L. No. 111–84, 123 Stat. 2402, Section 804 (b) (2009).
[40] FY 2010 NDAA, Pub. L. No. 111–84, 123 Stat. 2470, Section 1072 (a) (2009).
[41] "History," Deputy Chief Management Officer, accessed August 11, 2017, http://dcmo.defense.gov/About/History.
[42] GAO, *DoD Business Systems Modernization, GAO-15-627*, accessed June 15, 2017, http://www.gao.gov/assets/680/671452.pdf

evaluating programs.[43] DoDI 5000.75 superseded DoDI 5000.02 for DBSs. Although this new regulation for DBSs moves the process in the right direction, it is not as far-reaching as the recommendations from the 2010 Report to Congress, *A New Approach for Delivering Information Technology Capabilities in the Department of Defense*.[44] The Section 809 Panel intends to revive and enhance some of the 2010 report's more ambitious ideas that were never fully implemented.

Findings

In its research and analysis, the Section 809 Panel found the following, discussed in detail below:

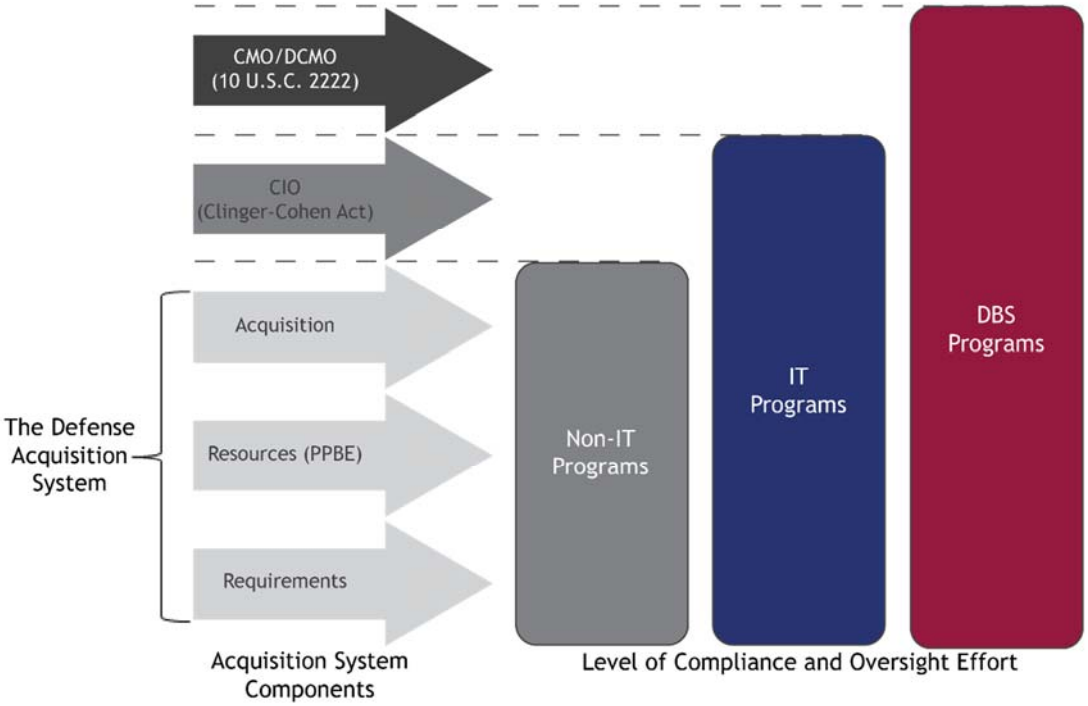
- Fragmented and overlapping oversight processes create a burdensome parallel acquisition system that hinders flexibility for the programs needing it most.
- The defense acquisition system's linear lifecycle inhibits use of modern commercial IT acquisition and implementation practices.[45]
- Previous recommendations to substantially change the DoD IT acquisition process, including acquisition of DBSs, were not implemented.

Oversight Processes

Fragmented and overlapping oversight processes create a burdensome, parallel acquisition system that hinders flexibility for programs needing it most. DBS programs are implementing fast-changing technology solutions and changing business processes (i.e., the way people do their jobs) as a result. To be successful, such projects require maximum flexibility to adjust as new information or new technology solutions become available. The current system, however, saddles DBS programs with additional oversight beyond that of a traditional DoD acquisition program (see Figure 3-2 below).

[43] Business Systems Requirements and Acquisition, DoDI 5000.75 (2017).
[44] DoD, A *New Approach for Delivering Information Technology Capabilities in the Department of Defense: Report to Congress Pursuant to Section 804 of the National Defense Authorization Act for Fiscal Year 2010*, accessed November 9, 2017, https://www.dau.mil/policy/PolicyDocuments/the849OSD13744-10-804ReportToCongress.pdf.
[45] "What is DevOps?" Amazon Web Services, accessed June 6, 2017, https://aws.amazon.com/devops/what-is-devops.

Figure 3-2. Comparison of Compliance and Oversight Effort



In 2012, the DoD Director of Acquisition Resources and Analysis studied the average number of *touchpoints* (e.g., document reviews, preparation meetings, formal briefings) during the typical lifecycle of an MDAP. The average number of touchpoints between the materiel development decision (MDD) and Milestone C (initial production) was 893.[46] This analysis was for non-IT programs. Referring back to Figure 3-2, it is evident the additional oversight prescribed in the Clinger–Cohen Act (CCA) and 10 U.S.C. § 2222 add more touchpoints. Additional compliance and oversight requirements to which DBS programs are subject as reported by GAO in May 2014, beyond the standard defense acquisition system, include the following:

- CCA compliance to the CIO based on a checklist of 11 major items
- BEA compliance[47]
- BPR certification
- Funding certification (in addition to normal planning, programming, budgeting, and execution [PPBE] activities)
- Authorization to Operate (Cyber Security/Risk Management Framework)

[46] Nancy Spruill, Defense Acquisition Executive Summary (DAES) briefing, April 4, 2012.
[47] Some DBS practitioners interviewed by the Section 809 Panel posit that BEA has become a rubber stamp that consumes substantial time and resources but does not have a noticeable effect on the outcome of the program. In extreme cases, the myriad BEA products produced do not represent the actual system being implemented. GAO, *DoD Business Systems Modernization: Further Actions Needed to Address Challenges and Improve Accountability, GAO-13-557*, accessed November 9, 2017, http://www.gao.gov/assets/660/654733.pdf. The report states: "even though DoD has spent more than 10 years and at least $379 million on its business enterprise architecture, its ability to use the architecture to guide and constrain investments has been limited."

These requirements create additional touchpoints that impede speed and agility in adopting commercial technology and business capabilities.

The results these activities produce are not always commensurate with the effort they require. The current system places little value on time, yet in the technology world, as in warfighting and business, time is a key factor that can affect outcomes. Satisfying the compliance-heavy, process-oriented requirements described above can add years to program schedules and comes at a substantial cost. This financial burden includes both the direct cost of labor to conduct the activities and opportunity cost of a solution that may be obsolete by the time it is deployed. When acquiring technology, DoD must take reasonable risks, move quickly, and stop performing double and triple checks before it takes action.

To obtain results faster, DoD needs to empower decision-makers and simplify acquisition processes, not create committees, or worse yet, layers upon layers of committees.[48] A recent study commissioned by the Deputy Assistant Secretary of Defense, Command, Control, and Communication (C3), Cyber, and Business Systems (DASD[C3CB]) acknowledged that the existence of a separate acquisition organization poses one of the major systemic challenges in DoD business transformation:

> *Business System modernizations tend to be more successful when led by a business leader and supported by IT. For instance, a human resource management system led by the head of HR and supported by the CIO organization. The business unit best understands the processes and requirements that the technology must support.*[49]

Industry typically has a business (user) organization and an IT organization (CIO) and must decide which one will lead a project, whereas DoD has three different entities: a business organization, an IT organization, and an acquisition organization. Involving more entities is inefficient and precludes the common commercial industry practice of business-led projects.[50] In the current DBS acquisition system, industry standard practice for project leadership and organization is *not even an option.*

This constraint is another symptom of applying concepts originally intended for weapon system programs to IT and business capabilities. One of the objectives of the Goldwater–Nichols Act was to separate the military-oriented requirements generation process from the acquisition process and put acquisition under separate, civilian leadership.[51] There are arguments for and against this separation, but in the case of IT and business systems, it has clearly diminished DoD's ability to operate in a manner resembling commercial industry. As stated above, to increase the likelihood of success for business systems projects, the business owner must lead the project, not a separate acquisition organization.

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[48] Navy PEO EIS, *Enterprise IT Acquisition Efficiency Study*. The study states: "Industry favors a decentralized core competence as opposed to centralized governance and oversight."
[49] DASD(C3CB) Study of Commercial Practices, Focus Area 5: Cost, Schedule and Performance, Acquisition Baselines, Variance Analysis, and IT Governance, September 23, 2016, 12.
[50] Ibid, 15. The study states: "BPR and requirements development are more successful at the commercial organizations where the individuals that own the process are directly involved in the re-engineering and requirements development, since they should understand the process better than the IT organization."
[51] Goldwater–Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433 (1986). Civilian Management of the Defense Acquisition System, 10 U.S.C., Subtitle A, Part IV, Chapter 149, § 2546.

In developing this concept, business leaders need to be responsible not only for individual projects but also for the entire portfolio of projects supporting their business areas (e.g., finance, logistics, HR). Empowered business owners or *portfolio leaders* would then be able to make the important trade-off decisions required when modernizing business practices. Use of portfolio leaders closely resembles recommendations in previous studies on IT acquisition, and in current and proposed legislation.[52] To be efficient and fully effective, DoD needs to formalize this approach with authority *outside* of the current acquisition chain of command.[53] The *2010 DoD Report to Congress* stated:

> *A major change in the new process will be moving from large multi-year programs to portfolios of short-duration projects. This requires a new approach to project oversight. This approach will place more accountability on timely coordination, quicker decision-making, and increased stakeholder involvement through more frequent performance-based in-process reviews. Oversight will be conducted by integrated and empowered governance bodies that have ownership of a capability roadmap.*[54]

In the current system, portfolio governance is an interim step in a complex funds-certification process instead of being an empowered function to make critical trade-off decisions.

Modern Commercial IT Acquisition and Implementation

The defense acquisition system's linear lifecycle inhibits use of modern commercial IT acquisition and implementation practices. The lifecycle models in the DoD 5000 Series are generally linear because they are based on the waterfall approach to systems development.[55] Although appropriate in some situations, the waterfall approach has numerous limitations, especially when it comes to acquiring IT at the speed of commercial innovation.[56] The *Defense Acquisition Guidebook* states that for large and complex projects using the waterfall approach, a single incomplete task can grind an entire project to a halt and often the "underlying technology is obsolete before delivery."[57] Current DoD policy includes some variations of the waterfall approach, such as spirals and increments; however, DoD's acquisition system typically treats increments as separate programs that take years, not weeks or months, as one

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[52] Senate Armed Services Committee, Report No. 115-125, FY 18 NDAA Mark, Section 884, Review and Realignment of Defense Business Systems to Emphasize Agile Methods.

[53] Recent changes to Defense Business Systems: Business Process Reengineering; Enterprise Architecture; Management, 10 U.S.C. § 2222, that increased the threshold for covered DBS from $1 million to $50 million help reduce some of the bureaucracy associated with DBS acquisitions, but also make some investments *invisible* to a certain extent. An empowered portfolio leader would have visibility (and trade off authority) for *all* of the DBS investments in their portfolio.

[54] DoD, A *New Approach for Delivering Information Technology Capabilities in the Department of Defense: Report to Congress Pursuant to Section 804 of the National Defense Authorization Act for Fiscal Year 2010*, 6, accessed November 9, 2017, https://www.dau.mil/policy/PolicyDocuments/the849OSD13744-10-804ReportToCongress.pdf.

[55] According to the Defense Acquisition Guidebook Chapter 6-3.4.1, the waterfall software development method is defined as follows: The waterfall method is a classical software development method for which tasks are arranged to fall sequentially. One phase is completed before the next phase is started. Several software builds are completed before deployment. In its purest form, all requirements are known before IT is developed and the finished product is not delivered until all tasks are completed.

[56] House Armed Services Committee Panel on Defense Acquisition Reform, DAR Interim Report, 17, accessed November 9, 2017, http://www.govexec.com/pdfs/031110rb1.pdf. The report states: "As a result, the Department is unable to keep pace with the rate of IT innovation in the commercial market place, cannot fully capitalize on IT-based opportunities, and seldom delivers IT-based capabilities rapidly. By way of example, the private sector is able to deliver capabilities and incrementally improve on those initial deliveries on a 12 to 18 month cycle; defense IT systems typically take 48-60 months to deliver. In an environment where technology is obsolete after 18 months, defense IT systems are typically two to three generations out of date by the time they are delivered."

[57] Defense Acquisition University, *Defense Acquisition Guidebook*, Chapter 6, Section 3.4.1., accessed November 9, 2017, https://www.dau.mil/tools/dag.

would expect.[58] The current DoD lifecycle models are out of step with modern commercial IT practices, which heavily rely on Agile principles that are markedly different from the waterfall approach.

The concept of Agile development stems from the Agile Manifesto, published in 2001 by software developers who wanted a more efficient and responsive way to address user needs. The Agile Manifesto includes many guiding principles. Some of the well-known principles are listed in Table 3-1 below along with the Section 809 Panel's assessment of their adoption status within DoD.

Table 3-1. DoD Status of Adopting Selected Agile Principles

Agile Manifesto	DoD Status
"Focus on customer satisfaction through continuous software delivery."[59]	DoD does not continuously deliver software to customers under most existing programs, but rather engages in deployments once an acquisition process is completed. During these procurements and subsequent deployments, customer satisfaction is arguably not the principal metric with which DoD aligns performance incentives for requirements staff, program staff, contracting staff, testing staff, or vendors.
"Deliver working products on a rapid-turnaround timeframe of a few weeks or months." [60]	DoD's acquisition apparatus does not usually abide by this principle. Most business systems require several years to progress from conceptualization to delivery of usable functionality.
"Accept that requirements will change, even late in the development process."[61]	DoDI 5000.75 includes flexibility that may, in some cases, allow for adoption of this principle in DoD IT acquisition programs: "Functional requirements will include enough detail to inform definition of potential business system solutions and evaluation criteria, but without including too much detail that would overly constrain solution selection."[62]
"The metric by which success is primarily measured should be whether software is built and works well."[63]	The primary metrics by which DoD, the Military Services, and Congress measure success tend to be growth in cost and schedule, as well as compliance with predetermined technical requirements. These technical requirements may in some cases be obsolete by the time the software is built.
"Acquisition professionals and system architects should pursue simplicity in programs, or 'the art of maximizing the amount of work not done'."[64]	The current approach to DBS programs, with its myriad compliance and oversight requirements and layers of committees, is arguably the opposite of simple. A great amount of work occurs, and much of it to satisfy a process metric or regulation, not to produce an outcome or capability.

One particular problem area in the current linear acquisition model for DBSs is the requirements process. Agile principles are based on the assumption that requirements will not be complete upfront

[58] Operation of the Defense Acquisition System, DoDI 5000.02 (2017).
[59] Adapted from "Principles behind the Agile Manifesto," AgileManifesto.org, accessed November 9, 2017, http://agilemanifesto.org/principles.html.
[60] Ibid.
[61] Ibid.
[62] See Business Systems Requirements and Acquisition, DoDI 5000.75, section 4.2(c)(3)(a), (2017 update).
[63] Adapted from "Principles behind the Agile Manifesto," AgileManifesto.org, accessed November 9, 2017, http://agilemanifesto.org/principles.html.
[64] Ibid.

and will change over the course of a project. The current DoD requirements process for DBSs is the opposite; it entails an exhaustive analysis of requirements, BPR, and even a return on investment (ROI) analysis prior to approval of requirements. These activities typically rely on not just requirements, but also on the selection of a specific solution (usually a COTS product in the case of DBSs). Attempting to complete BPR and ROI analysis prior to selection of a solution is not just difficult; some argue it is impossible.[65] Reengineering of DoD's business processes has not happened to the extent envisioned and needed. Consequently, the department contends with many customized systems that are costly to sustain and limit the ability to take advantage of innovations and new capabilities developed by software vendors.

The DBS requirements document, until recently referred to as a *problem statement*, has several parts addressing a wide range of topics and can take years to complete and approve, even for small projects.[66] The Army Materiel Command's (AMC's) price-and-credit tool project described in Figure 3-3 below illustrates this challenge.[67]

The price-and-credit tool illustration shows how DoD's current DBS requirements process is not only out of step with, but explicitly inhibits, use of modern commercial IT implementation practices such as Agile. It is impractical for users to define requirements up front, lock them down, and subsequently hand them off to an acquisition organization that takes years to deploy the capability. This approach ignores the reality that IT solutions change at a dizzying pace. To have anything resembling modern business capabilities, DoD must fundamentally change its expectations about the requirements process and lifecycle for DBS acquisitions.[68] The budget cycle exacerbates the challenges of the requirements process by further limiting flexibility to quickly adopt new technologies and solutions—a problem resulting from the expectation that requirements will be known years in advance of when they are needed.[69]

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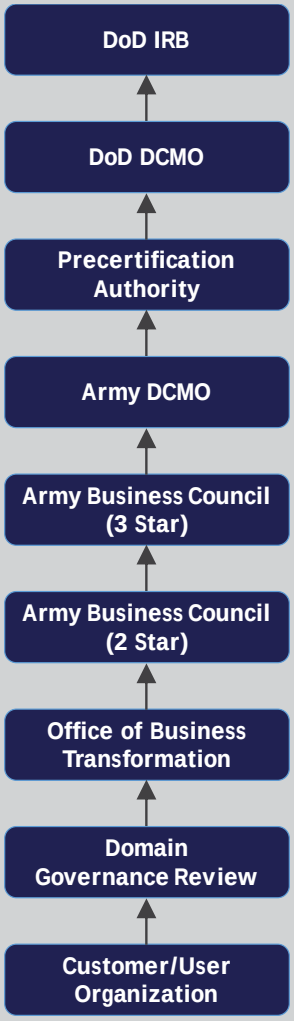
[65] DASD(C3CB) Study of Commercial Practices, Focus Area 1: Business Process Re-engineering and Requirements, September 23, 2016, p. 4 "Only so much BPR can be done prior to tool selection and implementation."
[66] The *Problem Statement* terminology was changed with the issuance of DoDI 5000.75 in February 2017. It is now split between *Capability Requirements* (former Problem Statement Part 1) and *Business Processes / BPR Changes* (some of which was in Problem Statement Part 2, some of which is new with the 5000.75).
[67] Project Manager Army Enterprise Systems Integration Program (PM AESIP) personnel, information for AMC price-and-credit tool case study provided to the Section 809 Panel staff, from July 31 to August 7, 2017.
[68] DASD(C3CB) Study of Commercial Practices, Focus Area 1: Business Process Re-engineering and Requirements, September 23, 2016.
[69] One DoD official told the Section 809 Panel staff, "There is also the linear and lengthy budget cycle that makes it hard to get funds for IT following the process. It would take over a year to get funds…to just get started on getting the system procured."

Figure 3-3. Requirements Process Example

Price-and-credit is a capability to consolidate the five budget formulation tools used by AMC to determine pricing on the material record. Initial estimates showed the project would take about 2 years and cost $9 million. At first, the customer/user organization was unaware it would need to complete a formal problem statement because this small project was not an acquisition program, and it had the required funding available. Under the DBS policy, the customer was in fact required to complete the multipart problem statement, including a business case analysis, and obtain approval all the way up to the DoD IRB. Instead of beginning the contracting process based on the requirements the customer had already documented, in April 2015, the customer began developing Part 1 of the problem statement, which took about 3 months. Part 1 was approved more than a year later in September 2016, and Part 2 was approved in conjunction with required funds certification another 8 months later, in May 2017. Altogether, it took more than 2 years to formalize and approve a requirement for what by DoD standards is a very small project intended to enhance a business capability and resolve long-standing shortcomings in the current legacy systems. The nine review and approval layers depicted at right are only the formal steps. Many briefs that are more informal and prebriefs typically occur during this process. One interviewee with knowledge of the process told the Section 809 Panel there are actually 77 separate steps to get a problem statement approved.[70]

Nine Layers in the DBS requirements approval process for a $9M project > 2 years to approve requirements



Another aspect of the current lifecycle model that suboptimizes defense business capabilities is the concept of system sustainment (formally referred to as *capability support* in DoDI 5000.75).[71] The linear lifecycle model is based on a program executing predetermined phases and milestones, and eventually declaring a full deployment (FD) milestone, which signifies the capability is in sustainment. At sustainment, DoD cannot add new, related capabilities or enhancements to the baseline quickly. Instead, any changes must go through the time-consuming problem statement process as described

[70] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, from March to July 2017.
[71] Business Systems Requirements and Acquisition, DoDI 5000.75, 18 (2017).

above and are essentially treated as a separate program (often referred to as an increment). Even in the best circumstances, these subsequent increments can take years to fully implement.[72] This model is starkly different than the one used by most commercial organizations. In common commercial approaches, IT projects do not have a defined point at which they transition to sustainment. Instead, commercial entities recognize that business capabilities and their supporting technology require ongoing enhancements and cannot wait for a lengthy requirements approval process to feed a waterfall development approach. Delayed implementation of capabilities, which are often outdated by the time they are deployed, is simply unacceptable to commercial companies, as it should be to DoD.

Serial test events in the current lifecycle process constitute yet another inhibitor to the speed and agility needed in modern DBS implementations. A 2010 House Armed Services Committee Panel on Defense Acquisition Reform report indicated,

> *Testing is integrated too late and serially in current IT systems acquisition practices, with testing in realistic operational environments deferred until the mandated operational test. The acquisition community has been reluctant to embrace virtualized testing or is overtly precluded from reusing or accessing operationally-relevant test data and environments.*[73]

DoD struggles to use Agile concepts under the rigid rules of its current acquisition system, yet many commercial entities are moving beyond Agile to Development Operations (DevOps). DevOps breaks down the traditional barriers and hand-offs between IT development and operations with the goal of getting functionality into production more quickly and more frequently. When using DevOps, technical staff may work at each phase of the process; little distinction may exist between developers, testers, and sustainment staff who work on the same product over the course of its lifecycle.[74] This model integrates capabilities more quickly and seamlessly.

The flexibility inherent in Agile and DevOps cannot be achieved with the existing DBS acquisition process. Advocates of the current DoD process argue that every requirement must be reviewed in the context of the DoD BEA to ensure there is no duplication of effort. Advocates also contend layers of governance committees are needed to ensure proper oversight and stewardship of taxpayer dollars. Although there is a need for enterprisewide oversight, the reality is that the current process cannot deliver the kind of agility and results desired. The system requires change to provide more flexibility and autonomy, along with requisite accountability.

Congress and DoD acquisition leadership have clearly expressed a desire to inject more flexibility and agility into IT acquisition.[75] For this transition to happen, the current system must be radically changed

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[72] The Logistics Modernization Program Increment 2 is considered a successful example of a subsequent increment of a DBS, but still took nearly 4 years from initiation through full deployment.
[73] House Armed Services Committee Panel on Defense Acquisition Reform, *DAR Interim Report*, 17, accessed November 9, 2017, http://www.govexec.com/pdfs/031110rb1.pdf.
[74] "What is DevOps?" Amazon Web Services, accessed June 6, 2017, https://aws.amazon.com/devops/what-is-devops.
[75] James MacStravic, acting in the capacity of USD(AT&L), noted, "Right now, to make a Milestone B decision on a major acquisition program, I have to sign up to 20 waivers in order to not conform to a statutory requirement that may or may not be relevant to the actual problem I was facing. A best practice on a hardware system has migrated into a statutory requirement on every system. I need those relieved, and the more I can pull those down so we can make contextually appropriate decisions that relate to the technical and operational changes we're actually facing, the more we'll see acquisition agility." "DoD's acting acquisition chief looks to purge 'the

from a serial, process-oriented model to a dynamic, outcome-oriented one in which individuals are empowered to make decisions and obtain results without layers of committees expecting analysis of every possible scenario before rendering a decision.[76] Agile methods change the frame of reference from measuring processes to measuring the outcomes, usually by observing the working software (e.g., does this transaction work the way the user expected? by how many days does it reduce cycle time?). Continuous feedback from business users is one of the hallmarks of Agile, and in conjunction with frequent releases, it allows for adjusting the project more quickly and ultimately solving the business problem better and faster.

A recurring theme in the Section 809 Panel's interviews in particular, and in IT research in general, is that smaller projects are more likely to succeed. The Standish Group's 2015 CHAOS Report, based on surveying more than 10,000 software projects, concluded that small projects using Agile had a 58 percent success rate compared to 44 percent when the project used the waterfall process. Large projects experience an even more pronounced gap, with the success rate for Agile 18 percent and a mere 3 percent for waterfall.[77] A case study by the software development estimation company Quantitative Software Management (QSM) showed that although Agile was less efficient when first adopted, by the second year, software deliveries were 34 percent faster and used 27 percent less effort than waterfall methods.[78] The takeaway is clear: DBS projects should be kept small and use Agile methods as much as possible.

A comparison of DoD and commercial industry enterprise resource planning (ERP) systems supports the argument that projects should remain small. ERPs are major COTS business systems that run functions such as finance and human resources. A 2009 study by the DoD BTA, cited in a report by the Center for Public Policy and Private Enterprise, revealed that several Fortune 100 companies have more ERP systems than DoD, even though DoD is a much larger organization. For example, General Electric, with an annual revenue of approximately $150 billion, had 15 ERP systems, yet DoD had more than three times that budget/revenue and only nine ERP systems.[79] The implication is that commercial industry determined that breaking up its business systems based on product line, geography, or other factors was the optimal strategy, and DoD has tried to implement massive systems with a much higher likelihood of failure.[80] Numerous GAO reports from 2012 to 2017 document these results.[81]

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stupid' from IT procurement," by Jared Serbu, Federal News Radio, June 6, 2017, https://federalnewsradio.com/dod-reporters-notebook-jared-serbu/2017/06/dods-acting-acquisition-chief-looks-to-purge-the-stupid-from-it-procurement/.

[76] House Armed Services Committee hearing on the initial findings of the Section 809 Panel, May 17, 2017, Representative Duncan Hunter, "Because people screw up…we're going to take…the personal responsibility element out of acquisition and create so many steps and milestones that no one has to take responsibility for anything…Talk about putting just somebody in charge, because that's—in the past 50 years that's one way that we've done a lot of our great stuff is by putting one person in charge and saying, 'You—you just do it.' And you can fail and try again and fail and try again, but we're going to put it on—on you to get it right."

[77] Standish Group, *CHAOS Report*, accessed November 9, 2017, https://www.projectsmart.co.uk/white-papers/chaos-report.pdf.

[78] Taylor Putnam, *Quantitative Software Management*, *A Case Study in Implementing Agile,* accessed August 11, 2017, file:///D:/User/My%20Documents/Downloads/A_Case_Study_in_Implementing_Agile.pdf.

[79] Jacques S. Gansler and William Lucyshyn, *Implementing the U.S. Army's Logistics Modernization Program*, 28–29, accessed November 9, 2017, http://www.cpppe.umd.edu/publications/implementing-us-army%E2%80%99s-logistics-modernization-program.

[80] U.S. Senate Permanent Subcommittee on Investigations, The Air Force's Expeditionary Combat Support System (ECSS): A Cautionary Tale on the Need for Business Process Reengineering and Complying with Acquisition Best Practices, accessed November 9, 2017, file:///D:/User/My%20Documents/Downloads/PSI%20REPORT%20-%20The%20Air%20Force's%20ECSS%20(July%207%202014).pdf.

[81] GAO, *DoD Business Systems Modernization, GAO-15-627*, accessed June 15, 2017, http://www.gao.gov/assets/680/671452.pdf.

IT Recommendations Not Implemented

Previous recommendations for substantial change to the DoD IT acquisition process, including acquisition of DBSs, were not implemented. The FY 2010 NDAA required the Secretary of Defense to "develop and implement a new acquisition process for information technology systems…and Report to Congress…on the new acquisition process developed."[82] The department submitted the required report to Congress in November 2010 titled *A New Approach for Delivering Information Technology Capabilities in the Department of Defense;* however, many of the reforms described in the report were not fully implemented or not implemented at all. Data from a 2016 GAO report and information collected through Section 809 Panel interviews suggest one of the main reasons for failure to implement these reforms was frequent turnover of senior leaders whose strong and consistent sponsorship would have been necessary to bring sweeping changes to fruition.[83] Prominent examples of specific reforms not fully implemented are listed in Table 3-2 below.

Table 3-2. Implementation Status of Selected Section 804 IT Acquisition Recommendations

Section 804 Recommendation	Implementation Status
Eliminate service and department-level oversight redundancy.[84]	The majority of DBS programs' milestone decision authority (MDA) was delegated to the Military Service level, which was positive. Other parts of the process, especially requirements approval, are still redundant. Reviews by interim bodies without decision-making authority remain a challenge. BCL was an attempt to address some of these issues, but was rescinded before it could be institutionalized. DBS programs have a unique and ongoing challenge in terms of oversight redundancy among the acquisition, CMO/DCMO, and CIO roles.
Realign traditional DoD 5000 milestone reviews for major program phases to frequent decision points more appropriate for the dynamics of IT acquisition.[85]	The latest model for DBS in DoDI 5000.75 appears similar to traditional DoD 5000 milestone reviews, although tailoring is encouraged. Substantial tailoring is not yet common, and likely more of a cultural challenge than a policy issue.
Change institutional processes with separate acquisition and sustainment phases to a model that allows for continuous IT capability development.[86]	A separate sustainment phase remains in all DoD 5000 lifecycle models, including the model in the DoDI 5000.75 designed specifically for DBSs. Continuous IT development is difficult to achieve under the current models.
Shorten the lengthy project initiation timeline to be responsive to the dynamic IT environment.[87]	No progress has occurred on this recommendation. By some accounts, initiating a project takes longer than it ever has (see case study in Figure 3-3).

[82] FY 2010 NDAA, Pub. L. No. 111–84, 123 Stat. 2402, Section 804 (b) (2009).
[83] Between 2009 and 2017, five different individuals held or acted in the position of DoD CIO (four of the five in only an acting capacity). This represents an average tenure of approximately 1.5 years per individual, and acting officials rarely make major policy changes. The DoD CMO and DCMO positions were each held by four different individuals between 2010 and 2016 (GAO, *Defense Business Transformation: DoD Should Improve Its Planning with and Performance Monitoring of the Military Departments, GAO-17*-9, accessed November 9, 2017, https://www.gao.gov/products/GAO-17-9.)
[84] Adapted from DoD, A *New Approach for Delivering Information Technology Capabilities in the Department of Defense: Report to Congress Pursuant to Section 804 of the National Defense Authorization Act for Fiscal Year 2010*, accessed November 9, 2017, https://www.dau.mil/policy/PolicyDocuments/the849OSD13744-10-804ReportToCongress.pdf.
[85] Ibid.
[86] Ibid.
[87] Ibid.

Section 804 Recommendation	Implementation Status
Move from large multiyear programs to portfolios of short-duration projects governed by empowered bodies that can make trade-offs across a portfolio to deliver valued mission capabilities.[88]	Portfolio governance bodies are but one step in the current DBS Investment Management process, and they are simply an interim review as opposed to being the final decision makers (i.e., not empowered).[89] Additionally, trade-off decisions are slow to be implemented due to the cumbersome governance and budgeting processes.
Change the Planning, Programming, Budgeting, and Execution (PPBE) system to more accurately reflect the nature of IT capability investment (e.g., a single appropriation type for IT projects, establishing an IT revolving fund, defining a new funding element).[90]	No substantial progress has been made on this recommendation, although as of the writing of this report DASD(C3CB) has a study in progress with the intent of making more specific recommendations related to funding flexibility for IT acquisitions.
Incorporate continuous user engagement into the process of delivering IT.[91]	Progress varies by functional customer, but typically the process includes hand-off of a requirement from a user (*capability developer* in DoD acquisition speak) to a project manager as opposed to continuous user engagement. Intensity of user engagement needs to be increased to ensure the right users with appropriate knowledge and skills are participating in delivery of new IT solutions.
Acknowledge the requirements uncertainty associated with the dynamic IT environment and incorporate the flexibility to responsively manage changing needs.[92]	No substantial progress has been made on this recommendation. Based on current DBS guidance, the expectation is that requirements are exhaustively defined upfront and approved at the Office of the Secretary of Defense (OSD) level, even for a Service-specific program/system. Changing requirements once a program has commenced is extremely difficult and not timely.
Supplant the deliberate and time-consuming *waterfall* process.[93]	Limited progress has occurred on this recommendation. Waterfall is still the dominant and default lifecycle methodology.

Conclusions

Some progress has been made in terms of deployed DBSs, but it was achieved through the brute force approach of expending vast amounts of financial and personnel resources. These successes occurred despite the acquisition process and culture, rather than because of them, often resulting in slipped schedules and cost overruns.[94] DoD has not adopted the majority of the reforms identified in the 2010 Section 804 report, yet those recommendations remain relevant today, and more needed than ever as the rate of IT change continues to outpace DoD's ability to adopt technology and improve its

[88] Ibid.
[89] DCMO, *Defense Business Systems Investment Management Guidance, Version 4.0*, accessed August 11, 2017, http://dcmo.defense.gov/Portals/47/Documents/Governance/DBS%20Investment%20Management%20Guidance%20Version%204.0%20-%20April%202017.pdf?ver=2017-05-30-110052-673.
[90] Adapted from Department of Defense, A *New Approach for Delivering Information Technology Capabilities in the Department of Defense: Report to Congress Pursuant to Section 804 of the National Defense Authorization Act for Fiscal Year 2010*, accessed November 9, 2017, https://www.dau.mil/policy/PolicyDocuments/the849OSD13744-10-804ReportToCongress.pdf.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] GAO, *DOD Financial Management: Reported Status of Department of Defense's Enterprise Resource Planning Systems, GAO-12-565R*, accessed November 9, 2017, https://www.gao.gov/products/GAO-17-9.

business operations.[95] Recommendations from the 2010 Section 804 report also closely align to the conclusions of more recent studies by Navy PEO EIS and DASD (C3CB).[96]

The greatest shortcomings in the current DBS acquisition process include the following:

- Requirements are still expected to be fully known and *locked down* at the outset of a project using the lengthy and onerous problem statement process, compromising DoD's ability to keep up with the technology innovation cycle.[97]
- It is too difficult to change policies and regulations to conform to commercially available, innovative functionality or business processes provided by COTS solutions. Customization persists because DoD acquisition professionals perceive it as less difficult than changing policies and regulations.[98]
- The linear program lifecycle and associated milestones/authority to proceed (ATP) that inhibit flexibility and agility persist in DoD regulations, including lengthy separate test events.[99] Continuous IT development is not a viable option. Tailoring is officially encouraged, but in practice is widely discouraged in the current system. The level of tailoring required to truly use Agile concepts breaks most of the paradigms in the current lifecycle, representing too much of a perceived risk for most decision-makers.
- The overlapping compliance and oversight processes of the CCA and 10 U.S.C. § 2222 layered on the defense acquisition system represent an additional burden on programs most needing the flexibility.
- Lack of funding flexibility limits the ability of DBS programs to quickly adopt the latest technologies and take advantage of opportunities for business operations improvement.[100]

In preparing this report, the Section 809 Panel reviewed Section 901 of the FY 2017 NDAA and DoD's report to Congress in response to Section 901. The Section 809 Panel also interviewed several individuals involved in producing the Section 901 report, with a specific focus on "Part 2: Restructuring

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[95] House Armed Services Committee Panel on Defense Acquisition Reform, Findings and Recommendations, March 23, 2010, 17.
[96] Enterprise IT Acquisition Efficiency Study, Navy PEO EIS, July 2016. DASD(C3CB) Study on Commercial Practices, September 2016.
[97] DASD(C3CB) Study on Commercial Practices, Acquisition of Technology, July 7, 2017, 25. As stated in the study, in the current DoD IT acquisition process "3.5 Year Period Between Identifying User Needs and Executing the Contract" while "6+ Technology Innovation Cycles passed between identifying the user need and executing the contract." The "Problem Statement" terminology was changed with the issuance of DoDI 5000.75 in February 2017. It is now split between "Capability Requirements" (former Problem Statement Part 1) and "Business Processes / BPR Changes" (some of which was in Problem Statement Part 2, some of which is new with the 5000.75).
[98] Logistics Modernization Program System Procure-to-Pay Process Did Not Correct Material Weaknesses, DoD Inspector General Report No. DODIG-2012-087, 19, May 29, 2012. The report states, "Army managers did not perform sufficient business process reengineering to implement the BEA's P2P business process within LMP successfully. Instead, the Army recreated most of the legacy business processes within LMP, which did not correct the long-standing material weaknesses within the P2P business process."
[99] "DoD's acting acquisition chief looks to purge 'the stupid' from IT procurement," by Jared Serbu, Federal News Radio, June 6, 2017, https://federalnewsradio.com/dod-reporters-notebook-jared-serbu/2017/06/dods-acting-acquisition-chief-looks-to-purge-the-stupid-from-it-procurement/. Quoted in the piece, Acting USD(AT&L) James MacStravic states, "By using modern software development and automation tools, it's possible to build in and validate the functionality and information assurance as you're doing the software, and our whole procurement model didn't reflect that."
[100] See Recommendation 18 on funding flexibility.

the Chief Management Officer Organization." Although the scope of the Section 901 report is broader than the Section 809 Panel's acquisition reform mandate, many of the CMO themes in the Section 901 report are consistent with the Section 809 Panel's DBS recommendations.[101] The general structure of the CMO organization is consistent, with some variations in terminology (e.g., the *reform leader* role in the Section 901 report is the *enterprise business process owner* in the Section 809 Panel's recommendations).

The Section 901 report identifies a new PEO for IT Business Systems within the CMO organization and states this PEO "will plan and execute the transformation of all business systems affecting support areas within the Department."[102] The Section 809 Panel agrees with the concept of the CMO planning and executing transformation of business systems; however, acquisition authority for the CMO is not explicitly stated in the Section 901 report. The CMO must have authority sufficient to accomplish this responsibility; therefore, the CMO should have consolidated authority for requirements, resources, and acquisition.

The other notable difference between the CMO structure in the Section 901 report and the Section 809 Panel's DBS recommendations is the Military Services supporting the *enterprise business process owners*. The Section 901 report is silent on the Military Services' role; the Section 809 Panel's recommendations specify empowered *portfolio leads* with responsibility for all DBS projects/programs within the Military Services' business process (e.g., financial management, supply chain, and logistics). The need exists to transition to enterprise services, and the Military Services must be empowered to transform their own DBS portfolios while supporting the larger departmentwide transition to enterprise services.

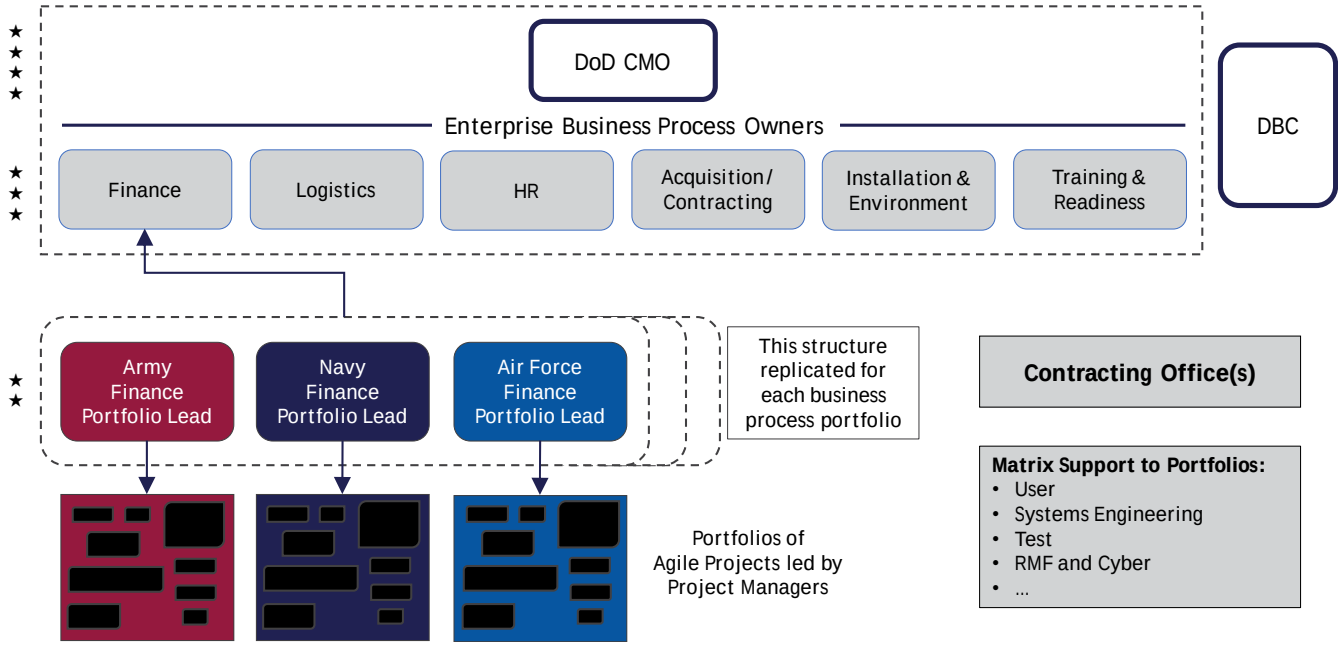
Implementation

Legislative Branch

- Provide consolidated acquisition authority to the CMO, including requirements, resources, and acquisition (see Figure 3-4 and the corresponding explanation below the figure for proposed governance structure).[103]

[101] DoD's Section 901 report Part 2 addresses DoD's business operations as a whole; the Section 809 Panel recommendations are specific to acquisition of DBSs enabling those business operations.
[102] DoD, *Report to Congress, Restructuring the Department of Defense Acquisition, Technology and Logistics Organization and Chief Management Officer Organization In Response to Section 901 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328),* 18, accessed November 9, 2017, https://www.defense.gov/Portals/1/Documents/pubs/Section-901-FY-2017-NDAA-Report.pdf.
[103] Follow a similar approach to the one that provided acquisition authority to U.S. Special Operations Command. See Unified Combatant Command for Special Operations Forces, 10 U.S.C. §167(e)(4).

Figure 3-4. Recommended DBS Governance Structure



Roles and responsibilities of entities depicted in Figure 3-4:

DoD Chief Management Officer (CMO)

- As stated in the FY 2018 NDAA, becomes the third most senior official in the department by precedence and is responsible for all enterprise business operations including the CIO functions for DBSs.
- Maintain a simplified DoD BEA described in 10 U.S.C. § 2222 (e) as "a blueprint to guide the development of integrated business processes within the Department of Defense."
- Change policies and regulations that prevent the use of commercial software solutions, and advocate for changes to statute when necessary.
- Approve budget requests for business system portfolios as part of the PPBE/POM process.

Defense Business Council (DBC)

- As currently specified in 10 U.S.C. § 2222 (f) except now chaired by the DoD CMO instead of being cochaired by the Under Secretary of Defense for Business Management and Information and the DoD CIO.

Enterprise Business Process Owners

- Recommend approval of budget requests for business system portfolios.
- Identify and advocate for enterprise (cross-Service) DBS solutions.
- Provide oversight of, and adjudicate issues among, the Service DBS portfolios.

Service Portfolio Leads

- Provide business process leadership and expertise to projects and project managers within the portfolio.
- Identify, select, prioritize, and resource projects within the portfolio based on desired business outcome measures and support to the mission via the Portfolio Execution Plan (a replacement for the current Organizational Execution Plan [OEP]) which according to current DBS Investment Management Guidance (p. 8) "articulates an organization's approach to align with the Functional Strategies and produce business results."
- Ensure appropriate matrix support from necessary disciplines to enable successful project execution.
- Advocate for changes to laws, regulations, and policies (LRPs) when such changes will enable more efficient business processes or better outcome measures.
- Assume the responsibilities previously fulfilled by the Service Chief Management Officer/Pre-Certification Authority (CMO/PCA): "the senior accountable official that is responsible for ensuring compliance with investment review policies…including BPR and BEA assertions."

- Amend 10 U.S.C. § 2222 to be the sole statute applicable to acquisition of DBSs and do the following:

  - Eliminate the separate funding certification process (see Recommendation 17).
  - Define a new empowered role (*portfolio lead*) to lead business capability portfolios with accountability for business metrics and outcomes, and authority sufficient to affect those outcomes.
  - Change basis of oversight from *covered defense business systems* to portfolios of business processes. Remove *priority defense business systems*.
  - Remove *responsibility of milestone decision authority* paragraph to provide authority for project decisions to the new empowered portfolio lead.
  - Remove the requirement for the CIO's information technology enterprise architecture to address "each of the major business processes conducted by the Department of Defense." Empower the CMO to address business processes.

Executive Branch

- Revise DoD's DBS Investment Management Guidance to reflect the following:

  - The new empowered and accountable role of portfolio lead.
  - A simplified governance process that includes only the CMO, enterprise business process owners, and portfolio leads in the chain of command, with the DBC continuing in its current capacity as an advisory body.
  - Elimination of the separate funding certification process that is now integrated into the PPBE process (see Recommendation 17).
  - New funding structure based on portfolios of projects instead of individual programs.

- Rescind the *DoD requirements validation and IT business case analysis template for business systems* and empower portfolio leads to determine the optimal requirements definition process for their business areas with concurrence of the CMO.

- Revise DoDI 5000.75 to reflect the following:

  - A simplified and iterative requirements-identification and documentation process that acknowledges exhaustive requirements and BPR cannot be completed prior to initiation of a project and selection of a specific vendor or technology solution.
  - Replacement of the single linear lifecycle and milestone (ATP) decision points with multiple lifecycle models, including both Agile and waterfall. Portfolio leads should establish lifecycles and decision points based on the attributes of the specific project, and not be bound by a set of predetermined decision points. Projects should not be required to have a defined point at which they transition to sustainment. Business capabilities and their supporting technology will require ongoing development and enhancements.
  - New structure of portfolios reflecting a preference for smaller, shorter projects instead of large, individual programs; elimination of business system categories and thresholds.
  - Responsibility of empowered portfolio leads to change policies and regulations whenever possible to enable BPR and adopt commercial processes and technology instead of customizing COTS products/solutions.
  - Elimination of the hand-off of requirements from a functional sponsor to a project manager in favor of continuous partnership with end users.
  - Prioritization of working software (business capabilities) and improvement of business outcome metrics as the definition of success.
  - Inclusion of a reference table summarizing all statutory and regulatory information requirements applicable to DBSs.

- Instruct CMO to publish new BEA guidance reducing the burden on programs to the minimum necessary as required by 10 U.S.C. § 2222(e).

Note: The recommended draft legislative text and sections affected display can be found in the Implementation Details subsection at the end of Section 3.

Implications for Other Agencies

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

Recommendation 17: Eliminate separate requirement for annual IRB certification of DBS investments.

Problem

The Investment Review Board (IRB) annual certification requirement for DBS investments leads to unnecessary delays and is duplicative of the program objective memorandum (POM) in the planning, programming, budgeting, and execution (PPBE) process. PPBE is the annual resource allocations and requirements process used to review and approve funding decisions for the defense budget, including DBS investments.

Background

The concept of an IRB as a governance mechanism to oversee DBS investments originated from the Financial Management Modernization Program, a 2001 initiative to modernize DoD business operations.[104] In the FY 2005 NDAA, Congress added the statutory requirement for IRB review and approval for DBSs in 10 U.S.C. § 2222.[105]

In the FY 2012 NDAA, Congress directed the DoD Deputy Chief Management Officer (DCMO) to establish an IRB and investment management process for covered DBSs by March 2012.[106] In response, DoD designated the Defense Business Council (DBC) to serve as the IRB for covered DBSs.[107] In the FY 2016 NDAA, Congress eliminated the term *Investment Review Board* and codified the DBC in 10 U.S.C. § 2222(f), requiring it to "provide advice to the Secretary on developing the defense business enterprise architecture, reengineering DoD's business processes, developing and deploying defense business systems, and developing requirements for defense business systems."[108]

DBC's membership consists of the DoD DCMO; CIO; the USD(AT&L); USD for Policy; DoD Comptroller; USD for Personnel and Readiness; USD for Intelligence; Director of Cost Assessment and Program Evaluation; Joint Staff; and the Service-level DCMOs and CIOs.[109]

DoD uses the IRB process to certify covered DBSs and recertify them each year. DBS programs "cannot proceed into development (or, if no development is required, into production or fielding)" unless they are IRB certified.[110] By law, these criteria include the following:

- DBS must be "reengineered to be as streamlined and efficient as practicable."[111]

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[104] USD(AT&L), *Investment Review Process Overview and Concept for Operations for Investment Review Boards*, June 2, 2005, accessed June 5, 2017, http://ogc.hqda.pentagon.mil/EandF/Fiscal_Documentation/TabASignedMemo%20with%20CONOPS.pdf.
[105] FY 2005 NDAA, Pub. L. No. 108-375, 118 Stat. 1853 (2004).
[106] FY 2012 NDAA, Pub. L. No. 112-81, 125 Stat. 1530 (2011).
[107] DoD, *Department of Defense Investment Review Board and Investment Management Process for Defense Business Systems, March 2012*, accessed August 10, 2017, http://dcmo.defense.gov/Portals/47/Documents/Publications/NDAA/NDAA_2012_IRB_Report.pdf.
[108] FY 2016 NDAA, Pub. L. No. 114-92, 129 Stat. 944 (2015).
[109] DoD, *Defense Business Council, December 10, 2014*, accessed August 11, 2017, http://dcmo.defense.gov/Portals/47/Documents/Governance/DBC_Charter_12122014.pdf.
[110] Defense Business Systems Investment Review, 10 U.S.C. § 2222(g)(1).
[111] Defense Business Systems Investment Review, 10 U.S.C. § 2222(g)(1)(A).

- DBS's implementation must "maximize the elimination of unique software requirements and unique interfaces."[112]
- DBS must be in "compliance with the defense business enterprise architecture."[113]
- DBS must have "valid, achievable requirements and a viable plan for implementing those requirements."[114]
- DBS's acquisition strategy must be designed to "eliminate or reduce the need to tailor commercial off-the-shelf systems to meet unique requirements."[115]
- DBS must be in "compliance with the Department's auditability requirements."[116]

According to DBC's 2014 charter, its role as the IRB for DBSs includes these criteria as well:

- Validating "requirements for defense business capabilities."
- Ensuring that "investments are aligned to DoD's lines of business."
- Supporting "measurable improvements to DoD's business objectives."
- Generating "a measureable return on investment."[117]

The IRB process outlined in DoD's DBS Investment Management Guidance[118] describes the integrated business framework (IBF) as the *overarching structure* to manage business IT investments.[119] As Figure 3-5 shows, IBF includes eight functional areas that require functional strategies (FSs) to direct PPBE activities, and organizational execution plans (OEPs) to specify the certification request for each functional area and component.[120]

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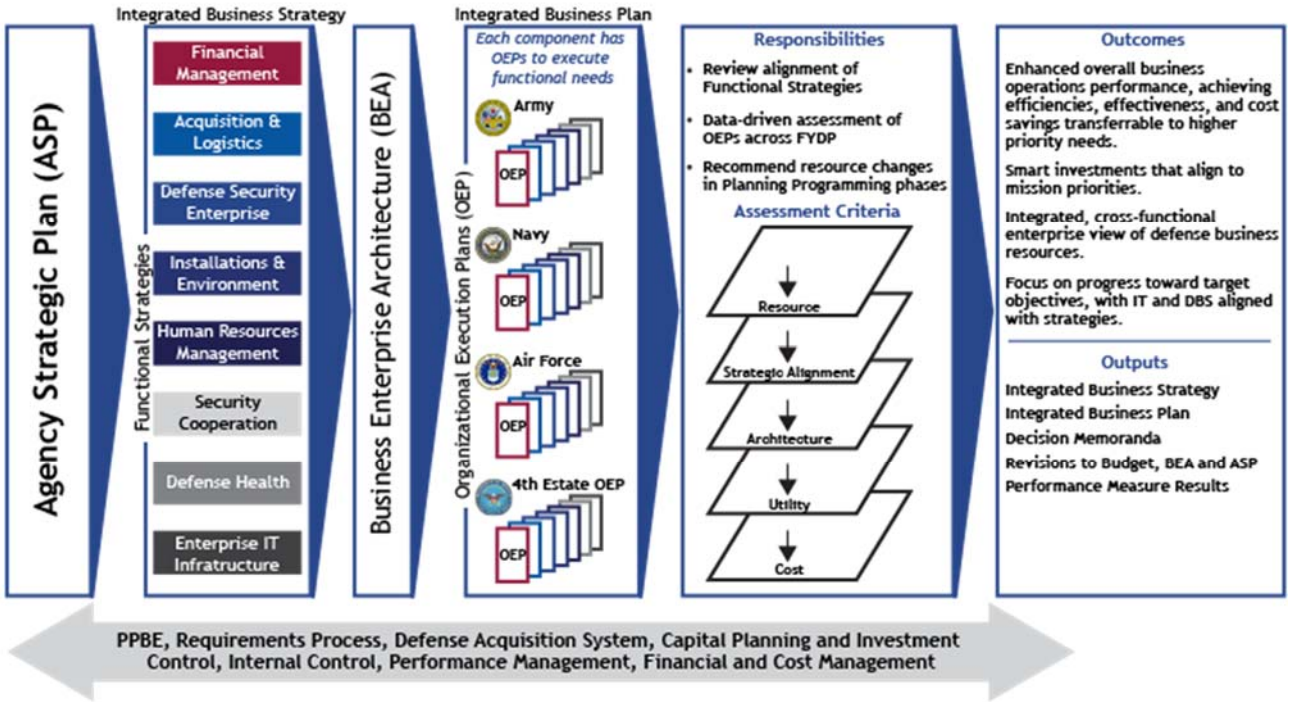
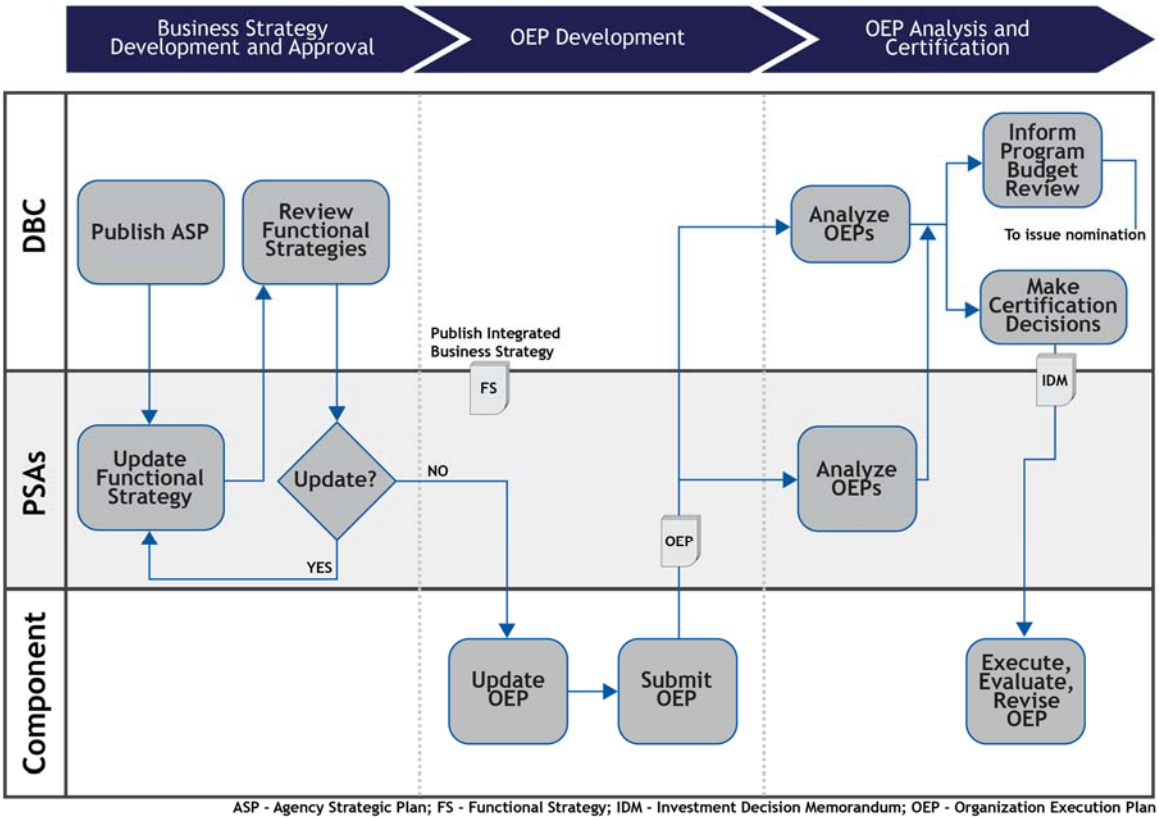
[112] Ibid.
[113] Defense Business Systems Investment Review, 10 U.S.C. § 2222(g)(1)(B).
[114] Defense Business Systems Investment Review, 10 U.S.C. § 2222(g)(1)(C).
[115] Defense Business Systems Investment Review, 10 U.S.C. § 2222(g)(1)(D).
[116] Defense Business Systems Investment Review, 10 U.S.C. § 2222(g)(1)(E).
[117] DoD, *Defense Business Council, December 10, 2014*, accessed August 11, 2017, http://dcmo.defense.gov/Portals/47/Documents/Governance/DBC_Charter_12122014.pdf.
[118] DoD, Office of the Deputy Chief Management Officer, *Defense Business Systems Investment Management Guidance, Version 4.0*, accessed November 9, 2017, http://dcmo.defense.gov/Portals/47/Documents/Governance/DBS%20Investment%20Management%20Guidance%20Version%204.0%20-%20April%202017.pdf?ver=2017-05-30-110052-673.
[119] Ibid.
[120] Ibid.

Figure 3-5. Integrated Business Framework



As Figure 3-6 shows, FSs and OEPs undergo a review process, resulting in certification decisions.

Figure 3-6. Integrated Business Management Process Overview



Findings

Statute specifies that IRB approval is required before programs can proceed to development.[121] In practice, however, DoD requires IRB approval well before development. DBS program personnel have indicated to the Section 809 Panel that a major issue with the IRB process is the approval of the problem statement—a step that takes place before the first program milestone, and in at least one case, several years before the start of product development.[122]

One purpose of requiring a problem statement is to ensure sufficient BPR, yet, in several cases, DoD misapplied the problem statement check in the IRB process, because BPR was already complete. Prominent examples of misapplied problem statement checks in the last 2 years include the following:

- The Integrated Personnel and Pay System–Army (IPPS-A) was delayed in FY 2015 because its fund certification was pending approval of its problem statement.[123] Despite the fact that (a) it was a follow-on increment after OSD directed the division of IPPS-A into two separate increments, and (b) the first increment was already operating under an approved business case and problem statement, yet DoD required a separate problem statement for the follow-on increment. The follow-on increment was delivering the same required capability and was fielded using approved program requirements documents.[124]

- The Medical Communications for Combat Casualty Care (MC4) program, which fields the Theater Medical Information Program-Joint (TMIP-J) software for Army computers in medical units, was delayed for FY 2015 because its fund certification was pending approval of its problem statement.[125] For a number of years, MC4 has had to explain that it previously received IRB certification under the provisions of the TMIP-J authorization documents.[126]

- The Army's LMP Increment 1 was not recertified in FY 2016 due to lack of a problem statement;[127] however, the program was fielded fully as of November 2011, was in sustainment per OSD, and should not have required certification.[128]

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[121] Defense Business Systems Investment Review, 10 U.S.C. § 2222(g)(1).
[122] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, from March to July 2017. *The Problem Statement* terminology was changed with the issuance of DoDI 5000.75 in February 2017. It is now split between *Capability Requirements* (former Problem Statement Part 1) and *Business Processes / BPR Changes* (some of which was in Problem Statement Part 2, some of which is new with the 5000.75).
[123] Office of the Deputy Chief Management Officer, Army Organizational Execution Plan (OEP) Investment Decision Memorandum (IDM) for Fiscal Year (FY) 2015 Defense Business Systems (DBS), (2014).
[124] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, from March to July 2017.
[125] Office of the Deputy Chief Management Officer, Army Organizational Execution Plan (OEP) Investment Decision Memorandum (IDM) for Fiscal Year (FY) 2015 Defense Business Systems (DBS) (2014).
[126] Data collection interviews conducted from March to July 2017 by Section 809 Panel Team 6: IT Acquisition.
[127] Office of the Deputy Chief Management Officer, Army Organizational Execution Plan (OEP) Investment Decision Memorandum (IDM) for Fiscal Year (FY) 2016 Defense Business Systems (DBS) (2015).
[128] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, from March to July 2017.

- The Global Combat Support System–Army Increment 2 was required to obtain IRB certification for its materiel development decision, which was two milestones and several years in advance of planned development.[129]

Another issue with the IRB process is the redundancy of a separate certification process.[130] By definition, the covered DBSs certified by IRBs have already been approved via the POM and subsequently had funds appropriated by Congress.

According to the Defense Acquisition Guidebook, "methods through which more detailed requirements are documented are not dictated by policy," but rather on a program-by-program basis.[131] Some program-level personnel have indicated that the ability to generate more detailed requirements on an ad hoc basis creates incentives for the IRB process to overburden programs with requirements that do not add value to end products.[132]

In 2016, DoD DCMO Peter Levine suggested that the IRB process had encountered problems with "getting mired in small detail" and needed to "focus instead on broader issues."[133] Several officials have also suggested that IRB-related problems persist.[134] In particular, the assessment checklists, multipart requirements templates, technical documentation requirements, and long wait times are major roadblocks for getting programs IRB-certified in a timely manner.[135]

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[129] Office of the Deputy Chief Management Officer, Army Organizational Execution Plan (OEP) Investment Decision Memorandum (IDM) for Fiscal Year (FY) 2016 Defense Business Systems (DBS) (2015). In the case of this program, the MDD milestone was renamed *Incremental Development Decision*.
[130] PEO personnel, conversation with Section 809 Panel staff, June 2017.
[131] Defense Acquisition University, "Defense Acquisition Guidebook," Chapter 6—3.5.2, accessed June 5, 2017, https://www.dau.mil/guidebooks/Shared%20Documents/Chapter%206%20Information%20Technology%20and%20Business%20Systems.pdf.
[132] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, from March to July 2017.
[133] House Armed Services Committee, "Statement of The Honorable Peter Levine, Deputy Chief Management Officer Department of Defense," March 22, 2016, http://docs.house.gov/meetings/AS/AS26/20160322/104711/HHRG-114-AS26-Wstate-LevineP-20160322.pdf, accessed June 5, 2017.
[134] Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, from March to July 2017.
[135] Technical documentation requirements may be perceived by program-level staff as particularly burdensome. Descriptive data elements associated with DBSs must be drawn up, formatted, and entered into—at a minimum—four different data systems, all prior to the initiation of an IRB review. These are the DoD Information Technology Portfolio Repository (DITPR), the Select and Native Programming Data Input Systems for Information Technology (SNaP-IT), the Integrated Business Framework Data Alignment Portal (IBF-DAP), and the DoD Information Technology Investment Portal (DITIP). Each of these data systems focuses on a different functional area and requires unique types of expertise and skillsets. See Deputy Chief Management Officer, *Defense Business Systems Investment Management Guidance, Version 4.0*, 21, accessed April 2017, http://dcmo.defense.gov/Portals/47/Documents/Governance/DBS%20Investment%20Management%20Guidance%20Version%204.0%20-%20April%202017.pdf?ver=2017-05-30-110052-673.
The multipart requirements template takes the form of a 34-page business case analysis (BCA) guidance document published by the DoD CIO. Program personnel are expected to provide detailed analysis of cost, alternatives, risk, funding sources, and many other topics associated with the business system. See Department of Defense Chief Information Officer, *DoD IT Business Case Analysis Template*, October 22, 2014, accessed June 5, 2017, http://dodcio.defense.gov/Portals/0/Documents/DOD%20IT%20Business%20Case%20Analysis%20(BCA).pdf.

There may also be unnecessary bureaucracy built into DBS Investment Management Guidance. For example, the guidance states,

> *10 U.S.C. § 2222 gives greater responsibilities to Military Department Chief Management Officers (CMOs) and defines the statutory thresholds for a covered DBS. However, military departments and Fourth Estate CMOs may lower thresholds used internally as discussed later in this document.*[136]

The statutory threshold for a covered DBS is $50M over the current FYDP period.[137] DoD lowered the threshold, however, and designated the Fourth Estate minimum threshold at $1M over the period of the current FYDP later in the guidance.[138] Instead of embracing this increased authority, DoD expanded its oversight role and designated nearly all Fourth Estate DBS programs as covered DBSs, requiring time-consuming annual fund certification and recertification.

Conclusions

The review and approval of DBS investments can be satisfied through the POM and PPBE processes, which already occur on an annual basis. The term *IRB* does not appear in law (10 U.S.C. § 2222), and the DBC is established in law "to provide advice" (i.e., it is not a decision body). The only statutory basis for the IRB process is the annual certification requirement in 10 U.S.C. §§ 2222(g)(3) and (g)(4). Accordingly, 10 U.S.C. §§ 2222(g)(3) and (g)(4) should be eliminated.

The proposed governance structure in Recommendation 16 allows a newly empowered CMO to address the goals of the IRB process, such as minimizing customization and aligning with the business enterprise architecture, in a much more streamlined manner.

Implementation

Legislative Branch

- Eliminate 10 U.S.C. §§ 2222(g)(3) and (g)(4), which states:
  - "(3) Annual certification.-For any fiscal year in which funds are expended for development or sustainment pursuant to a covered defense business system program, the appropriate approval official shall review the system and certify, certify with conditions, or decline to certify, as the case may be, that it continues to satisfy the requirements of paragraph (1). If the approval official determines that certification cannot be granted, the approval official shall notify the milestone decision authority for the program and provide a recommendation for corrective action."

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[136] Deputy Chief Management Officer, *Defense Business Systems Investment Management Guidance, Version 4.0*, 5, accessed April 2017, http://dcmo.defense.gov/Portals/47/Documents/Governance/DBS%20Investment%20Management%20Guidance%20Version%204.0%20-%20April%202017.pdf?ver=2017-05-30-110052-673. The term *Fourth Estate* refers to Defense agencies that are not the Military Services (e.g., Defense Acquisition University, Defense Logistics Agency).
[137] Defense Business Systems Investment Review, 10 U.S.C. § 2222(i)(2).
[138] Deputy Chief Management Officer, *Defense Business Systems Investment Management Guidance, Version 4.0*, accessed April 2017, http://dcmo.defense.gov/Portals/47/Documents/Governance/DBS%20Investment%20Management%20Guidance%20Version%204.0%20-%20April%202017.pdf?ver=2017-05-30-110052-673.

- "(4) Obligation of funds in violation of requirements.-The obligation of Department of Defense funds for a covered defense business system program that has not been certified in accordance with paragraph (3) is a violation of section 1341(a)(1)(A) of title 31."

Executive Branch

- Eliminate the IRB fund certification requirement from the DBS Investment Management Guidance.

Note: The recommended draft legislative text and sections affected display can be found in the Implementation Details subsection at the end of Section 3.

Implications for Other Agencies

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

Recommendation 18: Fund DBSs in a way that allows for commonly accepted software development approaches.

Problem

The current statutory and policy regime does not enable the speed DoD needs to effectively acquire DBSs. Funding constraints, in various forms, are key contributors to this problem. One constraint applies to the appropriations account and/or program element/budget line item (PE/BLI) from which money is spent. Another constraint applies to the point in time at which money is spent.

Because DBS acquisition follows a model similar to that of major weapon systems acquisition, program managers (PMs) are required to spend money from different appropriation accounts and PEs/BLIs based on the acquisition stage. Depending on financial management regulations (FMR) and Military Department regulations, DoD may need to fund a specific DBS requirement via Research, Development, Test, and Evaluation (RDT&E), Procurement, and/or Operation and Maintenance (O&M). These accounts categorize phases of weapon system engineering. When applied to business software IT, which by its nature does not have such clear phases, the account categories introduce inefficiencies.

PMs must also use different types of funding at different points in time, depending on the years in which Congress appropriated those funds and appropriation availability. This requirement prevents DoD from modifying DBS funding timetables on a monthly or even weekly basis. To accommodate continuous user feedback and changing technical requirements of DBSs, DoD needs the ability to make funding modifications with such frequency.

Appropriation system timing and account constraints are commonly known as *colors of money* in defense acquisition circles. DBS experts cite color of money as a major problem.[139]

Background

In the regular federal budgeting system, Congress appropriates money each year for agency use. This money must be obligated within a date range specified by the appropriation in question and may not, generally, be obligated beyond that range (see Table 3-3 below).[140] The obligation of these funds is also limited to the specific purpose identified in the appropriation.[141]

Table 3-3. Appropriation Accounts Used by DoD to Acquire Business Software Solutions

Appropriation account	Period of availability
Research, Development, Test, and Evaluation (RDT&E)	2 years
Other Procurement	3 years
Operation and Maintenance (O&M)	1 year (some exceptions)[142]

[139] Approximately 30 DBS experts, interviews with the Section 809 Panel staff, mid-2017.
[140] Balances Available, 31 U.S.C. § 1502.
[141] Application, 31 U.S.C. § 1301(a).
[142] For example, 1 percent of the Defense Health Agency appropriation is given 2-year availability (*de facto* carryover authority).

Fundamentals of the modern appropriation system are outlined in sections of law originally enacted in 1809.[143] Current law states that regular appropriations "may be construed to be permanent or available continuously only if the appropriation… expressly provides that it is available after the fiscal year covered by the law in which it appears."[144]

DBSs receive funding primarily from three appropriation accounts—RDT&E, Procurement, and O&M—all of which have different periods of availability and restrictions on use. PMs cannot use these funds interchangeably. For RDT&E and Procurement, program-specific funding is approved by the House and Senate appropriations committees after moving through a lengthy POM process within DoD.

Unlike RDT&E and Procurement funds, for which control resides at the program element level, O&M funding control takes place at a higher level and is not tied to specific programs. Additional constraints apply to O&M funding. In practice, a DBS PM's ability to plan and execute use of funds is restricted based on factors such as type of activity on which money is spent, production document scope, dollar-cost of purchase, and technical details of system modification.[145]

For example, DoD financial regulations distinguish between *investments* and *expenses* based not simply on the qualitative aspects of what is being purchased, but on whether the purchase falls within a dollar threshold of $250,000. Investments, greater than $250,000, must be funded via (specifically appropriated) Procurement dollars; whereas, expenses, less than $250,000, may be funded via O&M dollars.[146]

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[143] GAO, *Principles of Federal Appropriations Law, Third Edition, Volume I*, Chapter 4, 4–6, accessed August 10, 2017, http://www.gao.gov/special.pubs/3rdeditionvol1.pdf.

[144] Application, 31 U.S.C. § 1301(c).

[145] For differentiation based on type of activity, see FMR Volume 2A, Chapter 1, Section 010212(B)(1): "The underlying purpose for each discrete task within an IT effort determines the correct appropriation for budgeting of that task. An effort that is so broadly defined that it contains separate tasks appropriate to budgeting in different appropriations should be separated into discrete tasks, each of which is budgeted in the correct appropriation." For differentiation based on dollar threshold, see FMR Volume 2A, Chapter 1, Section 010212(B)(4): For DBS *modification efforts* of less than $250,000, Operation and Maintenance funding may be used. For DBS modifications involving "a complete system with a cost of $250,000 or more," however, PMs must use Procurement funds. These funds must be either explicitly appropriated by Congress and programmed by DoD at the PE/BLI level, or reprogrammed from another account (which often requires Congressional approval). Differentiation based on production document scope and technical thresholds may indicate Service-level decision-making problems in addition to regulatory problems. According to Service-level DBS acquisition officials in contact with Section 809 Panel staff in August 2017, if modification requirements are not explicitly listed in a DBS's current requirements document, RDT&E funding must be used for that requirement. Even if the DBS's requirements document explicitly lists the modification requirements in question, if a preponderance of development objects being modified are new, RDT&E funding must be used. Only if a majority of development objects being modified are not written from scratch may O&M funding be used. This requirement is important because unlike RDT&E and Procurement, O&M spending does not require the initiation of DBS-specific approval years in advance via the PPBE and appropriation processes.

[146] FMR, Volume 2A, Chapter 1, Section 010212(B)(4). This section of the FMR was codified in Use of Operations and Maintenance Funds for Purchase of Investment Items: Limitation, 10 U.S.C. § 2245a, but repealed in the FY 2017 NDAA (Pub. L. No. 114–328).

Case Study:
Dollar Thresholds Impeding Financial Auditability

In 2016, the Army's General Fund Enterprise Business System (GFEBS) required new computer code to enhance property management auditability reporting. The program contractor estimated that writing this code would cost approximately $600,000.[147]

The program office determined that the work primarily would take the form of newly written code, not modifications to existing code. This determination, combined with the fact that the feature's cost rose beyond the FMR's $250,000 *investment* threshold, necessitated funding the feature's development with RDT&E appropriations.[148]

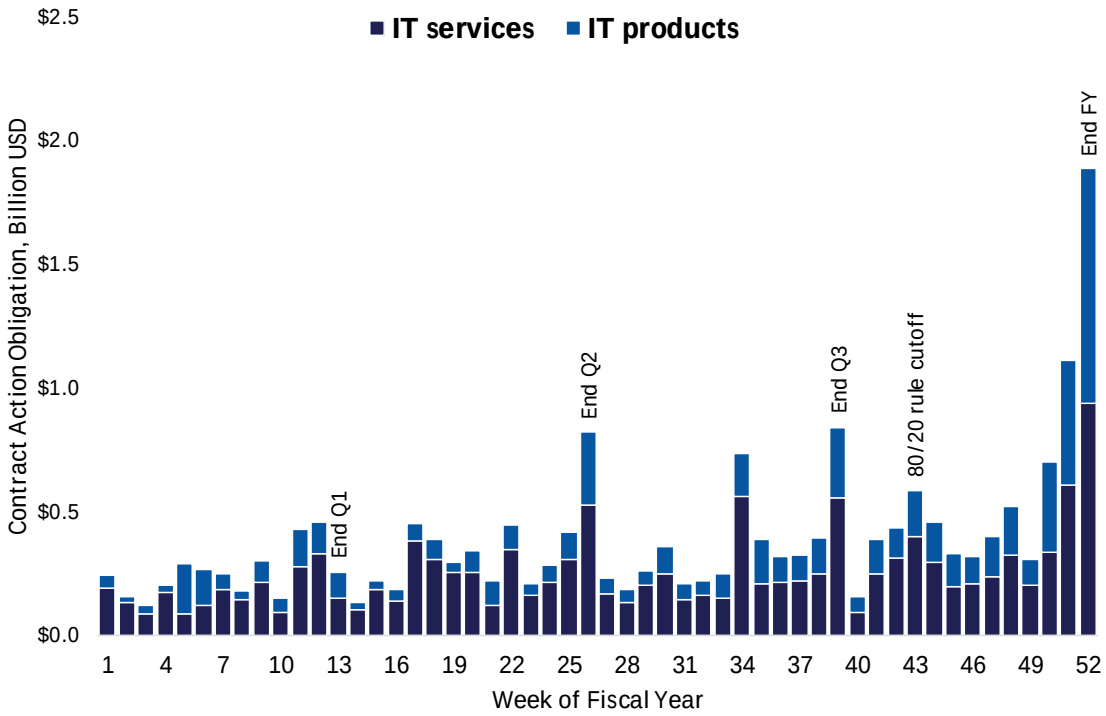
At the time, the program was already in sustainment and had no RDT&E funding. As a result, the program had to postpone the addition of this financial auditability feature. As of late 2017, the Army requested $1.7 million in FY 2019 and $6.7 million in FY 2020 for GFEBS Increment II RDT&E funding.[149] Some of this funding, if approved by Congress, presumably will be allocated to the development of the GFEBS auditability feature in question.

In addition to constraints created by applying normal appropriations accounts to DBSs, other laws, policies, and decision-making bodies may affect DBS spending patterns. These items include the statutory 80/20 rule, OMB quarterly apportionment practices, DoD comptroller *rephasing* practices, and Service-level comptroller policies.

As an illustration of these phenomena, Figure 3-7 below shows DoD's weekly IT contract obligations. In addition to the large peak in IT obligations in the final weeks of September (see rightmost bars of chart), there are smaller peaks visible throughout the fiscal year.

[147] Army DBS program office staff, emails to Section 809 Panel staff, August 2017.
[148] To some degree, this impediment may have been produced by the Army's interpretation of FMR language. According to one DCMO official, "some Services are known to be more conservative in the way they interpret" the distinction between expenses and investments. This situation suggests that part of the problem may be the FMR's excess complexity—as of August 2017, the document was more than 7,000 pages long.
[149] Assistant Secretary of the Army for Financial Management and Comptroller, "Department of Defense Fiscal Year (FY) 2018 Budget Estimates: Army Justification Book of Research, Development, Test & Evaluation, Army" (see page 225 of Volume II, Budget Activity 5B, under Project EV4, General Fund Enterprise Business System Inc. 2), accessed August 14, 2017, https://www.asafm.army.mil/documents/BudgetMaterial/fy2018/vol5b.pdf.

Figure 3-7. Weekly DoD Information Technology Contract Obligations During FY 2017[150]



A small peak in obligations is visible in the 43rd week of the fiscal year (at the end of July). This observation overlaps with the 80/20 rule, under which Congress requires at least 80 percent of single-year obligations to occur between the months of October and July. Small peaks also occur at midyear, the end of each quarter, and the end of most months. These peaks may overlap with temporal constraints applied by OMB, DoD, Military Departments, and lower-level organizations.

There are several important and legitimate reasons for imposing time- and account-based constraints on normal DoD program budgets. One reason may be that the annual appropriation process allows for a regular, standardized oversight process to occur by default. Another issue may be the concern that if funding never expires, it may result in large unobligated balances that could be used for inappropriate purposes. This second justification was alluded to in the 1980s and 1990s, during which some observers viewed certain forms of DoD budget flexibility as "slush funds."[151]

Program officials, however, describe the current appropriation system as a major impediment to the success of DBS programs. One former DBS PM noted commercial companies do not develop market-competitive software IT using the type of siloed-funding model that results from appropriation timing

[150] Dataset includes all DoD contract actions coded with Product and Service Codes *D3* or *70* from the Federal Procurement Data System, https://www.fpds.gov, accessed January 2, 2018. To ensure comparability of data across years, each weekly period contains the same days of the week. The first day of the fiscal year (or first 2 days for leap years) are omitted.

[151] See, for example, Senator Alfonse D'Amato's 1985 letter to the U.S. Comptroller General on this issue and the accompanying report: GAO, Comptroller General of the United States, Potential for Excess Funds in DOD, GAO/NSIAD-85-145, accessed June 27, 2017, http://www.gao.gov/assets/150/143300.pdf. In the past, funding flexibilities (such as the *M* accounts) have been permitted to exist for long periods of time but eventually were shut down after accumulating large unobligated balances. The flexibility accounts in question were eliminated by the FY 1991 NDAA (Pub. L. No. 101–510).

and account constraints. The PM suggested that the main problem was a failure to recognize that as users' needs become clearer, DBS technical specifications change. This fact, however, is not reflected in a requirement and PPBE process that attempts to lay out every technical detail of DBSs in advance. One DBS PM explained, "If you try to build the fifth floor of your house before the first floor, it isn't going to work."[152]

Findings

Time- and account-based funding constraints may address some of the accountability concerns raised by oversight officials. These constraints, however, are counter to two key characteristics of software: It changes rapidly and constantly.[153] For some DBS programs, these constraints can create serious inefficiencies. If a PM wishes to provide new capabilities to end-users based on their feedback from previous software releases, the PM must have the ability to modify requirements on relatively short notice. To modify requirements on short notice, the PM must be able to access congressionally appropriated funding with flexibility regarding time and account. The current DBS funding system lacks such flexibility and serves as a major constraint.

Case Study:
Embrace Funding Models That Can Accommodate Older IT Systems

The Air Force's Aviation Resource Management System (ARMS) is a 30-year-old ACAT III aviation information reporting system, historically funded with O&M appropriations.[154] Due to its age, it did not have any of the documentation associated with the DoDI 5000.02 major program acquisition process.

The Air Force determined that required upgrades to the system would have to be carried out using RDT&E appropriations, for which DoDI 5000.02 process documentation would be required, *causing a 2-year delay*.[155] By loosening the distinctions between O&M and RDT&E, Congress would allow for necessary upgrades to older software systems.

Statistical evidence lends some support to the hypothesis that the time periods of appropriation accounts are connected to the quality of DBS procurements. A 2013 study focused on U.S. federal government IT acquisition projects showed a correlation between funding obligated at the very end of the fiscal year and comparatively low quality of project outcomes.[156] A 2016 paper reiterated many of these points, concluding that although existing data "do not prove that wasteful year-end spending exists," current constraints "may encourage wasteful spending of taxpayer dollars."[157] Senior defense officials such as former DoD Comptroller Robert Hale, former Acting Army Secretary Patrick Murphy,

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[152] Former Army DBS PM, conversations with Section 809 Panel staff, May 2017.
[153] Jacques S. Gansler, Commercial Off The Shelf (COTS): Doing It Right, presentation for Acquisition Research Symposium, May 14-15, 2008.
[154] Defense Information Technology Portfolio Repository (DITPR), accessed August 15, 2017.
[155] Air Force CIO staff, emails with Section 809 Panel staff, August 15, 2017.
[156] Jeffrey B. Liebman and Neale Mahoney, "Do Expiring Budgets Lead to Wasteful Spending? Evidence from Federal Procurement," *National Bureau of Economic Research*, September 2013, accessed April 26, 2017, http://www.nber.org/papers/w19481.pdf.
[157] Jason J. Fichtner and Adam N. Michel, *Curbing the Surge in Year-End Federal Government Spending: Reforming 'Use It or Lose It' Rules*, accessed August 7, 2017, https://www.mercatus.org/system/files/mercatus-fichtner-year-end-spending-v1.pdf.

and former Army Business Transformation Office Director LTG Tom Spoehr have all suggested that timing constraints lead to suboptimal spending outcomes.[158]

Acquisition officials also described funding flexibility as necessary to build effective cybersecurity measures into DBSs. In their assessment, when critical needs arise due to unforeseen vulnerabilities, flexible funding must be available for the immediate development of new capabilities, as going through a formal POM process can take as long as 2 years.[159]

Case Study:
Using Appropriation Account and PE/BLI Flexibility to Promote Business Process Reengineering

The Air Force Way system (AFWay) is an electronic portal that enables users to securely order IT hardware, software, and services online. During development of the system's Version 4.0 technical refresh, acquisition personnel leading the effort believed many of the business processes involved in ordering IT hardware and services could be made more efficient. Compliance with then-current DoD security requirements necessitated a complete rewrite of the application code, which provided an opportunity to introduce concurrently the desired business process efficiencies.

The proposed improvements were considered new capabilities that required RDT&E funding. AFWay was an aging system with a 20-year-old set of requirements, being funded solely by O&M. As such, it not only lacked RDT&E funds, but also lacked a PE/BLI at which to assign such funds.

Because of the inability to use O&M dollars for application enhancements in this case, the proposed business process improvements could not be included in the rollout of AFWay's Version 4.0 in 2015.[160] Congress could mitigate this impediment to improving business processes by allowing for more malleable distinctions between DBS appropriation accounts.

[158] Robert Hale, "Why DoD's Year-End Spending Needs to Change," *Breaking Defense*, September 23, 2016, accessed December 28, 2017, http://breakingdefense.com/2016/09/why-dods-year-end-spending-needs-to-change. Changing Management Behavior: Every Dollar Counts, U.S. Army Directive 2016-16 (2016). David Vergun, "End-of-year 'use it or lose it' budget mindset to get tossed," *Army News Service*, April 18, 2016, accessed December 28, 2017, https://www.army.mil/article/166098.
[159] Air Force IT acquisition officials, conversations with Section 809 Panel staff, June 2017.
[160] Air Force CIO staff, emails with Section 809 Panel staff, August 15, 2017.

Case Study:
Tailoring Funding Timetables to Acknowledge Special Characteristics of DBSs

The Air Force's Contracting-Information Technology (CON-IT) program is intended to replace the outdated Standard Procurement System (SPS) as the departmentwide contract writing system. The Air Force used an integrated team of acquisition and contracting personnel to develop an innovative acquisition strategy for CON-IT.

By using an existing software solution owned by Defense Information Systems Agency (DISA) and outsourcing much of the development and training to USDA, the Air Force anticipated avoiding $83 million in costs and shortening the program schedule by 23 months.[161] The integrated team adopted an Agile software development methodology and provided a working prototype in 6 weeks, which shortened the program schedule by an additional 3 months.

Because the program succeeded in shortening its timeline by about 2 years, however, the Air Force required end-user software licenses much earlier than originally anticipated or budgeted. End-user license purchases constitute a system deployment, so they must be purchased using Procurement appropriations.

The FY 2018 POM request had already been delivered prior to successful delivery of the prototype system. Acquisition officials were able to locate sources of funding in other programs, but none of this funding was in the Procurement account, so they could not use it for purchasing end-user licenses.

Air Force acquisition personnel anticipated that an initial operational deployment would occur at the end of 2017 and broader fielding of CON-IT would occur in late 2018. This timetable was jeopardized by different appropriation accounts and the complex rules surrounding them.

The Air Force was stymied in deployment because it completed a prototype 23 months ahead of time and $83 million under budget. Due to substantial time savings, it lacked Procurement appropriations specific to the time period in which the budget originally called for them. Officials estimated that if money were not obtained for purchase of end-user licenses in FY 2017, it would cause deployment delays and approximately $7 million in added program costs due to simply "waiting for the right color of money."[162]

By modifying the rules on appropriations timetables and accounts for DBSs, Congress can mitigate the unnecessary program delays that exist due to the inherently unpredictable process of Agile DBS development.

One senior industry representative advised Congress to "kill the color of money immediately" with respect to DBSs.[163] He stated that although problems had arisen in implementation, "the concepts are sound" behind flexibility mechanisms such as the working capital fund used by DISA.[164]

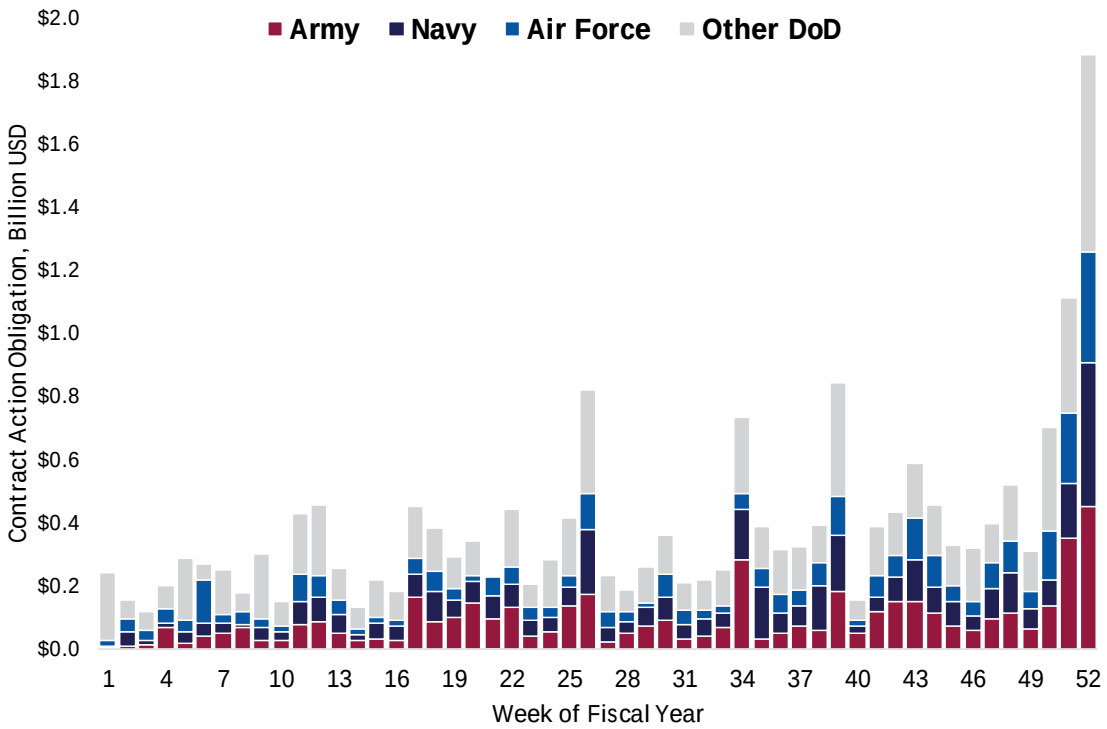
Other government representatives outside DoD were less vocal in their condemnation of time- and account-based funding constraints. Software developers from the General Services Administration said

[161] Ibid.
[162] Ibid.
[163] Industry organization managing director, conversation with Section 809 Panel staff, June 2017.
[164] Ibid.

that because they focused on delivering capabilities within very short timeframes, color of money was rarely a major problem. The software developers did suggest, however, these funding constraints might have greater effect on other agencies that run larger-scale development projects. They described themselves as favoring working capital fund models for software IT acquisition.[165]

The effect of color of money on DBS programs can be quantifiably estimated using publicly available federal procurement data. If there were a perfectly even distribution of DBS spending within fiscal years, about 2 percent of such spending would occur each week. In fact, recent observations show approximately 10 percent of IT spending concentrated in the final week of the fiscal year.[166]

Figure 3-8. Comparison of Military Departments' Weekly IT Contracting Obligations, FY 2017[167]



Much of the data in the chart are likely not DBS-related, but simply represent the purchase of computers and other equipment for day-to-day office use. This analysis, however, quantifies one of the most clearly visible ways in which the appropriation system produces skewed incentives for IT acquisition.

[165] GSA employees, conversation with Section 809 Panel staff, June 2017.
[166] Section 809 Panel analysis of FY 2017 Federal Procurement Data System data, January 2, 2018.
[167] Data from Federal Procurement Data System, extracted via Adhoc Report on January 2, 2018. Dataset includes all DoD contract actions coded with Product and Service Codes *D3* or *70* from the Federal Procurement Data System, https://www.fpds.gov, accessed January 2, 2018. To ensure comparability of data across years, each weekly period contains the same days of the week. The first day of the fiscal year (or first 2 days for leap years) are omitted.

This end-year skewing effect is higher for IT and IT-related products than for any other aggregate category of products purchased in substantial quantities by DoD in FY 2017.

Table 3-4. FY 2017 DoD Contract Obligations, By Aggregated Product Code[168]

PSC	PSC description	FY 2017 obligation	Obligation in final week of FY 2017	Final week as percent of FY 2017 total
69	Training Aids and Devices[169]	$1.5 billion	$384 million	22.9%
70	Information Technology Equipment, Including Firmware and Software	$7.0 billion	$945.6 million	13.6%
19	Ships, Small Craft, Pontoons, and Floating Docks	$15.1 billion	$1.8 billion	11.8%
58	Communication, Detection, and Coherent Radiation Equipment	$12.3 billion	$1.4 billion	11.2%
13	Ammunition and Explosives	$5.5 billion	$581.5 million	10.6%

Conclusions

No meaningful distinction exists among RDT&E, Procurement, or O&M for software systems developed according to modular, Agile principles. According to senior DoD IT officials, "Current appropriations laws and authorities are not aligned with the way technology is acquired for business operations."[170] The officials elaborate on the changes that would need to occur to achieve such alignment:

> *To acquire a technology solution that takes advantage of the latest available alternatives Congress would provide flexibility to current appropriations for business system capability needs. To avoid technical debt, resources would be available in the appropriation needed immediately for technology capabilities current in the marketplace.*[171]

The traditional appropriations model provides a helpful framework when developing complex weapon systems over the course of many years. This traditional model, however, is fundamentally incompatible with open-architecture business software programs intended to deliver new capabilities multiple times per year.

The defense acquisition funding system faces constraints associated with timing, appropriation account, and PEs/BLIs. These funding constraints lock DBS development into rigid, predetermined pathways fundamentally at odds with widely accepted best practices for commercial software development and the continuous engineering nature of software. These best practices include core principles of Agile development:

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[168] Data from Federal Procurement Data System, extracted via Adhoc Report on January 2, 2018. Only includes 2-digit product codes with FY 2017 DoD obligations greater than $1 billion.
[169] PSC 69, Training Aids and Devices, includes some computers and electronic communications equipment.
[170] Deputy Assistant Secretary of Defense for Communications, Command and Control, Cyber and Business Systems (DASD C3CB), *Study of Commercial Practices: Resourcing Alternatives Deep Dive,* July 10, 2017.
[171] Ibid.

- Delivering software on a regular basis, with continuous end-user feedback involves simultaneous research, development, acquisition, and sustainment.[172] The current system of defense appropriation accounts and PEs/BLIs does not acknowledge the fusion of these processes in software development.

- Delivering working software in a span of weeks or months requires a funding system that can change the allocation of program resources in such a timeframe.[173] The current appropriation system does not allow for the allocation or reallocation of resources on these timeframes.

Analysis:
Appropriation Labeling and Decision-Point Blockages

Service acquisition professionals state that the requirement to fund much of IT software development via RDT&E imposes a burden "simply because of the word Development within RDT&E."[174]

This statement suggests that DoD leadership psychology may be one of the problems associated with DBS funding. A given piece of software may never be done developing. As connected systems are modified, it may require the continual addition of new RICEFW objects. Consequently, program staff could potentially justify the funding of many endeavors under RDT&E, Procurement, or O&M. Those concerned primarily with legal compliance, however, may tend to default to the most liberal possible interpretation of the term *development* to ensure they avoid violating the law.

By allowing the type of funding flexibilities outlined below, Congress can mitigate the degree to which nonprogram officials impede DBS development due to DoD's overabundance of caution regarding fiscal law and regulation.

Ultimately, the more work DBS PMs devote to obligating funds within specific time periods or accounts, the less work they devote to ensuring positive outcomes for end-users. For this reason, greater funding flexibility is required if DBSs are to deliver value to warfighters at substantially lower cost to taxpayers.

Implementation

Legislative Branch

- Fund DBSs in a way that allows for commonly accepted software development approaches. To do so requires flexibility in both time period limits and appropriation account limits. DoD cannot effectively manage large IT projects in accordance with best practices without this flexibility. Account flexibility recommendations (internal reprogramming) and time period flexibility recommendations (carryover authority) are described below.

[172] See first principle of Agile Manifesto, "Principles behind the Agile Manifesto," AgileManifesto.org, accessed November 9, 2017, http://agilemanifesto.org/principles.html.
[173] Ibid, third principle.
[174] Air Force CIO staff, conversation with Section 809 Panel staff, August 15, 2017.

  - To address appropriation account constraints and allow Agile, sprint-based software development decisions to be made in real time, congressional defense committees should allow internal reprogramming for DBSs, provided that each internal reprogramming is within an individual DBS portfolio. Congress should allow DoD to manage DBS funding through internal reprogramming guidelines for reclassifying funds (including maximum thresholds). Further, movement of DBS funding across O&M accounts, RDT&E accounts, and Procurement accounts of a DBS portfolio should not count against general transfer authority and should not require prior approval from congressional committees.

  - To address time period constraints, add a section to the annual defense appropriation act permitting DBS carryover authority of 10 percent up to 6 months. In other words, DoD would be empowered to delay the obligation of funds for up to 6 months beyond the end of the fiscal year.

- Repeal the regular appropriations bill section on investment item unit costs to acknowledge that, for the purpose of modifying or enhancing DBSs, there is no technically meaningful distinction between RDT&E, Procurement, and O&M.[175]

  - In future appropriations acts, omit the section reading, "appropriations which are available to the Department of Defense for operation and maintenance may be used to purchase items having an investment item unit cost of not more than $250,000."[176]

Executive Branch

- Allow for flexibility across appropriation accounts at the DBS portfolio level, by delegating internal reprogramming authority to portfolio leads.

  - To address appropriation account constraints, OSD should issue policy or guidance to the Comptroller, CMO, and DBS managers. The policy or guidance should specify that DBS internal reprogramming should be maintained under the decision-making authority of DBS portfolio leads. DBS portfolio leads should be permitted to redistribute available funding among their own subordinate DBS program accounts. The CMO would send regular reports to the DoD Comptroller detailing all such transfers after the fact, to be incorporated into the Comptroller's internal reprogramming notifications to the congressional defense committees.

- The DoD comptroller and the CMO should issue policy or guidance stating their intent not to decrement funding due to DBS portfolios retaining unobligated money within targeted phases of the fiscal year. Without this policy or guidance, carryover provisions would be unlikely to produce benefits.

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[175] This recommendation would be in keeping with changes under the FY 2017 NDAA. The law repealed Use of Operation and Maintenance Funds for Purchase of Investment Items: Limitation, 10 U.S.C. §2245a, which mandated that "funds appropriated to the Department of Defense for operation and maintenance may not be used to purchase any item (including any item to be acquired as a replacement for an item) that has an investment item unit cost that is greater than $250,000."
[176] Section 8032 of the Consolidated Appropriations Act for FY 2017, Pub .L. No. 115–31 (2016).

- Rewrite FMR Volume 2A, Chapter 1, Section 010212(B) to acknowledge that, for the purpose of modifying or enhancing DBSs, there is no technically meaningful distinction between RDT&E, Procurement, and O&M.
  - Eliminate the $250,000 barrier between expenses and investments in FMR Volume 2A, Chapter 1, Section 010212(B)(4).

Note: No additional implementation material is included for this recommendation.

Implications for Other Agencies

- DoD (or parts of DoD) could serve as a pilot program for changing the U.S. government's approach to funding the acquisition of business software IT. Depending on problems encountered and lessons learned, similar approaches could be adopted by other agencies.

Section 3
Defense Business Systems: Acquisition of Information Technology Systems

Implementation Details

Recommendations 16 and 17

LEGISLATIVE PROVISIONS — 809 PANEL STATUTORY RECOMMENDATIONS RELATING TO DEFENSE BUSINESS SYSTEMS

[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 below.]

SEC. 601. DEFENSE BUSINESS SYSTEMS.

(a) ACQUISITION OF DEFENSE BUSINESS SYSTEMS.—

(1) AUTHORITY OF CHIEF MANAGEMENT OFFICER.—Section 2222 of title 10, United States Code, is amended by striking subsections (c) and (d) and inserting the following new subsection (c):

"(c) ACQUISITION OF DEFENSE BUSINESS SYSTEMS.—

"(1) AUTHORITY OF CHIEF MANAGEMENT OFFICER.—Subject to the authority, direction, and control of the Secretary of Defense, the Chief Management Officer of the Department of Defense (in this section referred to as the "CMO"), as an element of CMO's mission of managing the business operations of the Department, shall be responsible for, and shall have the authority for, management of defense business system portfolios, including acquisition of defense business systems included in any such portfolio. The authority of the CMO under this subsection includes authority for requirements determination and allocation of resources with respect to defense business system portfolios.

"(2) EXCLUSION FROM LAWS APPLICABLE TO ACQUISITION OF MAJOR DEFENSE ACQUISITION PROGRAMS AND MAJOR AUTOMATED INFORMATION SYSTEM PROGRAMS.—

The CMO may conduct acquisitions of defense business systems under paragraph (1) without regard to the following:

"(A) Any law otherwise applicable to acquisition of programs that are considered to be major defense acquisition programs.

"(B) Section 1706 of this title.

"(C) Section 2223a of this title and the program established under that section.

"(C) Section 2302d of this title.

"(D) Section 2431a of this title.

"(E) Section 806 of Public Law 109-163 (10 U.S.C. 2302 note).

"(F) Section 883(e) of Public Law 114-92 (10 U.S.C. 2223a note).".

(2) REPEAL OF SUPERSEDED AUTHORITY OF MILESTONE DECISION AUTHORITY.—Such section is further amended by striking subsection (h).

(b) GOVERNANCE STRUCTURE FOR DEFENSE BUSINESS SYSTEMS.—Such section is further amended by inserting after subsection (c), as added by subsection (a) of this section, the following new subsection (d):

"(d) GOVERNANCE STRUCTURE FOR DEFENSE BUSINESS SYSTEMS.—The Secretary of Defense, acting through the CMO, shall provide for a governance structure for defense business systems based upon—

"(1) identification of Department of Defense enterprise business processes; and

"(2) for each such identified enterprise business process—

"(A) designation of an officer or official within the Office of the CMO to have responsibility throughout the Department of Defense for the portfolio of defense business systems supporting that process; and

"(B) designation—

"(i) for each military department, of an officer or official to have responsibility within that military department for the portfolio of defense business systems supporting that process, including, to the extent provided by the CMO, authority for acquisition of such business systems; and

"(ii) for each Defense Agency or Department of Defense Field Activity designated by the Secretary for this purpose, of an officer or official to have responsibility within that Defense Agency or Field Activity for the portfolio of defense business systems supporting that process, including, to the extent provided by the CMO, authority for acquisition of such business systems.".

(c) REPEAL OF LIMITATION ON DEFENSE BUSINESS SYSTEMS PROCEEDING INTO DEVELOPMENT.—Subsection (g) of such section is repealed.

(d) DEFINITIONS.—Subsection (i) of such section is redesignated as subsection (g) as is amended—

(1) by striking paragraphs (2), (4), (5), and (9);

(2) by redesignating paragraph (3) as paragraph (2) and amending that paragraph to read as follows:

"(2) DEFENSE BUSINESS SYSTEM PORTFOLIO.—The term 'defense business system portfolio' means the defense business systems that collectively support a particular Department of Defense business process or function.";

(3) by redesignating paragraph (6) as paragraph (3);

(4) by redesignating paragraph (7) as paragraph (4) and in that paragraph by striking "section 11101 of title 40, United States Code" and inserting "section 3502 of title 44"; and

(5) by redesignating paragraphs (8), (10), and (11) as paragraphs (5), (6), and (7), respectively.

(e) DEFENSE BUSINESS ENTERPRISE ARCHITECTURE.—Subsection (e) of such section is amended—

(1) in paragraph (1), by striking "working through the Under Secretary of Defense for Business Management and Information" and inserting "acting through the CMO";

(2) in paragraph (2), by striking "and shall" and all that follows through the end and inserting a period; and

(3) in paragraph (4)(B), by striking ", including" and all that follows through the end and inserting a period.

(f) DEFENSE BUSINESS COUNCIL.—Subsection (f) of such section is amended—

(1) in paragraph (1)—

(A) by inserting "and" after "business processes,"; and

(B) by striking ", and developing requirements for defense business systems"; and

(2) in paragraph (2)—

(A) by striking "Chief Management Officers" in subparagraph (A) and inserting "Secretaries"; and

(B) by striking "Under Secretary of Defense for Acquisition, Technology, and Logistics" in subparagraph (B) and inserting "Under Secretary of Defense for Acquisition and Sustainment".

(g) DEFENSE BUSINESS SYSTEMS GENERALLY.—Subsection (b) of such section is amended—

(1) in the matter preceding paragraph (1), by striking "each covered" and all that follows through "of Defense" and inserting "each defense business system"; and

(2) in paragraph (2), by striking "a comprehensive" and all that follows and inserting "the defense business enterprise architecture developed pursuant to subsection (e)".

(h) SECTION HEADING.—

(1) REVISED HEADING.—The heading of such section is amended by striking the colon and all that follows.

(2) TABLE OF SECTIONS.—The item relating to such section in the table of sections at the beginning of chapter 131 of such title is amended by striking the colon and all that follows and inserting a period.

[Changes recommended to 10 U.S.C. 2222 are shown below.
[Matter to be deleted is shown in ~~stricken-thru~~ text; matter to be inserted is shown in ***bold italic*** text]

§2222. Defense business systems~~: business process reengineering; enterprise architecture; management~~

(a) DEFENSE BUSINESS PROCESSES GENERALLY.—The Secretary of Defense shall ensure that defense business processes are reviewed, and as appropriate revised, through business process reengineering to match best commercial practices, to the maximum extent practicable, so as to minimize customization of commercial business systems.

(b) DEFENSE BUSINESS SYSTEMS GENERALLY.—The Secretary of Defense shall ensure that each ~~covered~~ defense business system ~~developed, deployed, and operated by~~ ~~the Department of Defense—~~

(1) supports efficient business processes that have been reviewed, and as appropriate revised, through business process reengineering;

(2) is integrated into ~~a~~ ***the*** ~~comprehensive~~ defense business enterprise architecture ***developed pursuant to subsection (e)***;

(3) is managed in a manner that provides visibility into, and traceability of, expenditures for the system; and

(4) uses an acquisition and sustainment strategy that prioritizes the use of commercial software and business practices.

(c) ACQUISITION OF DEFENSE BUSINESS SYSTEMS.—

(1) AUTHORITY OF CHIEF MANAGEMENT OFFICER.—Subject to the authority, direction, and control of the Secretary of Defense, the Chief Management Officer of the Department of Defense (in this section referred to as the 'CMO'), as an element of CMO's mission of managing the business operations of the Department, shall be responsible for, and shall have the authority for, management of defense business system portfolios, including acquisition of defense business systems included in any such portfolio. The authority of the CMO under this subsection includes authority for requirements determination and allocation of resources with respect to defense business system portfolios.

(2) EXCLUSION FROM LAWS APPLICABLE TO ACQUISITION OF MAJOR DEFENSE ACQUISITION PROGRAMS AND MAJOR AUTOMATED INFORMATION SYSTEM PROGRAMS.—The CMO may conduct acquisitions of defense business systems under paragraph (1) without regard to the following:

(A) Any law otherwise applicable to acquisition of programs that are considered to be major defense acquisition programs.

(B) Section 1706 of this title.

(C) Section 2223a of this title and the program established under that section.

(C) Section 2302d of this title.

(D) Section 2431a of this title.

(E) Section 806 of Public Law 109-163 (10 U.S.C. 2302 note).

(F) Section 883(e) of Public Law 114-92 (10 U.S.C. 2223a note).

(d) GOVERNANCE STRUCTURE FOR DEFENSE BUSINESS SYSTEMS.—The Secretary of Defense, acting through the CMO, shall provide for a governance structure for defense business systems based upon—

(1) identification of Department of Defense enterprise business processes; and

(2) for each such identified enterprise business process—

(A) designation of an officer or official within the Office of the Chief Management Officer to have responsibility throughout the Department of Defense for the portfolio of defense business systems supporting that process; and

(B) designation—

(i) for each military department, of an officer or official to have responsibility within that military department for the portfolio of defense business systems supporting that process, including, to the extent provided by the CMO, authority for acquisition of such business systems; and

(ii) for each Defense Agency or Department of Defense Field Activity designated by the Secretary for this purpose, of an officer or official to have responsibility within that Defense Agency or Field Activity for the portfolio of defense business systems supporting that process, including, to the extent provided by the CMO, authority for acquisition of such business systems.

~~(c) ISSUANCE OF GUIDANCE.—~~

~~(1) SECRETARY OF DEFENSE GUIDANCE.—The Secretary shall issue guidance to provide for the coordination of, and decision making for, the planning, programming, and control of investments in covered defense business systems.~~

~~(2) SUPPORTING GUIDANCE.—The Secretary shall direct the Under Secretary of Defense for Business Management and Information, the Under Secretary of Defense for Acquisition, Technology, and Logistics, the Chief Information Officer, and the Chief Management Officer of each of the military departments to issue and maintain supporting guidance, as appropriate and within their respective areas of responsibility, for the guidance of the Secretary issued under paragraph (1).~~

~~(d) GUIDANCE ELEMENTS.—The guidance issued under subsection (c)(1) shall include the following elements:~~

~~(1) Policy to ensure that the business processes of the Department of Defense are continuously reviewed and revised—~~

~~(A) to implement the most streamlined and efficient business processes practicable; and~~

~~(B) to eliminate or reduce the need to tailor commercial off-the-shelf systems to meet or incorporate requirements or interfaces that are unique to the Department of Defense.~~

~~(2) A process to establish requirements for covered defense business systems.~~

~~(3) Mechanisms for the planning and control of investments in covered defense business systems, including a process for the collection and review of programming and budgeting information for covered defense business systems.~~

~~(4) Policy requiring the periodic review of covered defense business systems that have been fully deployed, by portfolio, to ensure that investments in such portfolios are appropriate.~~

~~(5) Policy to ensure full consideration of sustainability and technological refreshment requirements, and the appropriate use of open architectures.~~

~~(6) Policy to ensure that best acquisition and systems engineering practices are used in the procurement and deployment of commercial systems, modified commercial systems, and defense-unique systems to meet Department of Defense missions.~~

(e) DEFENSE BUSINESS ENTERPRISE ARCHITECTURE.—

(1) BLUEPRINT.—The Secretary, ~~working~~ ***acting*** through the ~~Under Secretary of Defense for Business Management and Information,~~ ***CMO,*** shall develop and maintain a blueprint to guide the development of integrated business processes within the Department of Defense. Such blueprint shall be known as the "defense business enterprise architecture".

(2) PURPOSE.—The defense business enterprise architecture shall be sufficiently defined to effectively guide implementation of interoperable defense business system solutions ~~and shall be consistent with the policies and procedures established by the Director of the Office of Management and Budget~~.

(3) ELEMENTS.—The defense business enterprise architecture shall—

(A) include policies, procedures, business data standards, business performance measures, and business information requirements that apply uniformly throughout the Department of Defense; and

(B) enable the Department of Defense to—

(i) comply with all applicable law, including Federal accounting, financial management, and reporting requirements;

(ii) routinely produce verifiable, timely, accurate, and reliable business and financial information for management purposes;

(iii) integrate budget, accounting, and program information and systems; and

(iv) identify whether each existing business system is a part of the business systems environment outlined by the defense business enterprise architecture, will become a part of that environment with appropriate modifications, or is not a part of that environment.

(4) INTEGRATION INTO INFORMATION TECHNOLOGY ARCHITECTURE.—(A) The defense business enterprise architecture shall be integrated into the information technology enterprise architecture required under subparagraph (B).

(B) The Chief Information Officer of the Department of Defense shall develop an information technology enterprise architecture. The architecture shall describe a plan for improving the information technology and computing infrastructure of the Department of Defense~~, including for each of the major business processes conducted by the Department of Defense~~.

(5) COMMON ENTERPRISE DATA.—The defense business enterprise shall include enterprise data that may be automatically extracted from the relevant systems to facilitate Department of Defense-wide analysis and management of its business operations.

(6) ROLES AND RESPONSIBILITIES.—

(A) The Chief Management Officer of the Department of Defense shall have primary decision-making authority with respect to the development of common enterprise data. In consultation with the Defense Business Council, the Chief Management Officer shall—

(i) develop an associated data governance process; and

(ii) oversee the preparation, extraction, and provision of data across the defense business enterprise.

(B) The Chief Management Officer and the Under Secretary of Defense (Comptroller) shall—

(i) in consultation with the Defense Business Council, document and maintain any common enterprise data for their respective areas of authority;

(ii) participate in any related data governance process;

(iii) extract data from defense business systems as needed to support priority activities and analyses;

(iv) when appropriate, ensure the source data is the same as that used to produce the financial statements subject to annual audit;

(v) in consultation with the Defense Business Council, provide access, except as otherwise provided by law or regulation, to such data to the Office of the Secretary of Defense, the Joint Staff, the military departments, the combatant commands, the Defense Agencies, the Department of Defense Field Activities, and all other offices, agencies, activities, and commands of the Department of Defense; and

(vi) ensure consistency of the common enterprise data maintained by their respective organizations.

(C) The Director of Cost Assessment and Program Evaluation shall have access to data for the purpose of executing missions as designated by the Secretary of Defense.

(D) The Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the Secretaries of the military departments, commanders of combatant commands, the heads of the Defense Agencies, the heads of the Department of Defense Field Activities, and the heads of all other offices, agencies, activities, and commands of the Department of Defense shall provide access to the relevant system of such department, combatant command, Defense Agency, Defense Field Activity, or office, agency, activity, and command organization, as applicable, and data extracted from such system, for purposes of automatically populating data sets coded with common enterprise data.

(f) DEFENSE BUSINESS COUNCIL.—

(1) REQUIREMENT FOR COUNCIL.—The Secretary shall establish a Defense Business Council to provide advice to the Secretary on developing the defense business enterprise architecture, reengineering the Department's business processes, ***and*** developing and deploying defense business systems~~, and developing requirements for defense business systems~~. The Council shall be chaired by the ~~Under Secretary of Defense for Business Management and Information~~ ***CMO*** ~~and the Chief Information Officer of the Department of Defense~~.

(2) MEMBERSHIP.—The membership of the Council shall include the following:

(A) The ~~Chief Management Officers~~ ***Secretaries*** of the military departments, or their designees.

(B) The following officials of the Department of Defense, or their designees:

(i) The Under Secretary of Defense for Acquisition~~, Technology,~~ and ~~Logistics~~ ***Sustainment*** with respect to acquisition, logistics, and installations management processes.

(ii) The Under Secretary of Defense (Comptroller) with respect to financial management and planning and budgeting processes.

(iii) The Under Secretary of Defense for Personnel and Readiness with respect to human resources management processes.

~~(g) APPROVALS REQUIRED FOR DEVELOPMENT.—~~

~~(1) INITIAL APPROVAL REQUIRED.—The Secretary shall ensure that a covered defense business system program cannot proceed into development (or, if no development is required, into production or fielding) unless the appropriate approval official (as specified in paragraph (2)) determines that—~~

~~(A) the system has been, or is being, reengineered to be as streamlined and efficient as practicable, and the implementation of the system will maximize the elimination of unique software requirements and unique interfaces;~~

~~(B) the system and business system portfolio are or will be in compliance with the defense business enterprise architecture developed pursuant to subsection (e) or will be in compliance as a result of modifications planned;~~

~~(C) the system has valid, achievable requirements and a viable plan for implementing those requirements (including, as appropriate, market research, business process reengineering, and prototyping activities);~~

~~(D) the system has an acquisition strategy designed to eliminate or reduce the need to tailor commercial off-the-shelf systems to meet unique requirements, incorporate unique requirements, or incorporate unique interfaces to the maximum extent practicable; and~~

~~(E) the system is in compliance with the Department's auditability requirements.~~

~~(2) APPROPRIATE OFFICIAL.—For purposes of paragraph (1), the appropriate approval official with respect to a covered defense business system is the following:~~

~~(A) Except as may be provided in subparagraph (C), in the case of a priority defense business system, the Under Secretary of Defense for Business Management and Information.~~

~~(B) Except as may be provided in subparagraph (C), for any defense business system other than a priority defense business system—~~

~~(i) in the case of a system of a military department, the Chief Management Officer of that military department; and~~

~~(ii) in the case of a system of a Defense Agency or Department of Defense Field Activity, or a system that will support the business process of more than one military department or Defense Agency or Department of Defense Field Activity, the Under Secretary of Defense for Business Management and Information.~~

~~(C) In the case of any defense business system, such official other than the applicable official under subparagraph (A) or (B) as the Secretary designates for such purpose.~~

~~(3) ANNUAL CERTIFICATION.—For any fiscal year in which funds are expended for development or sustainment pursuant to a covered defense business system program, the appropriate approval official shall review the system and certify, certify with conditions, or decline to certify, as the case may be, that it continues to satisfy the requirements of paragraph (1). If the approval official determines that certification cannot be granted, the approval official shall notify the milestone decision authority for the program and provide a recommendation for corrective action.~~

~~(4) OBLIGATION OF FUNDS IN VIOLATION OF REQUIREMENTS.—The obligation of Department of Defense funds for a covered defense business system program that has not been certified in accordance with paragraph (3) is a violation of section 1341(a)(1)(A) of title 31.~~

~~(h) RESPONSIBILITY OF MILESTONE DECISION AUTHORITY.—The milestone decision authority for a covered defense business system program shall be responsible for the acquisition of such system and shall ensure that acquisition process approvals are not considered for such system until the relevant certifications and approvals have been made under this section.~~

~~(i)~~ ***(g)*** DEFINITIONS.—In this section:

(1)(A) DEFENSE BUSINESS SYSTEM.—The term "defense business system" means an information system that is operated by, for, or on behalf of the Department of Defense, including any of the following:

(i) A financial system.
(ii) A financial data feeder system.
(iii) A contracting system.
(iv) A logistics system.
(v) A planning and budgeting system.
(vi) An installations management system.
(vii) A human resources management system.
(viii) A training and readiness system.

(B) The term does not include—

(i) a national security system; or

(ii) an information system used exclusively by and within the defense commissary system or the exchange system or other instrumentality of the Department of Defense conducted for the morale, welfare, and recreation of members of the armed forces using nonappropriated funds.

~~(2) COVERED DEFENSE BUSINESS SYSTEM.—The term "covered defense business system" means a defense business system that is expected to have a total amount of budget authority, over the period of the current future-years defense program submitted to Congress under section 221 of this title, in excess of $50,000,000.~~

~~(3)~~ ***(2)*** DEFENSE BUSINESS SYSTEM PORTFOLIO.—The term "defense business system portfolio" means ~~all~~ ***the defense*** business systems ~~performing functions closely related to the functions performed or to be performed by a covered defense business~~

~~system~~ ***that collectively support a particular Department of Defense business process or function***.

~~(4) COVERED DEFENSE BUSINESS SYSTEM PROGRAM.—The term "covered defense business system program" means a defense acquisition program to develop and field a covered defense business system or an increment of a covered defense business system.~~

~~(5) PRIORITY DEFENSE BUSINESS SYSTEM.—The term "priority defense business system" means a defense business system that is—~~

~~(A) expected to have a total amount of budget authority over the period of the current future-years defense program submitted to Congress under section 221 of this title in excess of $250,000,000; or~~

~~(B) designated by the Under Secretary of Defense for Business Management and Information [1] as a priority defense business system, based on specific program analyses of factors including complexity, scope, and technical risk, and after notification to Congress of such designation.~~

~~(6)~~ ***(3)*** ENTERPRISE ARCHITECTURE.—The term "enterprise architecture" has the meaning given that term in section 3601(4) of title 44.

~~(7)~~ ***(4)*** INFORMATION SYSTEM.—The term "information system" has the meaning given that term in section ~~11101~~ ***3502*** of title ~~40~~ ***44***~~, United States Code~~.

~~(8)~~ ***(5)*** NATIONAL SECURITY SYSTEM.—The term "national security system" has the meaning given that term in section 3552(b)(6)(A) of title 44.

~~(9) BUSINESS PROCESS MAPPING.—The term "business process mapping" means a procedure in which the steps in a business process are clarified and documented in both written form and in a flow chart.~~

~~(10)~~ ***(6)*** COMMON ENTERPRISE DATA.—The term "common enterprise data" means business operations or management-related data, generally from defense business systems, in a usable format that is automatically accessible by authorized personnel and organizations.

~~(11)~~ ***(7)*** DATA GOVERNANCE PROCESS.—The term "data governance process" means a system to manage the timely Department of Defense-wide sharing of data described under subsection (a)(6)(A) [***Probably should refer to (e)(6)(A)]***.

Statutes referred to in the Definitions subsection of 10 U.S.C. 2222 are as follows:

44 U.S.C. 3601(f):

(4) "enterprise architecture"—
(A) means—

(i) a strategic information asset base, which defines the mission;
(ii) the information necessary to perform the mission;
(iii) the technologies necessary to perform the mission; and
(iv) the transitional processes for implementing new technologies in response to changing mission needs; and

(B) includes—
(i) a baseline architecture;
(ii) a target architecture; and
(iii) a sequencing plan;

———

40 U.S.C. 11101:

(5) INFORMATION SYSTEM.—The term "information system" has the meaning given that term in section 3502 of title 44 [set forth below].

(6) INFORMATION TECHNOLOGY.—The term "information technology"—

(A) with respect to an executive agency means any equipment or interconnected system or subsystem of equipment, used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency, if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency that requires the use—
(i) of that equipment; or
(ii) of that equipment to a significant extent in the performance of a service or the furnishing of a product;

(B) includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources; but

(C) does not include any equipment acquired by a federal contractor incidental to a federal contract.

40 U.S.C. 11103:

(a) DEFINITION.—

(1) NATIONAL SECURITY SYSTEM.—In this section, the term "national security system" means a telecommunications or information system operated by the Federal Government, the function, operation, or use of which—
(A) involves intelligence activities;
(B) involves cryptologic activities related to national security;
(C) involves command and control of military forces;

(D) involves equipment that is an integral part of a weapon or weapons system; or

(E) subject to paragraph (2), is critical to the direct fulfillment of military or intelligence missions.

(2) LIMITATION.—Paragraph (1)(E) does not include a system to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications).

44 U.S.C. 3502:

(6) the term "information resources" means information and related resources, such as personnel, equipment, funds, and information technology;

(7) ***

(8) the term "information system" means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information;

(9) the term "information technology" has the meaning given that term in section 11101 of title 40 but does not include national security systems as defined in section 11103 of title 40;

——

44 U.S.C. 3552(b)(6)

(6)(A) The term "national security system" means any information system (including any telecommunications system) used or operated by an agency or by a contractor of an agency, or other organization on behalf of an agency-

(i) the function, operation, or use of which-

(I) involves intelligence activities;

(II) involves cryptologic activities related to national security;

(III) involves command and control of military forces;

(IV) involves equipment that is an integral part of a weapon or weapons system; or

(V) subject to subparagraph (B), is critical to the direct fulfillment of military or intelligence missions; or

(ii) is protected at all times by procedures established for information that have been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept classified in the interest of national defense or foreign policy.

(B) Subparagraph (A)(i)(V) does not include a system that is to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications).

Section 4
Earned Value Management for Software Programs Using Agile

Using the measurement approach appropriate for the IT development process employed helps ensure the product meets end-user needs and fulfills the mission requirement.

RECOMMENDATION

Rec. 19: Eliminate the Earned Value Management mandate for software programs using Agile methods.

INTRODUCTION

DoD uses EVM to periodically measure linear, waterfall-based programs with firm baselines established prior to starting development. EVM is not well suited as a measurement tool in an Agile environment, which is dynamic by design. The Section 809 Panel recommends the following in regard to use of EVM:

- When Agile methods are used for software development or integration contracts, EVM will not be mandated at any dollar value. EVM is still required for non-Agile programs.
- For all Agile software development or integration programs, the PEO should approve appropriate project monitoring and control methods, which may include EVM, that provide faith in the quality of data and, at a minimum, track schedule, cost, and estimate at completion.

RECOMMENDATION

Recommendation 19: Eliminate the Earned Value Management mandate for software programs using Agile methods.

Problem

DoD established use of EVM as a requirement for periodically measuring linear programs with firm baselines established prior to starting development. EVM is not well suited as a measurement tool in an Agile environment, which is dynamic by design.

Background

DoD's use of EVM originated in the 1967 DoDI 7000.2 *Performance Measurement for Selected Acquisitions*.[1] In simple terms, DoD uses EVM to track contractors' progress against a baseline and provide a mechanism for reporting key metrics. For example, cost performance index (CPI) measures conformance of actual work completed to actual cost incurred, and schedule performance index (SPI) is the ratio of the earned value to the planned value.[2] The following are examples of key metrics:

- Cost variance
- CPI
- Schedule variance
- SPI
- Budgeted cost of work scheduled
- Actual cost of work performed
- Estimate to complete
- Estimate at completion

EVM, an important management tool for DoD for the last several decades, is also used in commercial industry and advocated for by organizations such as the Project Management Institute (PMI).[3] EVM remains the prevailing tool by which DoD measures performance on large contracts. It was originally developed to measure project performance using the waterfall approach. Because threats and technology are now constantly evolving and necessitating rapid responses to changing operational requirements, DoD programs are transitioning to Agile methods to deliver capability more quickly.[4]

In March 2009, the Defense Science Board Task Force on DoD Policies and Procedures for the Acquisition of IT recommended, "The USD(AT&L) should lead an effort in conjunction with the Vice Chairman, Joint Chiefs of Staff, to develop new, streamlined, and agile capabilities (requirements)

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[1] DoDI 7000.2 was superseded by Earned Value Management Systems, Electronic Industries Alliance Standard 748, current release.
[2] "The Time Dependence of CPI and SPI for Software Projects," R. D. H. Warburton, Project Management Institute, accessed November 9, 2017, https://www.pmi.org/learning/library/earned-value-management-cost-index-6427.
[3] Project Management Institute, *The Practice Standard for Earned Value Management—Second Edition* (Newton Square, PA: Project Management Institute, 2011).
[4] "Agile by the Numbers," Peter Viechnicki and Mahesh Kelkar, Deloitte Insights, accessed November 9, 2017, https://dupress.deloitte.com/dup-us-en/industry/public-sector/agile-in-government-by-the-numbers.html.

development and acquisition processes and associated policies for information technology programs."[5] Congress accepted this recommendation, and in the FY 2010 NDAA required the "Secretary of Defense [to] develop and implement a new acquisition process for [IT] systems." This process included several principles of Agile development, such as early and continual involvement of the user; multiple rapidly executed increments or releases of capability; early, successive prototyping to support an evolutionary approach; and a modular open-systems approach.[6] Although DoD did not fully implement this new acquisition process for IT systems, Agile continued to gain traction as an effective method for developing capability more quickly with greater responsiveness to user requirements.

As Agile continued to gain popularity, many viewed EVM techniques as too difficult to implement effectively on an Agile project.[7] The rationale was that EVM cannot easily accommodate fluid requirements and shifting baselines.[8] By its nature, Agile is intended to provide more current and visible feedback to stakeholders participating in integrated development teams through near real-time performance reporting and frequent releases of working capabilities. To analyze this potential conflict, in July 2014 the Office of Performance Assessments and Root Cause Analysis (PARCA) initiated discussions with various DoD services and agencies to address the possibility of implementing EVM and Agile development practices together on DoD programs. PARCA ultimately started an initiative to explore the joint applicability of Agile and EVM, which resulted in DoD publishing the PARCA Agile and EVM Project Manager's Desk Guide in March 2016. The desk guide provides a resource for DoD personnel whose work includes programs that apply both Agile and EVM.[9]

Although some argue that EVM and Agile are not compatible, using an Agile approach does not preclude the need for disciplined program management and performance measurement processes. Program managers should select appropriate resources from their toolkit based on program characteristics, and EVM is just one of many tools available. PMI, the Software Engineering Institute at Carnegie Mellon University, the Institute of Electrical and Electronics Engineers, and the GAO have published many best practices for effectively planning and managing major IT acquisitions.[10]

The current DoD requirement to use EVM applies to all cost- and incentive-type contracts of $20 million or more. For cost- and incentive-type contracts of $100 million or more, the contractor is required to have a certified EVM system. Both of these requirements apply regardless of the development approach (e.g., waterfall, Agile, other).[11]

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[5] Defense Science Board, *Report of the Defense Science Board Task Force on Department of Defense Policies and Procedures for the Acquisition of Information Technology,* OUSD(AT&L), 2009, x, accessed November 27, 2017, https://www.hsdl.org/?view&did=37450.
[6] FY 2010 NDAA, Pub. L. No. 111-84, 123 Stat. 2402, Section 804 (b) (2009).
[7] "Measuring Integrated Progress on Agile Software Development Projects," Tamara Sulaiman and Hubert Smits, Methods and Tools, accessed October 23, 2017, http://www.methodsandtools.com/archive/archive.php?id=61.
[8] Ibid.
[9] OUSD AT&L (PARCA), *Agile and Earned Value Management: A Project Manager's Desk Guide,* accessed November 9, 2017, https://www.acq.osd.mil/evm/docs/PARCA%20Agile%20and%20EVM%20PM%20Desk%20Guide.pdf.
[10] GAO, *DoD Major Automated Information Systems: Improvements Can Be Made in Applying Leading Practices for Managing Risk and Testing, GAO Report 17-322*, accessed November 9, 2017, http://www.gao.gov/assets/690/683831.pdf.
[11] Earned Value Management System, DFARS 234.2.

Findings

Using EVM and Agile Together

For EVM to work with Agile, users must tailor EVM to integrate into the overall program management approach. Software programs are frequently tasked with implementing fast-changing technology or business solutions (e.g., functional changes needed to achieve future business processes).[12] Agile improves performance visibility, continually adapts to changing priorities, and improves customer engagement and satisfaction by bringing the most valuable products and features to market faster and more predictably.[13] Agile also complements reengineering of business processes to adopt best business practices from COTS software products through this customer-focused approach. Agile projects inherently require maximum flexibility to adjust the baseline as software development progresses and releases are developed and delivered. By contrast, EVM methods stress the importance of establishing a stable baseline for defined work in the planning phase before the project starts.[14] EVM also assumes linear progress on task execution and completion for schedule and cost-performance measurements.

Coexistence of Agile and EVM requires a tailored approach, which can be costly and time-consuming to develop and support. Implementing tailored EVM can appear to be a contrived solution compared to more modern tools that support the inherent transparency of the Agile development process.

Limited Value of EVM

Given the dynamic nature of Agile, implementing a batch-oriented EVM system has limited value in an Agile environment. By its nature, Agile provides dynamic and ongoing feedback to stakeholders participating on development teams.[15] The opposite is true for EVM techniques, which take a static measurement at a point in time. Legacy accounting and program management tracking systems can only accrue performance data once or twice a month. Today, timekeeping systems are linked to a cost system that updates weekly.[16]

An Acquisition Category I project manager interviewed by the Section 809 Panel stated,

> *EVM slows me up. It can take up to 9 months for an integrated baseline review [IBR] after which work actually starts … then add 3 months to get meaningful metrics, and you are a year in before getting any usable performance data.*[17]

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[12] Business Systems Requirements and Acquisition, DoDI 5000.75 (2017).
[13] "Embracing Agile," Darrell K. Rigby, Jeff Sutherland, and Hirotaka Takeuchi, Harvard Business Review, accessed November 9, 2017, https://hbr.org/2016/05/embracing-agile.
[14] DoD Defense Contract Management Agency Instruction: Earned Value Management System Compliance Reviews, DCMA-INST 208, Change 1 (2017).
[15] "12 Principles Behind the Agile Manifesto," Agile Alliance, accessed November 27, 2017, https://www.agilealliance.org/agile101/12-principles-behind-the-agile-manifesto/.
[16] "Part 2 – Weekly Earned Value: More trouble than it's worth?" Humphreys and Associates, accessed November 9, 2017, https://blog.humphreys-assoc.com/part-2-weekly-earned-value/.
[17] COL Pat Flanders, meeting with Section 809 Panel staff, May 11, 2017.

This situation is in contrast to an Agile project for which multiple working software releases would be expected during the first year. DoD culture needs to accept a new paradigm of using software tools that provide daily information, rather than mandating the use of EVM.

Another substantial shortcoming of EVM is that it does not measure product quality. A program could perform ahead of schedule and under cost according to EVM metrics, but deliver a capability that is unusable by the customer. Agile mitigates this risk by incorporating end users on integrated teams that frequently produce, test, and release working software. Traditional measurement using EVM provides less value to a program than an Agile process in which the end user continuously verifies that the product meets the requirement.

Monitoring Tools and Agile Metrics

There are many tools available to monitor performance, but no single best approach. Numerous project monitoring and control processes, best practices, and tools exist to track and review the progress and performance of an acquisition program. Each program must determine the right tool suite and metrics for its use. Common metrics used in Agile software development include the following:[18]

- Velocity: The amount of work accomplished, expressed as story points per sprint.[19]
- Burn-down: Story points remaining in the sprint backlog.
- Cost Per Story Point: Used to track efficiency and estimate cost of future work.
- Delivery Progress: Relative to current product roadmap and goals for each sprint.

Staff from the U.S. Army's Reserve Component Automation System (RCAS) program demonstrated for the Section 809 Panel a suite of leading tools that integrate, review, and report progress in near real-time. RCAS managers use this tool as a key information source when they meet daily to review progress. EVM may be of little or no value when managers can see progress in near real-time. MITRE's recent work on *Acquisition in the Digital Age* reinforces this concept: "Given the dynamic and iterative structure and processes of Agile, implementing an EVM system can pose a significant challenge with little value."[20]

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[18] Will Hayes et al., Software Engineering Institute, *Agile Metrics: Progress Monitoring of Agile Contractors, CMU/SEI-2013-TN-029,* accessed November 27, 2017, https://resources.sei.cmu.edu/asset_files/TechnicalNote/2014_004_001_77799.pdf.

[19] A sprint, also known as an iteration, is the time during which an Agile development team works, usually one week to one month, at the end of which the team delivers working software. Story points are a unit of measure for expressing an estimate of the overall effort that will be required to fully implement a product feature or any other piece of work.

[20] Pete Modigliani and Su Chang, The MITRE Corporation, *Defense Agile Acquisition Guide: Tailoring DoD IT Acquisition Program Structures and Processes to Rapidly Delivery Capabilities,* 48, accessed November 27, 2017, http://www.acqnotes.com/Attachments/MITRE-Defense-Agile-Acquisition-Guide.pdf.

Conclusions

PMs should have the option to choose the project monitoring and control methods best suited for their acquisition programs. The drivers for deciding which methods to use include the benefits of each tool, technique, and metric and how they contribute to overall program success.

Overall conclusions include the following:

- Agile and EVM can be tailored to work together, but with near real-time tools available, it is questionable whether the tailoring effort yields a commensurate benefit to Agile projects.
- Using EVM with Agile can require requests for waivers and/or deviations to meet current DFARS requirements.[21]
- EVM has been required on most large software programs but has not prevented cost, schedule, or performance issues.[22]
- PMs should choose the proper project monitoring and control approaches for their acquisition programs, rather than be mandated to use EVM.

Implementation

Legislative Branch

- There are no statutory changes required.

Executive Branch

- Eliminate the mandate for using EVM at any dollar value when Agile methods are used for software development or integration contracts. Continue to require EVM for non-Agile programs.
- Allow the PEO to approve appropriate project monitoring and control methods for all Agile software development or integration programs. Selected project monitoring and control methods, which may include EVM, should provide faith in the quality of data and track the following at a minimum:
  - Schedule accomplishment vs. plan
  - Cost accomplishment vs. plan
  - Estimate to complete
- Revise DFARS Subpart 234.201, DoDI 5000.02 Table 8, and OMB Circular A-11 to reflect the above.

[21] Earned Value Management System, DFARS 234.2.
[22] GAO, *DoD Business Systems Modernization: Additional Action Needed to Achieve Intended Outcomes, GAO-15-627*, accessed November 9, 2017, http://www.gao.gov/assets/680/671452.pdf.

Note: Recommended detailed executive branch changes can be found in the Implementation Details subsection at the end of Section 4, and words to this effect should be used to modify the DFARS.

Implications for Other Agencies

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

Section 4
Earned Value Management for Software Programs Using Agile

Implementation Details

Recommendation 19

Regulatory Mark-up

DFARS

SUBPART 234.2—EARNED VALUE MANAGEMENT SYSTEM

234.201 Policy.

(1) DoD applies the earned value management system requirement as follows:

(i) For cost or incentive contracts and subcontracts valued at $20,000,000 or more, the earned value management system shall comply with the guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA-748).

[See DoD Class Deviation 2015-O0017, Earned Value Management System Threshold. Effective immediately, the Earned Value Management System (EVMS) compliance review threshold at DFARS 234.201(1)(ii), DFARS provision 252.234-7001, and DFARS clause 252.234-7002 is raised from $50 million to $100 million. This class deviation remains in effect until incorporated in the DFARS or otherwise rescinded.]

(ii) For cost or incentive contracts and subcontracts valued at $50,000,000 or more, the contractor shall have an earned value management system that has been determined by the cognizant Federal agency to be in compliance with the guidelines in ANSI/EIA-748.

(iii) For cost or incentive contracts and subcontracts valued at less than $20,000,000—

(A) The application of earned value management is optional and is a risk-based decision;

(B) A decision to apply earned value management shall be documented in the contract file; and

(C) Follow the procedures at PGI 234.201(1)(iii) for conducting a cost-benefit analysis.

(iv) For software development or integration contracts using Agile methods at any dollar value, the application of earned value management is optional. For all Agile software development or integration programs, the Program Executive Officer or equivalent shall approve appropriate project monitoring and control methods that provide faith in the quality of data and track at a minimum:

(A) Schedule accomplishment against plan;

(B) Cost accomplishment against plan; and

(C) Estimate to complete.

(~~iv~~*v*) For firm-fixed-price contracts and subcontracts of any dollar value—

(A) The application of earned value management is discouraged; and

(B) Follow the procedures at PGI 234.201(1)(iv) for obtaining a waiver before applying earned value management.

234.203 Solicitation provisions and contract clause.

[Use provision at 252.234-7001, Notice of Earned Value Management System (DEVIATION 2015-O0017)(SEP 2015), and the clause at 252.234-7002, Earned Value Management System (DEVIATION 2015-O0017)(SEP 2015) in lieu of the provision at DFARS 252.234-7001, Notice of Earned Value Management System, and the clause at DFARS 252.234-7002, Earned Value Management System (May 2011).]

For cost or incentive contracts valued at $20,000,000 or more, *except for software development or integration contracts using Agile methods,* and for other contracts for which EVMS will be applied in accordance with 234.201(1)(iii) and (~~iv~~*v*)—

(1) Use the provision at 252.234-7001, Notice of Earned Value Management System, instead of the provisions at FAR 52.234-2, Notice of Earned Value Management System – Pre-Award IBR, and FAR 52.234-3, Notice of Earned Value Management System – Post-Award IBR, in the solicitation; and

(2) Use the clause at 252.234-7002, Earned Value Management System, instead of the clause at FAR 52.234-4, Earned Value Management System, in the solicitation and contract.

OMB Circular No. A-11

Part 7, Capital Programming Guide

I. Planning and Budgeting Phase

I.5.5.4) Planning for Acquisition Management

The risk associated with the asset selected for consideration will determine the type of performance-based management system that should be used to monitor contractor performance in achieving the cost, schedule, and performance goals during the contract period. All major acquisitions with development effort, *except for DoD software development or integration contracts using Agile methods,* will include the requirement for

the contractor to use an Earned Value Management System (EVMS) that meets the guidelines in EIA Standard-748 to monitor contract performance.

Section 5
Services Contracting

Clarify the definitions of personal and nonpersonal services and incorporate in the DFARS a description of supervisory responsibilities for services contracts.

RECOMMENDATION

Rec. 20: Clarify the definitions of personal and nonpersonal services and incorporate in the DFARS a description of supervisory responsibilities for services contracts.

INTRODUCTION

In recent decades, federal agencies implemented a multisector workforce to gain access to the evolving and necessary skills, technologies, and expertise required to accomplish their mission in the 21st century. This approach requires agencies to develop and use the most efficient combination of government, military, and contractor employees to successfully accomplish their respective missions. Contracted services, whether personal or nonpersonal, for commercial and noncommercial services, are the means by which the government acquires the contractor element of the multisector workforce.

A lack of clear guidance on acquisition of advisory and assistance services (A&AS) and knowledge-based services (KBS) has created confusion concerning use of personal and nonpersonal services contracts and the supervisory responsibilities contractors must exercise when providing contracted services.

This first phase of the Section 809 Panel's investigation and recommendations on services contracting aligns with the panel's tasking to recommend regulatory changes to improve the acquisition process. The Section 809 Panel has developed clear guidance on supervisory responsibilities when providing contracted services. This guidance delineates specific supervisory responsibilities, including proposed policy and prescriptive language on contracts for contracted services. These proposed policies also include guidance on what constitutes appropriate direction that government employees may provide to contractor employees performing on nonpersonal services contracts. Implementing this guidance will improve acquisition and management of contracts supporting the multisector workforce by providing clarity concerning the roles and responsibilities of both contractor and government employees. This guidance will also improve the definition of requirements for contracted services and performance on awarded contracts.

In a second phase of reviewing services contracting, the Section 809 Panel will develop a broad set of recommendations for both statutory and regulatory change across the entire spectrum of services requirements. The Panel will develop these recommendations based on consultation with the Military Services and Defense Agencies, engagement with industry, and research on evolving technologies and services acquisition best practices. These recommendations will recognize the realities of the multisector workforce, enable the adoption of private-sector approaches, and reflect the evolving nature of DoD requirements for which it will use services contracts to acquire solutions and rapid access to new technologies and innovations needed to accomplish the DoD mission.

RECOMMENDATION

Recommendation 20: Clarify the definitions of personal and nonpersonal services and incorporate in the DFARS a description of supervisory responsibilities for services contracts.

Problem

The FAR, DFARS, and other DoD issuances provide policies for contracted services for mission support. Confusion exists as to when these commercial and noncommercial services should be contracted either as a personal or nonpersonal service, and what supervisory responsibilities contractors must exercise when providing contracted services.

Background

In recent decades, federal agencies adopted a multisector workforce approach to gain access to the evolving and necessary skills, technologies, and expertise required to accomplish their missions in the 21st century. 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."[1]

The National Academy of Public Administration, in a November 16, 2005 paper titled *Managing Federal Missions with a Multisector Workforce: Leadership for the 21st Century*, cites a variety of reasons for workforce restructuring. Reasons include the following: "to utilize existing service delivery mechanisms, to acquire hard to find skills, to save money, to have the private sector do work that is not inherently governmental, to augment capacity on an emergency basis, and to reduce the size of government."[2] Within the workforce structure, DoD predominately acquires contractor personnel by nonpersonal service contracts.

A stringent requirements-determination process in DoD ensures that the agency does not award a contract for services unless the following apply:

- The workload for the requirement has been validated.
- Government personnel with the required training and capabilities are not available within the agency.
- For a personal services contract, the requirement must be specifically authorized by statute.

[1] General Policy for Total Force Management, 10 U.S.C. § 129a.
[2] The National Academy of Public Administration, *Managing Federal Missions with a Multisector Workforce: Leadership for the 21st Century,* Academy Initiative, November 16, 2005, accessed December 8, 2017, http://www.distributedworkplace.com/DW/governmentgovernment/National%20Academy%20of%20Public%20Administration%202005.pdf.

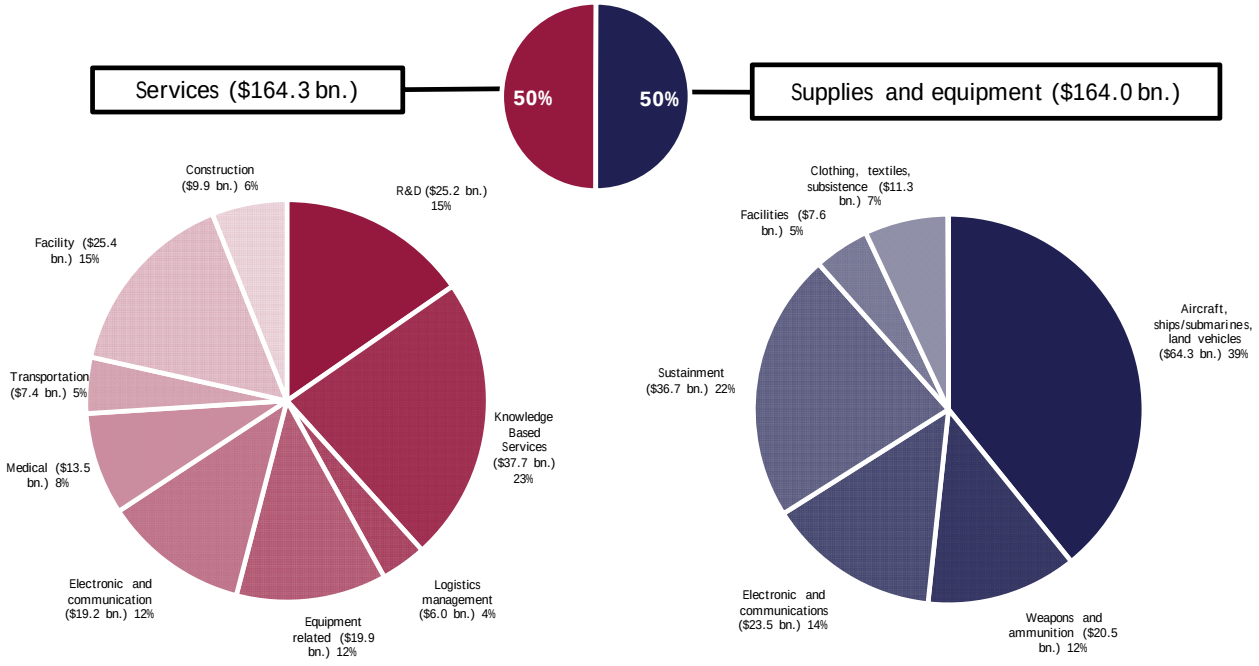
A formal review and approval process exists within the DoD Components.[3] The following DoDIs address these requirements:

- DoDI 5000.74, Defense Acquisition of Services, defines the service acquisition category (S-CAT) levels, policies, responsibilities, and procedures for acquiring services.[4]
- DoDI 5000.02, Operation of the Defense Acquisition System, requires the program manager, in conjunction with the designated DoD Component human systems integration staff, to determine the most efficient and cost-effective mix of DoD workforce and contract support.[5] The mix of military, DoD civilian, and contract support necessary to operate, maintain, and support the system is determined based on the manpower mix criteria is DoDI 1100.22, Policy and Procedures for Determining Workforce Mix.[6]

KBS (often referred to as A&AS[7]) contracted commercial and noncommercial services are by far the largest category of services supporting the multisector workforce, now accounting for $37.7 billion in annual DoD expenditures.[8] DoD acquires the contractor portion of the multisector workforce through either a personal or nonpersonal services contract; 99.1 percent are awarded as nonpersonal services.

[3] General Policy for Total Force Management, 10 U.S.C. § 129a. Policy and Procedures for Determining Workforce Mix, DoDI 1100.22 (2010).
[4] Acquisition of Services, DoDI 5000.74 (2016). Procurement of Contract Services: Management Structure, 10 U.S.C. § 2330.
[5] Operation of the Defense Acquisition System, DoDI 5000.02 (2015).
[6] Policy and Procedures for Determining Workforce Mix, DoDI 1100.22 (2010).
[7] "Knowledge Based Services (A&AS)," DAU Service Acquisition Mall (SAM), accessed December 8, 2017, http://sam.dau.mil/Content.aspx?currentContentID=knowledge_based_services.
[8] "Services Spend Charts," Services Acquisition (SA), Defense Procurement and Acquisition Policy, accessed December 8, 2017, https://www.acq.osd.mil/dpap/sa/Learn-More/ServiceSpendCharts.html.

Figure 5-1. FY 2017 Spend—DoD as Funding Department[9]



A lack of clarity regarding the differences between personal and nonpersonal services contracts raises concern among government personnel who may incorrectly conclude that contractor employees performing alongside government employees are (or should be) under a contract for personal services.

Congress, federal agencies, and DoD have enacted a number of statutes and policies outlining the requirements for appropriate use of contracts for A&AS and KBS.

- In 1992, OMB issued Circular A-120, Guidelines for the Use of Advisory and Assistance Services. DoD implemented OMB Circular A-120 as well as DoDD 4205.2, DoD Contracted Advisory and Assistance Services (CAAS) outlining policy, responsibilities, and procedures for the management, acquisition, and use of CAAS for requirements within DoD.[10] OMB Circular A-120 was rescinded in 1994 and DoD rescinded DoDD 4205.2 in 2004, citing redundancy with its other service contracting policies.[11]

- OMB issued Policy Letter 93-1, Management Oversight of Services, on May 18, 1994, following a review of service contracting practices and capabilities across the Executive Branch as part of the National Performance Review. It established responsibilities and "guiding principles through the 'best practices' concept to help agencies develop, analyze, and perfect requirements

[9] Data from Federal Procurement Data System, extracted January 2, 2018. Categories based on DPAP *Crosswalks* services and supplies and equipment taxonomy at https://www.acq.osd.mil/dpap/sa/Tools/crosswalks.html, accessed January 2, 2018.
[10] DoD Contracted Advisory and Assistance Services (CAAS), DoDD 4205.2 (1992).
[11] GAO, *Federal Contracting: Congressional Action Needed to Address Long-standing Problems with Reporting of Advisory and Assistance Services, GAO-08-319,* accessed December 8, 2017, http://www.gao.gov/assets/280/274250.pdf.

for service contracts which, in turn, should help improve contract management and administration."[12]

- The 1994 FASA provided a definition for A&AS and authorized both civilian agencies and DoD to use task order contracts with limits on the ordering period to procure A&AS.[13] A&AS was defined as those services provided by nongovernmental sources for management and professional support services; studies, analyses, and evaluations; and engineering and technical services.[14] FASA also directed OMB to collect and report, annually, obligations for A&AS in the President's budget.[15] The FAR Subpart 37.2 was amended in 1995 to include the definition for A&AS. The FAR was later amended in April 2000 to move the definition for A&AS from FAR Subpart 37.2 to FAR Subpart 2.101, Definitions.[16]

> *'Advisory and assistance services' as defined in FAR Subpart 2.101 are 'those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision-making; management and administration; program and/or project management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature). In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations recommendations, training and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations.' They are classified into three major categories: (1) management and professional support services; (2) studies, analyses and evaluations; and (3) engineering and technical services.*[17]

- OFPP issued Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, dated September 12, 2011, pursuant to section 6(a) of the Office of Federal Procurement Policy Act, 41 U.S.C. 405(a), the President's March 4, 2009, Memorandum on Government Contracting, and section 321 of the FY 2009 NDAA, Pub. L. No. 110-417. The intent of the policy is to provide guidance to help agencies manage functions that are closely associated with inherently governmental and critical functions performed by both Federal and contractor employees.[18]

Neither the FAR nor the DFARS defines KBS. DoD designated KBS as a portfolio group in the DoD taxonomy of services on November 23, 2010,[19] subsequently updated on August 12, 2012.[20] The taxonomy now reflects how "DoD organizes its spend for services and supplies, and equipment using a

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[12] Management Oversight of Service Contracting, OMB Policy Letter 93-1, May 18, 1994.
[13] Budget Contents and Submission to Congress, 31 U.S.C. § 1105(g). Advisory and Assistance Services, 41 U.S.C. § 4105.
[14] Budget Contents and Submission to Congress, 31 U.S.C. § 1105(g).
[15] Ibid.
[16] Federal Acquisition Circular 97-17, FAR Case 1999-014 (2000).
[17] FAR Subpart 2.101 Definitions, Current to: FAC 2005-96 (2017).
[18] Performance of Inherently Governmental and Critical Functions, OFPP Policy Letter 11-01 (2011).
[19] OSD(AT&L), Defense Procurement Acquisition Policy (DPAP) Memo, *Taxonomy for the Acquisition of Services,* November 23, 2010, accessed December 8, 2017, http://bbp.dau.mil/docs/Taxonomy%20for%20the%20Acquisition%20of%20Services.pdf.
[20] OSD(AT&L), Defense Procurement Acquisition Policy (DPAP) Memo, *Taxonomy for the Acquisition of Services and Supplies & Equipment,* August 27, 2012, accessed December 8, 2017, https://www.acq.osd.mil/dpap/policy/policyvault/USA004219-12-DPAP.pdf.

taxonomy that maps Product Service Codes (PSCs), as set forth in the Federal Procurement Data System Product and Service Codes" (shown below).[21]

Table 5-1. Services Portfolio Group: PSC Definitions; Knowledge-Based Services

Portfolio Category	PSC	Title
Engineering and Technical Services	R412	Simulation
	R413	Specifications Development Services
	R415	Professional Services/Tech Sharing–Utilization
	R425	Engineering and Technical Services (Includes R414 and R421 merging in FY 2012)
Program Management Services	Axx6	RDT&E Management Support
	B	Special Studies and Analyses—Not R&D
	R405	Operations Research & Quantitative
	R406	Policy Review/Development Services
	R408	Program Management/Support Services
	R410	Program Evaluation/Review Development (Includes R407 and R409 merging in FY 2012)
	R499	Other Professional Services
	R707	Contract & Procurement Support
	R799	Other Management Support Services
Management Support Services	R7xx	Management Support Services Less R706, R707, and R799
Administrative & Other Services	R6xx	Administrative Support Services
	T	Photographic, Mapping, Printing, and Publications Services
Professional Services	R4xx	Professional Services Less R405-R410, R412-R415, R421, R425, R426 and R499
Education and Training	U	Education and Training Services

DoD uses the taxonomy to facilitate strategic sourcing.[22] The taxonomy identifies a KBS Portfolio Group that includes engineering and technical services, program management services, management support services, administrative and other services, professional services, and education and training.[23]

DoD separated the Logistics Management Services Portfolio Group from the KBS Portfolio Group and established it as its own portfolio group. A&AS is neither discussed nor identified as a separate portfolio group within the taxonomy.

The following is a description of KBS found in the Defense Acquisition University (DAU) Service Acquisition Mall (SAM):

> *KBS, commonly referred to as Advisory and Assistance Services (A&AS), relates to tasks that require the application of detailed processes or technical knowledge. A&AS pertains to the details provided under contract by nongovernmental sources to support or improve organizational policy development, decision-making, management and administration, program and/or project management and administration, or research and development (R&D) activities. It can also involve the furnishing of professional advice or*

[21] Ibid.
[22] Ibid.
[23] Ibid.

> *assistance rendered to improve the effectiveness of Federal management processes or procedures, including those of an engineering and technical nature. The result of these services may take the form of information, advice, opinions, alternatives, analysis, evaluations, recommendations, training, and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations.*[24]

Section 812 of the FY 2017 NDAA (Pub. L. No. 114-328 § 812) amended 10 U.S.C. § 2330a to add KBS, logistics management services, equipment related services, and electronics and communications services as separate service acquisition portfolio groups for the budgetary data collection requirement. Additionally, this legislation requires an "annual inventory, of activities performed during the preceding fiscal year pursuant to staff augmentation contracts for the DoD."[25] The term *staff augmentation contracts* is defined in this statute and is stated as,

> *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.*[26]

Agencies acquire A&AS, KBS, and other staff augmentation requirements by either a personal or nonpersonal services contract. The primary difference between award of a contract for a personal service and award of a nonpersonal service is that a statutory authority must exist for the award of certain requirements for a personal service contracts.[27] Another difference involves the supervisory responsibilities of the contractor. In the case of a nonpersonal services contract, the contractor is solely responsible for the supervision of its employees.

A *nonpersonal services contract*, as defined in FAR Subpart 37.101, "means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees."[28]

A *personal services contract,* as defined in FAR Subpart 2.101, "means a contract that, by its express terms or as administered, make the contractor personnel appear to be, in effect, government employees (see 37.104)."[29] FAR Subpart 37.104(a) further states, "a personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor's personnel.[30]

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[24] "Knowledge Based Services (A&AS)," DAU Service Acquisition Mall (SAM), accessed December 8, 2017, http://sam.dau.mil/Content.aspx?currentContentID=knowledge_based_services.
[25] Procurement of Services: Tracking of Purchases, 10 U.S.C. § 2330a.
[26] Ibid.
[27] Employment of Experts and Consultants; Temporary or Intermittent, 5 U.S.C. § 3109. Personal Services Contracts, 10 U.S.C. § 1091. Authority to Procure Personal Services, 10 U.S.C. § 129b. Employment Experts and Consultants; Temporary or Intermittent, 5 U.S.C. § 3109.
[28] FAR Subpart 37.101 Definitions, Current to: FAC 2005-96, November 6, 2017.
[29] FAR Subpart 2.101 Definitions, Current to: FAC 2005-96, November 6, 2017.
[30] FAR Subpart 37.104(a), Current to: FAC 2005-96, November 6, 2017.

Within a multisector workforce structure, contractor personnel perform alongside government personnel. A clear understanding of the supervision of contractor employees in this environment is necessary to ensure that a nonpersonal services contract does not inadvertently function as a personal services contract. Under nonpersonal services contracts, contractors are solely responsible for supervision of their employees. This arrangement necessitates a detailed definition of the supervisory functions provided by the contractor in contrast to the role of the government in providing direction and oversight to contractor employees. In general, government personnel may provide guidance and direction to contractor employees and approve work product (see 37 U.S.C. § 104c 1 ii); however, direction must not include functions such as recruitment, hiring, termination, compensation, and other functions.

Findings

Numerous audits issued by GAO and the Inspector General (IG) address long-standing congressional concerns with federal agency processes for requirements determination, reporting mechanisms, and management of A&AS contracts.[31] These reports highlight challenges that federal agencies and DoD encounter with how they manage and track contracts for A&AS, KBS, and staff augmentation services within their organizations.[32]

Current acquisition policies are vague on the supervisory responsibilities of contractors providing contracted services support. Policies are also vague on the appropriate direction that government employees can provide to contractors performing under these contracts. This ambiguity has created confusion about the appropriate use of personal and nonpersonal service contracts. Providing clear and definitive guidance will streamline the requirements definition process and improve communication between the requiring activities, contracting organizations, and contractors performing these types of services.

The DFARS should include definitions for both KBS and staff augmentation services. Adopting these recommended regulatory changes would produce a clearer understanding of what is and is not a personal service or a nonpersonal service, what statutory authorities are necessary for the award of a personal services contract, and what type of direction government employees can provide contractor employees on nonpersonal services contracts.

Conclusions

DoD acquires the contractor element of Total Force Management using contracted services, whether personal or nonpersonal.[33] In an effort to resolve confusion concerning the acquisition of personal or nonpersonal services, federal agencies and DoD continue to develop and implement a variety of policies and instructions aimed at improving vague definitions and existing guidance on data collection requirements for congressional reporting and internal spend analysis. These efforts have not fully addressed the challenges and confusion on this topic continues within the acquisition workforce. There is a need for updated and definitive guidance and policy on when contract services should be

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[31] GAO, *DoD Consulting Services: Erroneous Accounting and Reporting of Cost, GAO/NSIAD-98-136,* Appendix I: Selected Reports About A&AS Management and Reporting Problems, 12-14, accessed December 8, 2017, http://www.gao.gov/assets/230/225673.pdf.
[32] GAO, *Federal Contracting: Congressional Action Needed to Address Long-standing Problems with Reporting of Advisory and Assistance Services, GAO-08-319,* accessed December 8, 2017, http://www.gao.gov/assets/280/274250.pdf.
[33] Acquisition of Services, DoDI 5000.74 (2016). Policy and Procedures for Determining Workforce Mix, DoDI 1100.22 (2010).

acquired as either a personal or nonpersonal service. Furthermore, there is a need to clarify the supervisory responsibilities of contractors and the types of direction government employees may provide to contractors.

Implementation

Legislative Branch

- No statutory changes are required.

Executive Branch

- Supplement FAR 37.102 Policy (under FAR 37.1 Service Contracts – General) by adding DFARS 237.201(j).
- Modify DFARS Subpart 237.5, Management Oversight of Service Contracts, to provide clarity on supervisory responsibilities of contractors performing contracted services. The modification includes deleting language in DFARS 237.503 and adding DFARS 237.504.
- Supplement FAR 37.203 Policy for A&AS by adding DFARS 237.203(e) to provide guidance that it is appropriate to use a personal services contract to acquire A&AS and KBS if the requirement is authorized by statute.
- Add a definition for Knowledge-Based Services (KBS) and Logistic Management Services at DFARS 237.101 Definitions.
- Update the DoD COR Handbook to incorporate these recommendations.
- Update DAU training to reflect these recommendations.

Note: Recommended detailed Executive Branch changes can be found in the Implementation Details subsection at the end of Section 5, and words to this effect should be used to modify the DFARS.

Implications for Other Agencies

- The recommendations, as stated here, would have no implications for other agencies; however, civilian agencies would benefit from adopting these recommendations; thus, the Defense Acquisition Regulation Council should discuss implementation of these recommendations at the FAR level with the Civilian Agency Acquisition Council.

Section 5
Services Contracting

Implementation Details

Recommendation 20

Supplement FAR 37.102 Policy (under FAR 37.1 Service Contracts – General) by adding DFARS 237.102 as proposed below:

SUBPART 237.1--SERVICE CONTRACTS--GENERAL

237.102 Policy.

(j) Supervision of employees in a nonpersonal services contract is the sole responsibility of the contractor and establishes the employer-employee relationship it has with its employees.

(1) Supervision includes the continuous employee management of recruitment, hiring, termination, compensation, benefits, career development, human resources management infrastructure, security clearance management, work location, contract assignment and evaluations of contractor employee.

(2) Government personnel are authorized, dependent on contract terms and conditions,

(i) to regularly assign work tasks and provide guidance on the completion of work products or services,

(ii) give an order for a specific article or service,

(iii) with the right to reject the finished product or results (See FAR 37.104(c)(1)(ii)).

Modify DFARS Subpart 237.5, Management Oversight of Service Contracts, to delete language in DFARS 237.503 and add DFARS 203.504.

SUBPART 237.5--MANAGEMENT OVERSIGHT OF SERVICE CONTRACTS

237.503 Agency-head responsibilities.

(c) The agency head or designee shall employ procedures to ensure that requirements for service contracts are vetted and approved as a safeguard to prevent contracts from being awarded or administered in a manner that constitutes an unauthorized personal services contract. Contracting officers shall follow the procedures at PGI 237.503, include substantially similar certifications in conjunction with service contract requirements, and place the certification in the contract file. The program manager or other official responsible for the requirement, at a level specified by the agency, should execute the certification. In addition, contracting officers and program managers should ~~remain aware of the descriptive elements at FAR 37.104(d) to~~ be aware of the supervisory responsibilities of contractors described in DFARS 237.102(j) to ensure that a service contract does not inadvertently become administered as a personal-services contract. However, so long as the government is not performing supervisory functions (see DFARS 237.504) the descriptive elements in FAR 37.104(d) are not applicable to DoD.

237.504 Policy Related to Supervisory Responsibilities on Nonpersonal Services.

Supervision of employees in a nonpersonal services contract is the sole responsibility of the contractor and establishes the employer-employee relationship it has with its employees. Government personnel shall refrain from exercising supervisory responsibilities for contractor personnel as delineated in DFARS 237.102(j) which are inconsistent with the employer-employee relationship the contractor has with its employees. Government personnel are authorized to regularly assign work tasks and provide guidance on the completion of work products or services, give an order for a specific article or service, with the right to reject the finished product or results (See FAR 37.104(c)(1)(ii)).

Add a definition for "Staff Augmentation" as established in 10 U.S.C. 2330a at DFARS 237.101, Definitions, and provide guidance on how staff augmentation requirements should be acquired at DFARS 237.2XX.

A definition, policy and procedures for the acquisition of A&AS are included in the FAR and DFARS. However, KBS is only described in the taxonomy DoD uses for the acquisition for services, supplies, and equipment to support strategic sourcing and is not included in FAR Subpart 37.2. Because the terms A&AS and KBS are used interchangeably, any differences between the two terms should be clarified that the policy for A&AS also applies to KBS.

Supplement FAR 37.203 Policy for A&AS by adding DFARS 237.203(e) as proposed below:

DFARS SUBPART 237.2 – Advisory and Assistance Services

237.203(e) Contracts for advisory and assistance services, knowledge-based services, and logistics management services, may be appropriate for personal services, but only if the requirement for the personal service is specifically authorized by statute. See DFARS 237.104 for the statutory authorities to acquire personal services.

Add a definition for Knowledge Based Services and Logistics Management Services at Subpart 237.101 Definitions as proposed below:

SUBPART 237.1--SERVICE CONTRACTS--GENERAL

237.101 Definitions.

"Knowledge Based Services (KBS) and Logistics Management Services are elements of Advisory and Assistance Services (A&AS) defined in FAR 2.101 Definitions and DFARS 237.102-74 Taxonomy for the acquisition of services, and supplies and equipment."

Recommend guidance on how A&AS and KBS requirements should be acquired by adding the following for the acquisition of knowledge-based services and logistics management services in DFARS Subpart 237.2, Advisory and Assistance Services.

SUBPART 237.2--ADVISORY AND ASSISTANCE SERVICES

237.2XX Acquisition of Knowledge-Based Services and Logistics Management Services

As Knowledge-Based Services and Logistics Management Services are elements of Advisory and Assistance Services, follow the policies and procedures for advisory and assistance services as prescribed at FAR 37.2 and DFARS 237.2.

Add a definition for "Staff Augmentation" as established in 10 U.S.C. 2330a at DFARS 237.101 Definitions and provide guidance on how "staff augmentation" requirements should be acquired at DFARS 237.2XX.

SUBPART 237.1--SERVICE CONTRACTS--GENERAL

237.101 Definitions.

As used in this subpart—

> "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 mission, including authorized personal services contracts."

SUBPART 237.2--ADVISORY AND ASSISTANCE SERVICES

237.2XX Staff Augmentation Services

Contracts for staff augmentation requirements can be either personal or nonpersonal services. Contracts for staff augmentation requirements shall follow the policies and procedures for Advisory and Assistance Services (A&AS) as prescribed at FAR 37.2 and DFARS 237.2.

Section 6
Small Business

Refocus DoD's small business policies and programs to prioritize mission and advance warfighting capabilities and capacities.

RECOMMENDATION

Rec. 21: Refocus DoD's small business policies and programs to prioritize mission and advance warfighting capabilities and capacities.

- **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.
- **21b:** Build on the successes of the SBIR/STTR and RIF programs.
- **21c:** Enable innovation in the acquisition system and among industry partners.

INTRODUCTION

This section addresses businesses falling within the Small Business Size Standards for industries in the North American Industry Classification System (NAICS) as determined by the U.S. Small Business Administration (SBA).

The Department of Defense's (DoD) small business policies and programs do not align with DoD's strategic priorities, including the Third Offset Strategy and building a more lethal force.[1] DoD is not fully capitalizing on small businesses' innovativeness. Instead, DoD appears to focus its small business policies and programs on acquiring goods and services based on meeting societal goals not related to mission. Complexity and slowness in the acquisition system, an uncoordinated outreach process, a lack of clear points of entry into the defense market, and contract compliance requirements deter and appear to prevent small businesses from working with DoD. Small business programs enabling research, development, and innovation have the greatest potential to positively affect DoD and the small business community.

The Section 809 Panel conducted a literature review and interviews with more than 50 small businesses, six venture capitalists, and more than a dozen DoD and U.S. government officials responsible for small business policy and programs. The panel offers one overarching recommendation relating to small business, along with three subrecommendations:

- Refocus DoD's small business policies and programs to prioritize mission and advance warfighting capabilities and capacities.
  - 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.
  - Build on the successes of the SBIR/STTR and RIF programs.
  - Enable innovation in the acquisition system and among industry partners.

[1] The Third Offset Strategy develops and applies "novel capabilities and concepts" to overcome challenges posed by adversaries in increasingly contested security environments. See Timothy Walton, *Securing the Third Offset Strategy: Priorities for Next US Secretary of Defense*, accessed August 4, 2017, https://files.acrobat.com/a/preview/b27088c2-2f87-466e-9d64-90dc23538553.

RECOMMENDATION

Recommendation 21: Refocus DoD's small business policies and programs to prioritize mission and advance warfighting capabilities and capacities.

Problem

Today's increasingly complex and contested security environment places pressure on DoD to optimize warfighting capabilities and allocate its resources efficiently. Secretary of Defense James Mattis prioritized improving DoD's warfighting capabilities and lethality in his January 2017 memo, "Implementation Guidance for Budget Directives in the National Security Presidential Memorandum on Rebuilding the U.S. Armed Forces."[2] In his memo, Secretary Mattis stated that DoD will make "critical investments in advanced capabilities" as a means to "build a larger, more capable, and more lethal force."[3] Harnessing innovation is an essential component of DoD's Third Offset Strategy; however, DoD's slow acquisition system and ineffectiveness in engaging with small, innovative businesses, put DoD at risk of losing the race to advanced capabilities, as potential adversaries such as China work aggressively to acquire U.S. innovations and new technology.[4]

Small businesses produce many of the innovative capabilities, emerging technologies, and complex services DoD must acquire for warfighting dominance in a dynamic and uncertain strategic environment. Large contractors traditionally provide products and support to DoD yet studies indicate small companies are more innovative per dollar of research and development funds spent and per employee than large firms.[5] Therefore, DoD's challenges in working effectively with small businesses to address critical needs and achieve the strategic objectives of DoD are of substantial concern.

DoD would benefit if it aligned its acquisitions from small business with its strategic priorities of improving warfighting capabilities and lethality, as well as the Third Offset. Instead, DoD's small business policies and programs currently focus on acquiring supplies and services that further socioeconomic goals but do not fully leverage innovative and unique capabilities of small businesses to support DoD's mission. A complex and cumbersome acquisition system, coupled with few clear entry

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[2] Implementation Guidance for Budget Directives in the National Security Presidential Memorandum on Rebuilding the U.S. Armed Forces, Memorandum from Secretary of Defense (2017).
[3] Ibid.
[4] Paul Mozur and Jane Perlez, "China Bets on Sensitive U.S. Start-Ups, Worrying the Pentagon," New York Times (2017), accessed January 2, 2018, https://www.nytimes.com/2017/03/22/technology/china-defense-start-ups.html?emc=edit_dk_20170323&nl=dealbook&nlid=69253745&ref=dealbook&te=1&_r=1. Supporting journalistic reporting on Chinese government investment into U.S. technologies with potential defense applications, four companies in the San Francisco area and three venture capitalists independently informed the Section 809 Panel that Chinese government-backed firms are increasingly pursuing acquisition of U.S. companies, start-ups, and technologies.
[5] Jose M. Plehn-Dujowich, *Product Innovation by Young and Small Firms*, accessed August 4, 2017, https://www.sba.gov/sites/default/files/files/rs408tot.pdf. Anthony Breitzman, D. Hicks, M. Albert, *Small Firms and Technology: Acquisitions, Inventor Movement, and Technology Transfer,* accessed August 4, 2017, http://rdw.rowan.edu/cgi/viewcontent.cgi?article=1012&context=csm_facpub. Diana Hicks and Anthony Breitzman, *Small Serial Innovators: The Small Firm Contribution to Technical Change,* 2003, accessed August 4, 2017, http://rdw.rowan.edu/cgi/viewcontent.cgi?article=1038&context=csm_facpub. Anthony Breitzman and Patrick Thomas, *Analysis of Small Business Innovation in Green Technologies,* accessed August 4, 2017, https://www.nist.gov/sites/default/files/documents/2017/05/09/analysis-of-SM-innovation-Technologies.pdf.

points into the defense market and uncoordinated outreach to small businesses, deters many small businesses from pursuing DoD as a customer.

Background

DoD has an extensive history of supporting small businesses. Congress first tasked DoD with establishing a small business program in the Armed Services Procurement Act of 1947.[6] The 1953 Small Business Act also explicitly linked small business set-asides to DoD's core mission of national defense. Section 214 of the Act read,

> *To effectuate the purposes of this title, small-business concerns within the meaning of this title shall receive any award or contract of any part thereof as to which it is determined by the Administration and the contracting procurement agency (A) to be in the interest of mobilizing the Nation's full productive capacity, or (B) to be in the interest of war or national defense programs.*[7]

With a large budget and extensive presence across the country, DoD has played, and continues to play, a substantial role in achieving Congress's goal of supporting small American businesses. In 1958, the Small Business Act minimized the importance of using set-asides to fulfill national defense needs in favor of maximizing benefits to small businesses by requiring a *fair portion* of contracts for property and services go to small businesses in each industry category.[8] Concerns that small businesses could not win a *fair portion* of contracts, however, ultimately led to Congress creating set-asides for minority-owned small businesses via amendments to the Small Business Act in 1978.[9] The statute now emphasizes the role of small business set-asides and programs in furthering socio–economic policy objectives and supporting the U.S. economy.[10]

The Small Business Act, as it stands today, does not state a goal for government agencies to leverage small businesses as a means to enhance or support mission execution. The statute includes a reference that the American economic system of private enterprise and competition is essential to the "security of this Nation," but contains no direct references to agency missions or national defense.[11] DoD's small business activities are dollar-goal-oriented, with little focus on supporting the warfighter and DoD's mission. Furthermore, small business provisions and programs in statute today are codified in a disorganized manner, making it difficult for both government and the private sector to understand and follow relevant statute.

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[6] Section 202 of the 1947 Armed Services Procurement Act stated, "It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns. Whenever it is proposed to make a contract or purchase in excess of $10,000 by negotiation and without advertising, pursuant to the authority of paragraph (7) or (8) of section 2 (c) of this Act, suitable advance publicity, as determined by the agency head with due regard to the type of supplies involved and other relevant considerations, shall be given for a period of at least fifteen days, wherever practicable, as determined by the agency head."

[7] Small Business Act of 1953, Pub. L. No. 163-83, 67 Stat. 238 (1953).

[8] Andrew G. Sakallaris, "Questioning the Sacred Cow: Reexamining the Justifications for Small Business Set Asides," *Public Contract Law Journal,* 36 (2007): 685-700. Small Business Act of 1953, Pub. L. No. 16-83, 67 Stat. 238 (1953).

[9] Andrew G. Sakallaris, "Questioning the Sacred Cow: Reexamining the Justifications for Small Business Set Asides," *Public Contract Law Journal,* 36 (2007): 685-700.

[10] Aid to Small Business, 15 U.S.C. Chapter 14a.

[11] Declaration of Policy, 15 U.S.C. § 631.

Findings

DoD's Lack of a Coherent Small Business Strategy

A principal challenge for DoD is establishing a coherent strategy and infrastructure for aligning small business programs and policies with DoD's mission-related needs. A number of previous advisory groups have identified challenges related to DoD's lack of a strategic approach to working with industry. For example, a 2012 report produced by the House Committee on Armed Services Panel on Business Challenges noted, "[T]he Panel found that DoD lacks a clearly articulated strategy that would provide a corporate vision of DoD's future technology needs."[12] A decline of nearly 100,000 small companies registered in the System for Award Management (SAM) to do business with the federal government since 2012[13] may be one issue cause by a lack of strategy. Steve Chabot, in 2015 testimony before the U.S. House of Representatives Committee on Armed Services, noted a lack of policy for driving small businesses toward "gaps in our industrial base."[14] Although this lack of policy was framed as a governmentwide problem, it is consistent with the Section 809 Panel's finding that DoD lacks an effective small business strategy.

Numerous offices and organizations exist across DoD to either shape the industrial base or promote small business use across the department. Examples of such offices include the Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy (DASD(MIBP)), Office of Small Business Programs (OSBP), and Defense Logistics Agency (DLA) Office of Small Business Programs.[15] Coordination among small-business-related offices and DASD(MIBP) is minimal, which has resulted in a disjointed and incomplete view of small business capabilities and innovations, as well as their importance to the health and robustness of the defense market.

DASD(MIBP) conducts analyses of the defense base to ensure critical capabilities and systems are protected and preserved. DASD(MIBP) does not place meaningful or specific focus on critical capabilities or emerging technologies developed by small businesses. For example, the *2015 Annual Industrial Capabilities Report to Congress* produced by DASD(MIBP) does not indicate an industrial base analysis was conducted to identify unique capabilities or preserve critical skills among small technology companies.[16] Although the report references establishment of Defense Innovation Unit Experimental (DIUx), it includes no information to suggest a robust industrial base assessment of small technology firms and start-ups has occurred.[17] Not including a thorough assessment of small businesses or technology in the report suggests DoD has not paid sufficient attention to either component as being critical to the defense market and enablers of DoD's strategic imperatives.

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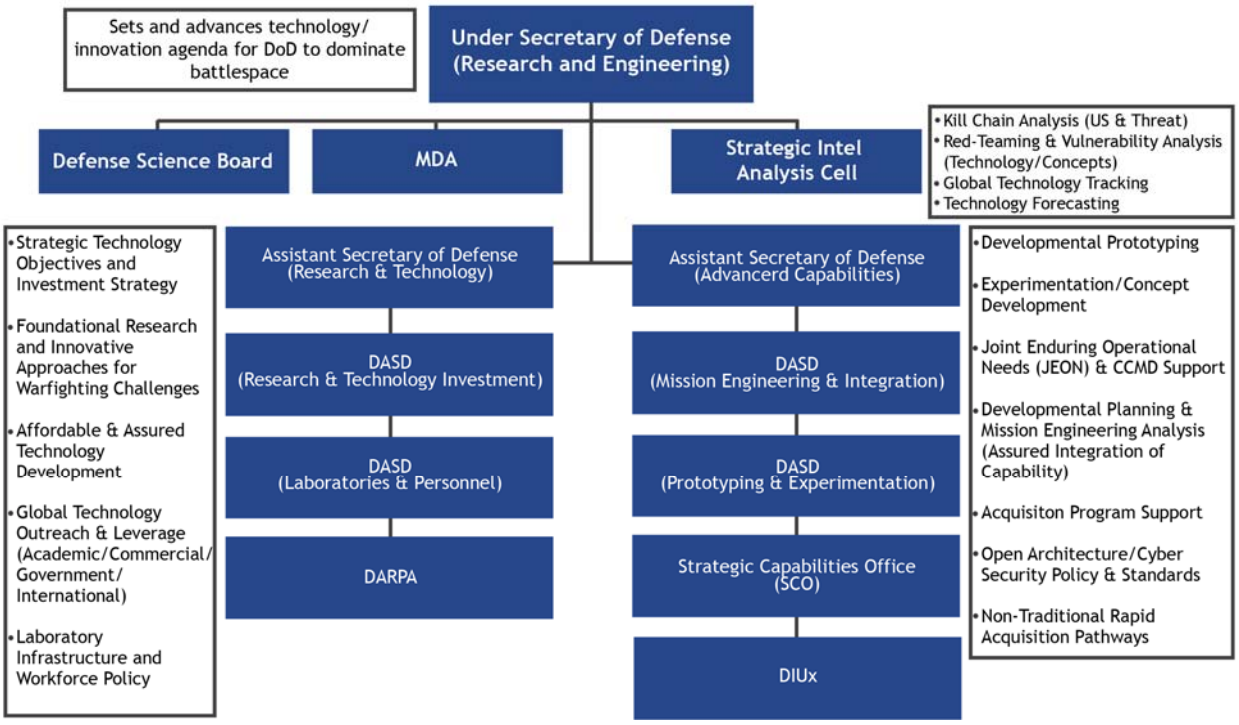
[12] Panel on Business Challenges in Defense Industry, C*hallenges to Doing Business with the Department of Defense: Findings of the Panel on Business Challenges in Defense Industry,* March 2012, vii, accessed November 7, 2017, https://wcoeusa.org/sites/default/files/Challenges%20to%20Bus%20with%20DOD.3.12.pdf.
[13] Steve Chabot, Chairman, Committee on Small Business, testimony before U.S. House of Representatives Committee on Armed Services, April 14, 2015, accessed November 8, 2017, https://smallbusiness.house.gov/uploadedfiles/chabot_written_statement_fy_16_ndaa.pdf.
[14] Ibid.
[15] DLA's Office of Small Business Programs administers the Procurement Technical Assistance Program.
[16] OSD(AT&L), *Annual Industrial Capabilities Report to Congress for 2015,* accessed August 4, 2017, http://www.acq.osd.mil/mibp/resources/2015%20AIC%20RTC%2010-03-16%20-%20Public%20Unclassified.pdf.
[17] Ibid.

OSBP oversees DoD's implementation of small business policies and programs such as the 8(a) Business Development Program set-asides, SBIR, STTR, and RIF through small business offices across DoD. OSBP focuses on ensuring DoD's compliance with statutorily established small business contracting goals and administration of programs such as SBIR, STTR, and RIF. Data gathered in interviews conducted by the Section 809 Panel indicate there is no system or recurring dialogue between DASD(MIBP) and OSBP to align small business program objectives with critical needs in the broader defense market.

DLA administers the Procurement Technical Assistance Program (PTAP), which is designed to help small businesses enter the government market and navigate government contracting. DLA's administration of the program, prescribed in statute,[18] lacks a clear link to DASD(MIBP) or OSBP priorities, much less the SBA. Disjointedness among PTAP, industry, and DoD small business organizations is not new. In FY 1997 DLA unsuccessfully recommended repeal of Chapter 142 of Title 10, which requires DLA to administer PTAP, citing overlap between PTAP and SBA's Small Business Development Center (SBDC) program.[19] (PTAP is discussed again in greater detail below).

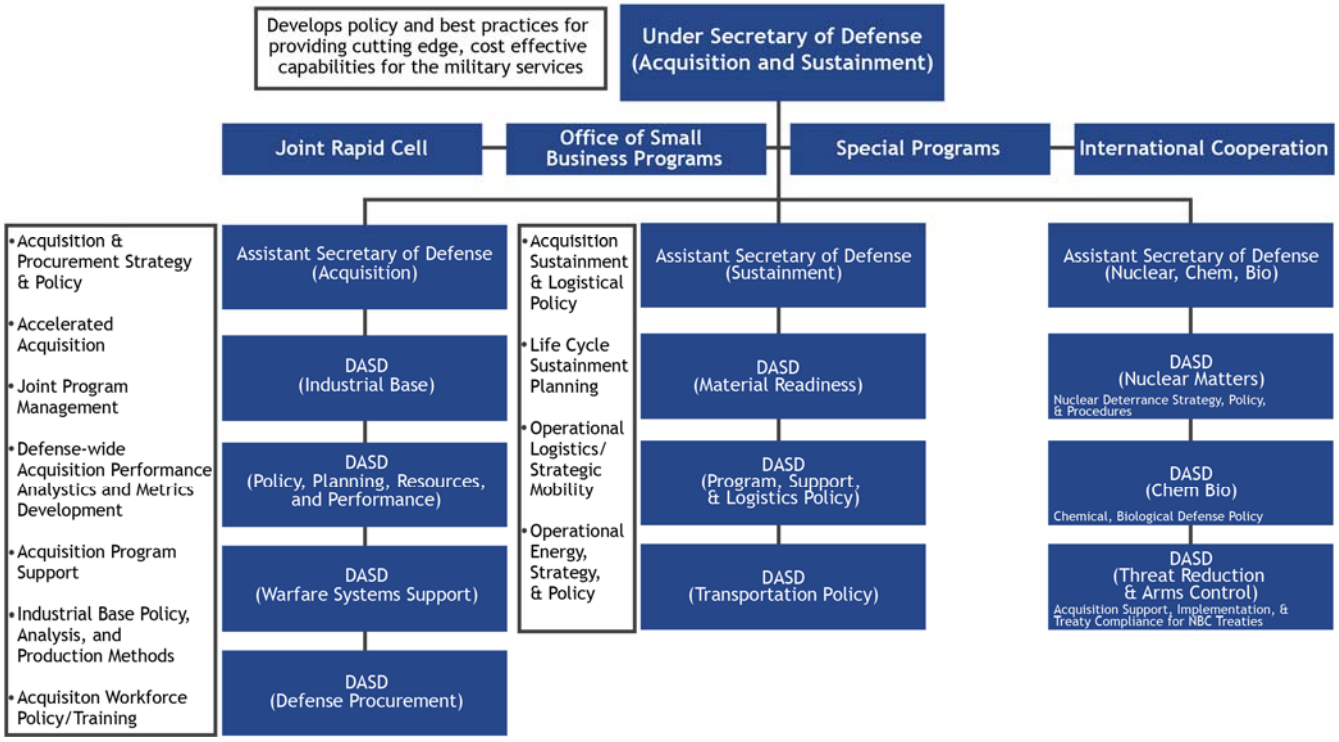
Figure 6-1. Proposed USD(R&E) Organization



Source: Report to Congress, August 2017[20]

[18] Cooperative Agreements, 10 U.S.C. § 2413.
[19] Office of the Inspector General, Department of Defense Procurement Technical Assistance Cooperative Agreement Program, accessed August 4, 2017, http://www.dodig.mil/Audit/reports/FY97/97-007.pdf.
[20] DoD, *Report to Congress: Restructuring the Department of Defense Acquisition, Technology and Logistics Organization and Chief Management Officer Organization,* August 2017, accessed November 8, 2017, https://www.sba.gov/sites/default/files/articles/FY2017_Final_Agency_Goals_Spreadsheet_20161201.pdf.

Figure 6-2. Proposed USD(A&S) Organization



Source: Report to Congress, August 2017[21]

A proposed reorganized structure was released in August 2017 outlining a potential realignment of USD(AT&L) functions under an Under Secretary of Defense (Research and Engineering) (USD[R&E]) and Under Secretary of Defense (Acquisition and Sustainment) (USD[A&S]) (see Figures 6-1 and 6-2 above). Of note, the proposal includes giving USD(A&S) responsibility for DASD(MIBP)'s current portfolio of industrial base policy and analysis, as well as oversight of DoD's OSBP. The proposal leaves OSBP as a distinct office, answering to USD(A&S).

The proposal further suggests realigning the SBIR, STTR, and RIF programs to fall under USD(R&E) instead of the OSBP.[22] DIUx, tasked with helping attract innovative companies and commercial technologies into the defense market, also would be aligned to USD(R&E). Moving SBIR, STTR, and RIF under USD(R&E) is a positive step toward aligning small business programs with acquiring innovations that enhance DoD's mission-essential capabilities. The proposed reorganization, however, does not clearly address the need to create a coordinated outreach program, identify clear points of entry for companies seeking to enter the defense market (discussed below), or the need for greater alignment of small business policy and programs with needs across the broader defense market.

[21] Ibid.
[22] Ibid.

Coupled with a disjointed management structure (at least as offices and programs are arranged currently), DoD's small business use is driven by the dollar value of contracts awarded to small businesses with little regard for effect on DoD's mission. This situation may be due in some part to the fact that for FY 2017, DoD set a target for at least 22 percent of its government prime contract dollars to be awarded to small businesses and small, disadvantaged businesses.[23] Five percent of prime contracts and 5 percent of subcontracts are to be awarded to women-owned small businesses; 5 percent to disadvantaged business owners; 3 percent to HUBZone small businesses; and 3 percent to service-disabled, veteran-owned small businesses.[24]

Contracting officers and program managers, not DoD's small business specialists, are held accountable for ensuring small businesses receive contracts, small business requirements are met, and goals are achieved. As a result, small business programs focus almost exclusively on the amount of money and number of contracts awarded to small businesses.[25] One RAND study notes,

> *Small business utilization is generally judged on input. That is, the entire goal-setting process, as well as data collection on its effects and reporting of its results, is geared to measuring the dollars and contracts awarded to small business.*[26]

Although small business specialists in the field conduct outreach to the small business community, the Section 809 Panel did not find any information to indicate outreach is informed by a strategy or aligned to mission-related needs.

Multiple experts with whom the Section 809 Panel spoke indicated most DoD small business contracts go toward procuring basic services and commodities, given an almost singular focus on the aggregate dollar value of small business contracts.[27] It is easier and less risky for contracting officers to meet their contracting goals by acquiring basic commodities and services than it is to conduct market research and find new small businesses with which to work; available data confirm this assertion. Small businesses disproportionately account for the acquisition of basic commodities and services like administrative support, construction, building and grounds maintenance, and food-related support. FY 2017's top-10 DoD obligations to small businesses (see Table 6-1), as a percentage of DoD's total reported obligations, shows small businesses account for approximately 94 percent of obligated dollars toward fruits and vegetables; 83 percent toward maintenance of *other* administrative facilities and service buildings; and 90 percent toward highway and road maintenance.[28]

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[23] Small Business Administration, Small Business Procurement—Final FY2017 Goals—As of 12/01/16, accessed Dec. 8, 2017, https://www.sba.gov/sites/default/files/articles/FY2017_Final_Agency_Goals_Spreadsheet_20161201.pdf.
[24] "Goaling," U.S. Small Business Administration, accessed August 4, 2017, https://www.sba.gov/contracting/contracting-officials/goaling.
[25] The Section 809 Panel arrived at this finding through interviews with senior officials and staff responsible for small business policy and programs across DoD and Small Business Administration.
[26] Clifford A. Grammich, et al., *Small Business and Defense Acquisitions: A Review of Policies and Current Practices,* RAND National Defense Research Institute (2011), 35, accessed November 8, 2017, http://www.dtic.mil/dtic/tr/fulltext/u2/a551005.pdf.
[27] There is no definition in the FAR for the term *commodity*. For the purposes of this paper, the Section 809 Panel refers to the Merriam-Webster definition of a commodity as "an economic good, such as a mass-produced unspecialized product."
[28] Calculations based on Product and Service Code (PSC) contract obligation data retrieved from the Federal Procurement Data System as of January 2, 2018. Categories refer to PSC 8915: Fruits and vegetables; PSC Z1AZ: Other administrative facilities and service buildings maintenance services; and PSC Z1LB: Highways, roads, streets, bridges, and railways maintenance services.

Table 6-1. Top Ten FY 2017 DoD Obligations to Small Businesses as a Percentage of Total FY 2017 DoD Obligations (for total obligations more than $100 million)[29]

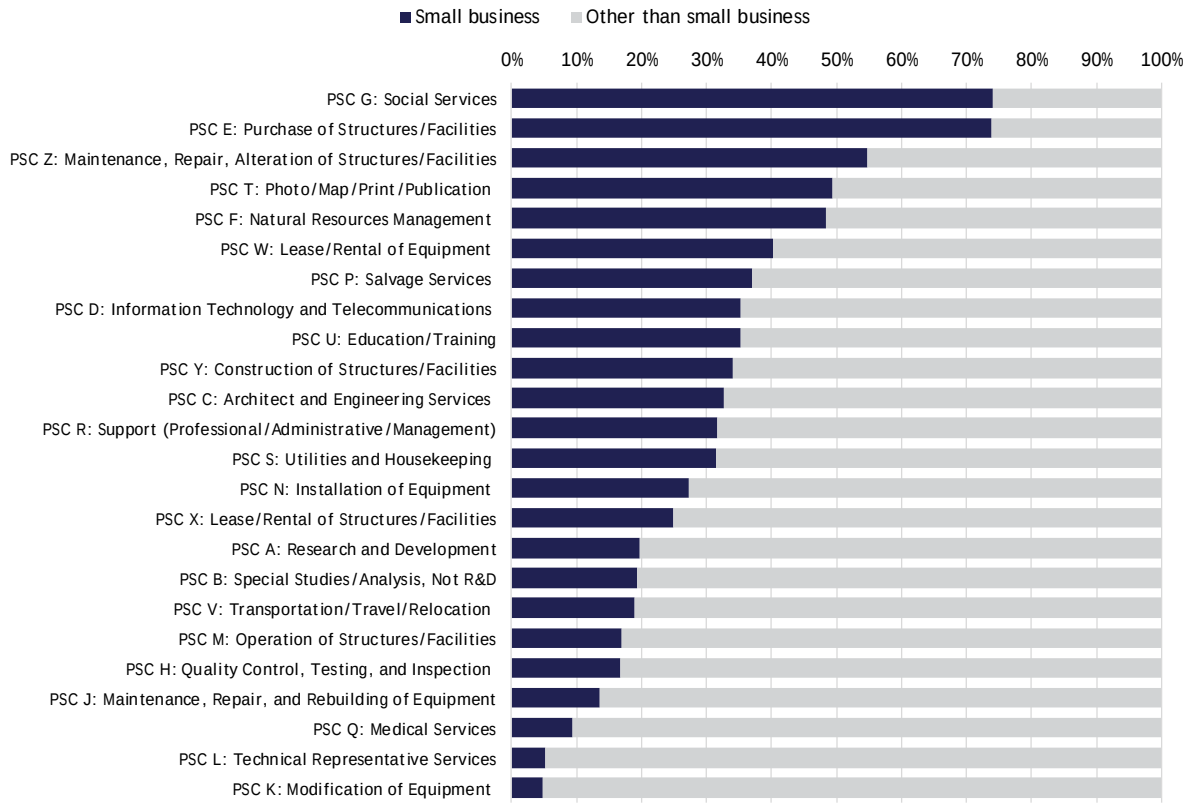
PSC and Description	Small business USD obligations	Percent small business
PSC Y1BF: Missile system facilities construction services	$121.8 million	98.9%
PSC 4220: Marine lifesaving and diving equipment	$1.69 billion	97.6%
PSC Z2EB: Maintenance buildings repair or alteration services	$152.2 million	93.9%
PSC 8915: Fruits and vegetables	$100.1 million	93.5%
PSC Z1LB: Highways, roads, streets, bridges, and railways maintenance services	$107.7 million	89.9%
PSC AC32: Ships applied research and exploratory development defense systems R&D	$109.1 million	89.7%
PSC Z2EZ: Other industrial buildings repair or alteration services	$119.9 million	86.7%
PSC Z1JZ: Miscellaneous buildings maintenance services	$217.2 million	85.0%
PSC AD22: Other applied research and exploratory development defense R&D services	$144.5 million	84.5%
PSC Z1AZ: Other administrative facilities and service buildings maintenance services	$261.1 million	83.1%

Further analysis of FPDS data indicates that approximately 55 percent of all obligated dollars for maintenance, repair, and alteration of structures and facilities went to small businesses in 2017.[30] By contrast, only 20 percent of R&D-related dollars went to small businesses.[31] DoD's dollars obligated to small businesses ultimately skew toward acquiring commoditized and noninnovative products and services (see Figure 6-3).

Meeting small business goals by acquiring basic commodities and services, rather than obtaining innovative products and support from small companies, will ultimately hurt DoD's ability to maintain warfighting dominance. Research shows small businesses can provide advanced capabilities and support to DoD; however, data show DoD is not prioritizing working with small businesses to acquire innovation and technology. According to one study, small companies generate "13 to 14 times more patents per employee" and produce more cutting-edge technologies than large companies.[32] Large companies in the technology industry with which the Section 809 Panel met indicated small businesses often are more innovative and capable of developing unique solutions for their customers. DoD is not capitalizing on the innovative potential of small businesses; the majority of DoD's small business contracts do not prioritize or align with its mission and warfighting needs.

[29] Data retrieved from FPDS on January 2, 2018.
[30] Calculations based on PSC contract obligation data retrieved from the Federal Procurement Data System on January 2, 2018. Categories refer to PSC Z (maintenance, repair, alteration of structures/facilities) and PSC A (research and development).
[31] Ibid.
[32] Diana Hicks and Anthony Breitzman, *Small Serial Innovators: The Small Firm Contribution to Technical Change*, 2003, accessed August 4, 2017, http://rdw.rowan.edu/cgi/viewcontent.cgi?article=1038&context=csm_facpub.

Figure 6-3. Percentage of DoD Contract Dollars Obligated to Small Business, by Service Contract Category[33]



In addition to potentially undermining the acquisition community's focus on furthering DoD's core mission, DoD's current approach to working with small businesses may not support DoD's long-term interests. The number of small business contract actions dropped nearly 70 percent from FY 2011 to FY 2016, but during that same timeframe the value of DoD small business contracts rose approximately 290 percent.[34] Small companies are receiving contracts of substantial value from the government, including DoD, but the decline in the number of small business contract actions indicates DoD's small business contracting is not promoting competition and fostering robustness in the defense market.

Small business programs, such as the 8(a) Business Development Program and Mentor–Protégé Program, aim to help small businesses mature and become capable of handling larger prime contracts. In theory, helping companies mature promotes healthier competition for federal contracts; however, small companies that successfully grow beyond the small business threshold for their NAICS code must compete with large companies for contracts, putting *other than large* companies at a substantial disadvantage compared to large contractors. For example, SBA's Table of Small Business Size Standards indicates many technology-related companies have limited room to grow before becoming

[33] Data extracted from Federal Procurement Data System on January 2, 2018. Service contract categories represent PSCs aggregated at the one-digit level.

[34] Steve Chabot, Chairman, Committee on Small Business, testimony before U.S. House of Representatives Committee on Armed Services, April 14, 2015, accessed November 8, 2017, https://smallbusiness.house.gov/uploadedfiles/chabot_written_statement_fy_16_ndaa.pdf.

other than small. Companies offering custom computer programming services, for instance, cannot grow beyond $27.5 million in average annual revenue over the previous 3 years before losing their small business classification.[35] Companies that exceed this threshold must bid against large competitors that offer the same services such as Booz Allen Hamilton, Lockheed Martin, and Northrop Grumman, which respectively posted $5.4 billion, $47.2 billion, and $24.5 billion in revenue in FY 2016.[36] Many companies that are not small, but far from large, struggle to compete for government contracts against large, well-established companies without set-aside programs and other support.

This structure incentivizes small companies to adopt strategies that may be inconsistent with DoD's interests and small business programs' goals. For example, some small defense contractors adopt a practice of restricting their growth to ensure they retain their small business classification and maintain access to preferential contracting and small business programs.[37] This practice may run counter to DoD's interest in leveraging its small business programs, such as the 8(a) Business Development Program, to create greater robustness in the defense market.

Given the complexity and wide range of issue areas included in socio–economic programs and provisions, the Section 809 Panel will assess their effect on defense acquisition more fully in a subsequent report. The panel recognizes the importance of products and services to DoD that do not directly enhance warfighting capabilities or capacities and will outline alternative means for companies offering such support to sell to DoD in a future report.

Impediments to Working with Small, Innovative Companies

The complexity and slowness of DoD's acquisition system impedes working with small, innovative companies. To better understand barriers to entry into the defense market for small businesses, the Section 809 Panel met with more than 50 small companies. Of those companies, at least 30 explicitly stated that doing business with DoD is too complex and burdensome. Many of these companies also stressed that the slowness of the acquisition system presents challenges. Small businesses, particularly those in the technology sector, operate on rapid business cycles. Such companies must raise funds at least every 12 to 18 months, yet according to one investor DoD often takes at least two years to award a contract.[38] The amount of time it takes DoD to get to *yes* on executing an acquisition, as well as the amount of time to say *no*, is especially problematic for small companies. In a meeting with the Section 809 Panel, Heidi Roizen, a renowned venture capitalist stated, "Companies would rather reach

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[35] U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes,* accessed August 4, 2017, https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

[36] Booz Allen Hamilton Holding Corporation, *Form 10-K,* accessed August 4, 2017, http://investors.boozallen.com/secfiling.cfm?filingID=1443646-16-138#BAH-20160331X10K_HTM_S366CB8D67F54551397F4E49AC59D9239. Lockheed Martin Corporation, *2016 Annual Report,* accessed August 4, 2017, http://www.lockheedmartin.com/content/dam/lockheed/data/corporate/documents/2016-annual-report.pdf. Northrop Grumman, *2016 Annual Report,* accessed August 4, 2017, http://www.northropgrumman.com/AboutUs/AnnualReports/Documents/pdfs/2016_noc_ar.pdf.

[37] Donna Huneycutt, Wittenberg Weiner Consulting, presentation to Section 809 Panel, April 25, 2017. Jacques Gansler, William Lucyshyn, and Jinee Burdg, *Unintended Outcomes of Small Business Legislation & Policy: Opportunities for Improvement,* accessed August 4, 2017, https://www.publicpolicy.umd.edu/sites/default/files/SPP_Unintended%20Outcomes%20of%20Small%20Business%20Legislation%20and%20Policy_March%202015_FINAL_0.pdf.

[38] Heidi Roizen, DFJ Venture Capital, meeting with Section 809 Panel, February 16, 2017.

a quick 'no' than deal with a drawn-out 'maybe.' "[39] Setting aside time, personnel, and money to pursue business with DoD is too risky for many small companies.[40] Given the risks of relying on DoD for revenue, five of six venture capitalists with whom the Section 809 Panel met indicated they advise the companies in which they invest to avoid doing business with DoD.

Many companies not familiar with DoD struggle to understand requirements as they are articulated in requests for proposal. Acronyms and jargon that are widely used across DoD are not always comprehensible for small businesses lacking experience in the defense market, which leads them to develop proposals that are noncompliant with what DoD actually requires.[41] Similarly, DoD's workforce may not be sufficiently versed on the language used by small businesses, particularly those in the technology sector, and might pass on awarding contracts that would acquire potentially better technologies and solutions.[42]

Small companies also desire more open communication with DoD's acquisition community, much like the communication they have in private-sector acquisitions. A roundtable discussion with four small business in San Diego, CA, highlighted that small businesses experience barriers to entry into the defense market due to the inability to speak with DoD's acquisition officials to ask questions about requirements and receive feedback on proposals. DoD's lack of transparency and communication with small businesses subsequently leaves small companies struggling to learn and understand DoD's needs and expectations. This situation may lead to small businesses producing noncompliant proposals and missing opportunities. Some small companies indicated they need more communication and support to understand administrative requirements, such as how to certify compliance with complex legal liability and risk provisions included in many contracts, such as cyber security, counterfeit electronic parts controls, and export controls. Empowering and encouraging contracting officers to engage with small businesses and help them understand and navigate requirements and processes is one way to reduce such barriers to entry.

Need for Clear Entry Points and Effective Outreach

Small and large businesses alike express frustration over the lack of clear entry points into the defense market. Companies can spend months or years searching for the appropriate person or office with the authority to initiate the acquisition process. For example, a San Francisco-based company met with multiple potential customers in DoD, and despite those potential customers expressing strong interest in acquiring the company's product, the company was unable to find a client with appropriate

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[39] Ibid.

[40] Scott Fredrick, NEA, meeting with Section 809 Panel, June 12, 2017. For further reports demonstrating the effects of complexity and slowness of the defense acquisition system on businesses, see also GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies,* accessed August 4, 2017, http://www.gao.gov/assets/690/686012.pdf. Panel on Business Challenges in Defense Industry, C*hallenges to Doing Business with the Department of Defense: Findings of the Panel on Business Challenges in Defense Industry,* March 2012, accessed November 7, 2017, https://wcoeusa.org/sites/default/files/Challenges%20to%20Bus%20with%20DOD.3.12.pdf.

[41] Meagan Metzger, Dcode42, meeting with Section 809 Panel, March 29, 2017. Additionally, during a roundtable discussion with the Section 809 Panel on June 30, 2017, six small companies seeking entry into the defense market indicated requests for proposals and requirements often are unclear, making it difficult for small companies new to the defense market to understand client needs and offer effective solutions.

[42] Meagan Metzger, Dcode42, meeting with Section 809 Panel, June 30, 2017. Scott Fredrick, NEA, meeting with Section 809 Panel, June 12, 2017.

acquisition authorities to carry out the acquisition. Because of the cost and burden of pursuing DoD contracts, the company decided to abandon all efforts to work with DoD. This company was among 18 companies that told the Section 809 Panel they have no interest or plans to do business with DoD in the near future.

Anecdotal evidence gathered by the Section 809 Panel indicates that the example above is not a unique experience; companies with new technology unknown to DoD cannot easily introduce their products and services into the defense market, to the ultimate detriment of warfighters. Six California-based companies independently indicated similar challenges, stating to the Section 809 Panel they had *no idea where to begin* when it came to pursuing DoD contracts. Difficulties finding points of entry often lead to increased costs and burdens for companies actively seeking opportunities in the defense market. For instance, representatives from one small company that manufactures custom industrial equipment indicated their company outsources searching for requests for proposal, because it cannot afford to hire a team with the knowledge to find and pursue business opportunities with DoD.[43]

To understand what infrastructure exists to help companies to enter the defense market, the Section 809 Panel reviewed PTAP. Under the program, DoD established Procurement Technical Assistance Centers (PTACs) nationwide to help businesses "compete successfully in the government marketplace."[44] Awards are made annually to eligible entities (e.g., nonprofits, states, Indian tribes, and universities) to serve as PTACs, but due to cost-sharing requirements, becoming a PTAC often is unaffordable or unattractive to such entities.[45]

PTACs operating on a statewide basis can receive up to $750,000 per fiscal year, and those operating on *less than a statewide basis* can receive up to $450,000.[46] The centers must find matching funds, as DoD cannot bear more than 65 percent of the cost of providing assistance (or in the case of distressed areas, 75 percent of the cost).[47] For example, in the case of the San Diego PTAC, DoD provides $300,000 in funding per fiscal year, and the center must find matching funds from other sources, such as state and local governments.[48] Funds go to covering administrative costs, including salaries.[49] After covering such expenses, PTACs often find themselves with inadequate funds for advertising and outreach, causing low awareness among small businesses of the existence of PTACs. During interviews, the Section 809 Panel asked representatives from 14 small businesses in Silicon Valley if they knew about the existence of PTACs. None were familiar with the centers.

A DoDIG report from 1996 expressed concerns over PTAC roles. The report noted PTACs duplicate some roles of the SBA's SBDCs, primarily because of an expansion of PTAP's authorities in the FY 1994

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[43] The Section 809 Panel met with the company in Seattle, WA, in March 2017; the company operates in the manufacturing industry, producing custom-designed components for machines, engines, etc.
[44] "About the PTAP and APTAC," Association of Procurement Technical Assistance Centers, accessed August 4, 2017, http://www.aptac-us.org/about-us/.
[45] Sherry Savage, Defense Logistics Agency, meeting with Section 809 Panel, July 10, 2017.
[46] Limitation, 10 U.S.C. § 2414.
[47] Cooperative Agreements, 10 U.S.C. § 2413.
[48] Rachel Fischer, San Diego Procurement Technical Assistance Center, meeting with Section 809 Panel, June 19, 2017.
[49] Ibid.

NDAA,[50] allowing PTAPs to provide assistance on contracts with other federal agencies, as well as state and local governments.[51]

Each PTAC is different due to the nature of its environment, local industries, and other factors. For instance, the technical competency of companies from rural, agricultural regions may be very different from those in urban areas.[52] PTACs must develop a unique approach to supporting small businesses within their areas of responsibility. As such, DLA includes in its assessment of PTACs their performance against three goals: the number of new clients, number of outreach events, and number of counseling hours.[53]

PTACs with limited staffs and high demand, like the one in San Diego, also struggle at times with backlog. For instance, in 2009 during the economic downturn, the San Diego PTAC faced a 12-week waiting period for small companies to get an appointment. Although the PTAC dealt successfully with the problem, the experience highlights the lack of integration among PTACs. Additionally, the PTACs lack a system, and sufficient visibility within DoD, necessary to help build DoD-wide awareness of small businesses' unique offerings and innovations.

Beyond PTAP, the Section 809 Panel was not able to identify a DoD-wide program or system designed to conduct outreach to bring small businesses into the defense market. Although DIUx represents a concerted effort to work more closely with small technology companies, it does not conduct broad outreach and technology scouting to discover new technologies and companies. Stated requirements from DoD customers, such as the Military Service branches, drive DIUx's process, which only solicits commercial solutions for DoD's known needs.[54] There are, however, isolated models within DoD that have demonstrated successes in conducting outreach, and DoD can look to other agencies for lessons on how to better reach small, nontraditional partners.

U.S. Special Operations Command (USSOCOM), in partnership with the Doolittle Institute, launched SOFWERX. SOFWERX aims to cultivate an ecosystem of innovative companies that can deliver solutions to the special operations community's unique challenges.[55] To do so, SOFWERX accepts unsolicited proposals, hosts challenges, and advertises widely across social media and through its university and industry partners. SOFWERX has facilities in which companies can collaborate, conduct rapid prototyping, and demonstrate capabilities.[56] To attract and leverage the ideas of young, innovative, and entrepreneurial people, the organization offers fellowships, summer camps, and college internships. USSOCOM reported that for a low cost, SOFWERX gives USSOCOM awareness to

[50] Office of the Inspector General, Department of Defense Procurement Technical Assistance Cooperative Agreement Program, accessed August 4, 2017, http://www.dodig.mil/audit/reports/fy97/97-007.pdf.
[51] Authority to Provide Certain Types of Technical Assistance, 10 U.S.C. § 2418.
[52] Sherry Savage, Defense Logistics Agency, meeting with Section 809 Panel, July 10, 2017.
[53] Ibid.
[54] "Work With Us," Defense Innovation Unit Experimental, accessed October 26, 2017, https://www.diux.mil/work-with-us/companies.
[55] SOFWERX, accessed October 26, 2017, http://www.sofwerx.org/. See also Defensewerx, accessed October 26, 2017, http://defensewerx.org/.
[56] "Frequently Asked Questions," SOFWERX, accessed October 26, 2017, http://www.sofwerx.org/faqs/.

unknown and emerging technologies, and is successfully cultivating partnerships with innovative small businesses to support warfighters.[57]

Part of SOFWERX's success may be attributable to the brand and public recognition of the special operations community. Similarly, the National Aeronautics and Space Administration's (NASA's) iTech program ascribes a portion of its success to NASA's globally recognizable brand. Small companies and innovators place great value on recognition from organizations with high visibility, like the U.S. Special Forces and NASA, because that recognition may attract venture capital investments for their companies or technology.[58]

Similar to SOFWERX, NASA's iTech program targets nonspace small startup companies, as well as universities and labs seeking to discover innovative technologies that can potentially solve critical challenges necessary for future space exploration. NASA iTech does not post specific requirements, but rather posts a broad topic of interest for a given challenge.[59] For example, iTech's third challenge cycle accepted white papers from potential participants on artificial intelligence, augmented reality, autonomy, high performance computing, and medical breakthroughs.[60] If applicants have a technology they believe NASA needs, but does not fit into one of the focus areas listed, NASA accepts white papers submitted under an undefined X Factor category.[61] NASA evaluates the white papers, and semifinalists have an opportunity to demonstrate their technology to all NASA chief technologists, venture capitalists, and representatives of large companies.[62] For little cost, iTech provides NASA an effective outreach capability and point of entry to identify groundbreaking technologies with both NASA mission-related and commercial viability.

Compliance-Related Requirements

Based on data gathered from Section 809 Panel interviews with small companies, many that pursue business with DoD for the first time either are unaware of or underestimate the potential effects of audits, paperwork, and other processes on their companies' ability to operate. In one instance, a small business owner with whom the panel spoke shut down his business due to alleged delays and inappropriate application of accounting standards by the Defense Contract Audit Agency (DCAA), causing the company to lose a contract.[63] Although that company's experience may be an extreme case, the Section 809 Panel consistently heard that auditability requirements place undue burden on small companies. For example, the panel participated in a roundtable with four small businesses that had substantial experience operating in the aerospace and defense industries. Despite having experience in the defense market, all four companies expressed consistent struggles to meet DCAA requirements and cover audit-related costs.[64] Due to the complexity and depth of audit-related challenges, this report

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[57] James Geurts, Special Operations Command, presentation to the Section 809 Panel, May 25, 2017.
[58] Kira Blackwell, NASA iTech, presentation to the Section 809 Panel, September 14, 2017.
[59] Ibid.
[60] NASA iTech, accessed October 26, 2017, https://nasaitech.com/#intro.
[61] Kira Blackwell, NASA iTech, presentation to the Section 809 Panel, September 14, 2017.
[62] Ibid.
[63] The company was based in the San Diego, CA, vicinity and had been in business for 16 years before ending operations.
[64] The roundtable took place in Seattle, WA, in March 2017. Though the companies all operated in aerospace and defense, each offered different products and services.

includes a separate section that explores the issue and offers recommendations on that topic (see Section 2).

In addition to challenges caused by audits, some companies, particularly those without prior experience in the defense or national security sectors, indicated they have difficulty obtaining security clearances. Valerie Muck, the Air Force's Director of Small Business Programs summarized small businesses' challenge with security clearances: "Small businesses cannot get a clearance without a contract, but cannot win a contract without having a clearance."[65] Failure to address such burdens on small businesses will continue to deter companies from entering the defense market and drive innovative companies out of the market.

Small Business Programs and Authorities Enabling Research and Development and Innovation

The Section 809 Panel researched the SBIR and STTR programs, RIF, Mentor-Protégé Program, and consortia to assess their ability to help small businesses gain entry into the defense market.[66]

Small Business Innovation and Research Program and Small Business Technology Transfer Program

Congress created the SBIR and STTR programs in 1982 and 1992 respectively to encourage small businesses to contribute innovation to solve the nation's public policy challenges through federal research and development funding.[67] SBIR and STTR encourage domestic small businesses to engage in federal research/research and development (R/R&D) that has the potential for commercialization.[68] SBIR and STTR allow small businesses to profit from the commercialization of products developed through the program.[69] The SBIR and STTR programs have similar structures, but the STTR program requires the small business to collaborate with a research institution throughout the program.

Past reports and performance evaluations indicate the SBIR program generates positive outcomes for participants and the government. The Government Accountability Office (GAO) found that agencies were funding high quality and innovative proposals through the program; indicating positive returns on investment for the agencies involved.[70] An analysis of employment and sales growth among 1,435 companies over a 10-year span indicated that companies participating in SBIR programs across the U.S. government, particularly companies in the high-tech sector located in areas with high volumes

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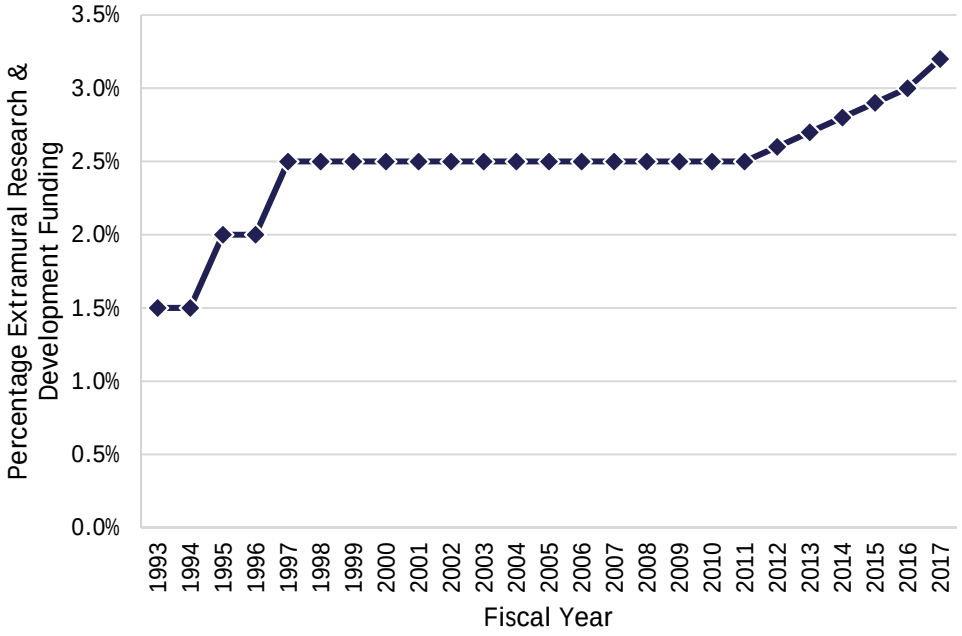
[65] Valerie Muck, United States Air Force Office of Small Business Programs, meeting with Section 809 Panel, September 22, 2017.
[66] The Section 809 Panel also identified the Comprehensive Subcontracting Test Program as potentially effecting small businesses' access to the defense market. The Section 809 Panel intends to research the program more extensively as part of its research on subcontracting separately from this report.
[67] David Metzger, *While the Nation Slept: The Struggle of Small Innovative Businesses in the U.S.* (Herndon, VA: Mascot Books, 2016), 180.
[68] DoD tends to view commercialization differently than most other agencies administering an SBIR program. DoD typically defines commercialization as a product being acquired by a DoD entity; most other agencies define commercialization as a product being marketed and sold outside the government market.
[69] "About SBIR," U.S. Small Business Administration, accessed August 4, 2017, https://www.sbir.gov/about/about-sbir#embedded_flash_111707621.
[70] U.S. General Accounting Office, *Federal Research: Effectiveness of Small Business Innovation Research Program Procedures,* accessed August 4, 2017, http://www.gao.gov/assets/150/145342.pdf.

of private venture capital investment, were more likely to receive venture capital investments and grow in size than those companies that did not participate in SBIR.[71]

SBIR also offers a rather direct connection between innovative technology companies and the acquisition community. A survey conducted by the National Research Council revealed SBIR allows participants "direct access to DoD acquisition officers and other staff without the need to work through a prime contractor."[72] Statutory requirements for DoD to increase technology transition from SBIR into programs of record encourage connections between program participants and the acquisition community.[73] Small companies offering niche capabilities that may not attract venture capital funding can leverage SBIR's resources and support to improve their products and find potential DoD customers.[74]

Figure 6-4. Minimum Expenditures Toward SBIR (By Fiscal Year)



[71] Josh Lerner, "The Government as Venture Capitalist: The Long-Run Impact of the SBIR Program," *The Journal of Business,* 72, no. 3, (1999): 285-318.
[72] Jacques Gansler, et al., *SBIR at the Department of Defense* (Washington, DC: The National Academies Press, 2014), 143-144.
[73] Goal for SBIR and STTR Technology Insertion, 15 U.S.C. § 638(y)(6).
[74] Jacques Gansler et al., *SBIR at the Department of Defense* (Washington, DC: The National Academies Press, 2014), 142.

SBIR's funding is currently set at 3.2 percent of DoD's extramural R&D funds.[75] The SBIR program has received incremental increases in its percentage allocation from DoD's extramural R&D funds since 2011.[76] STTR receives an allocation of just 0.45 percent of the extramural budget.[77] A study commissioned by the U.S. Air Force offers some insights into the SBIR and STTR programs' returns on investment. The study evaluated the economic effects of the U.S. Air Force's $4 billion investment into SBIR and STTR from 2000 to 2013, and indicated that the service's SBIR and STTR investments yielded $47.9 billion in economic output nationwide.[78] The benefits of the SBIR and STTR programs have led to calls for them to become permanent. Currently, the programs' reauthorization requires periodic renewal, with the risk of not being reauthorized.[79] Several experts in acquisition and small business innovation advocate for the permanent authorization of SBIR and STTR. Jacques Gansler, a scholar and former USD(AT&L), stated in a 2015 Senate Small Business Committee hearing that it is time for the programs to become permanent.[80] During this hearing, the committee asked other outside expert acquisition witnesses if there were any possible objections to making SBIR and STTR permanent; none were given.[81] Other small business and innovation experts have called for the programs to be improved and made permanent.[82]

Although the SBIR program is lauded as being successful, the program has some limitations. Of greatest concern to the Section 809 Panel is that the SBIR program lacks speed, agility, and flexibility. The program's processes are increasingly onerous.[83] Companies, program experts, and prior studies indicate the topics, time to Phase III, contracting process, and audits undermine the program's innovative potential.[84] Many companies struggle to transition to Phase III of DoD's SBIR program and see their technologies inserted into DoD programs of record.[85]

Numerous small companies shared concern about DoD's SBIR topics. Representatives from one San Diego-based company noted that the only SBIR topics for which their organization had received an award were the topics the company wrote themselves and provided to the DoD program managers for

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[75] Required Expenditure Amounts, 15 U.S.C. § 638(f)(1).
[76] Ibid.
[77] Given the relatively small size of the STTR program compared to SBIR, the Section 809 Panel put greater emphasis on researching opportunities to improve the SBIR program as a means to reduce barriers to entry for small businesses and better work with the small business community to support DoD's mission.
[78] United States Air Force, *The Air Force Impact to the Economy via SBIR/STTR*, accessed October 30, 2017, https://www.sbir.gov/sites/default/files/USAF%20SBIR-STTR%20Economic%20Impact%20Study%20FY2015.pdf.
[79] SBIR and STTR must be reauthorized by September 30, 2022 under Section 1834 of the FY 2017 NDAA.
[80] Jacques Gansler, *Acquisition Reform: Next Steps*, testimony before United States Senate Committee on Armed Services, December 1, 2015.
[81] Ibid.
[82] David Metzger, *While the Nation Slept: The Struggle of Small Innovative Businesses in the U.S.* (Herndon, VA: Mascot Books, 2016), 279-282.
[83] Small Business Technology Council, *Small Business Innovation Research (SBIR): Leveraging American Business Growth and Jobs, SBIR: Entrepreneur-Driven R&D to Support American Economic Revitalization*, 2017, accessed November 20, 2017, http://sbtc.org/wp-content/uploads/2017/01/SBTC-SBIR-White-Paper-2017.pdf.
[84] Jacques Gansler et al., *SBIR at the Department of Defense* (Washington, DC: The National Academies Press, 2014). For further information on SBIR topics and program phases, see "About SBIR," U.S. Small Business Administration, accessed November 30, 2017, https://www.sbir.gov/about/about-sbir#sbir-three-phase-program.
[85] Ibid, 220. The report notes improvements have been made in helping small companies reach Phase III, but also notes a number of ways in which DoD can improve Phase III transition.

inclusion in a broad agency announcement (BAA). Topics often are prescriptive, outlining specific requirements and thus creating barriers for innovative companies trying to participate in SBIR. Transitioning away from requirements-based topics to problem statements or theme-based topics may help alleviate this issue. The National Science Foundation (NSF) may serve as a model for such an approach. NSF's SBIR topics are thematic in nature; posting broad needs and interests encourages many companies with different capabilities and ideas to generate SBIR proposals.

Awarding a Phase I contract often takes at least a year.[86] The speed at which technologies mature in DoD's SBIR program simply does not happen quickly enough; DoD SBIR technologies take 8 to 12 years to reach commercialization.[87] The rate of technological advancement far outpaces the speed of DoD's SBIR program, potentially causing DoD to acquire already outdated or suboptimal technologies through SBIR Phase III.[88] Other agencies have struggled with lack of speed in the SBIR program in the past, and have found success in accelerating their programs through rather modest initiatives. For example, the NSF adopted the Lean LaunchPad methodology[89] for its Innovation Corps (I-Corps) program. In an effort to improve the pace and effect of its SBIR program, NSF also established an I-Corps boot camp program that exposes all SBIR grantees and their program officers to the Lean LaunchPad process.[90]

A master release schedule, which SBA manages,[91] determines when DoD can make SBIR awards.[92] This approach constrains DoD from awarding SBIR contracts in response to unsolicited proposals. DoD also awards all of its SBIR funds using contracts. Federal regulations require that DoD grants officers make a determination as to whether the proposed activity is for a *public purpose* or is in support of DoD's mission.[93] The SBIR program supports research that meets both criteria and could be grant funded. Even though other federal agencies fund SBIR projects through grants, as well as contracts, current regulations that apply only to DoD restrict DoD's options for funding companies' innovation- and research-related efforts through SBIR.

Relative to grant and cooperative agreement funding, FAR-based contracts are more complex, and SBIR participants and DoD officials have difficulty with contracting and FAR-based requirements

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[86] David Sikora, Acting DoD SBIR/STTR Program Administrator, meeting with Section 809 Panel, May 4, 2017.
[87] Ibid.
[88] Ample research exists demonstrating the rate of technological change happens exponentially. For example, Moore's Law projected that computing power would double approximately every 2 years (see: Gordon E. Moore, "Cramming More Components onto Integrated Circuits," *Electronics*, April 19, 1965). Ray Kurzweil's Law of Accelerating Returns further indicates technological change happens exponentially, and the rate of technological advancement is consistently increasing (see Ray Kurzweil, *The Law of Accelerating Returns,* accessed August 4, 2017, http://www.kurzweilai.net/the-law-of-accelerating-returns).
[89] The Lean Launchpad methodology, pioneered by Steve Blank, consists of three elements: (1) Companies or organizations develop a one-page business or mission model canvas, which outlines core assumptions and hypotheses about a product to be developed and its end-users; (2) Companies or organizations gather data from potential end-users to ensure the product to be developed is solving actionable problems, rather than meeting prescriptive requirements; and (3) Agile development of the product allows for incremental testing and iterative feedback by and from the anticipated end-users.
[90] Errol Arkilic, former Innovation Corps Program Director, phone call with Section 809 Panel, June 28, 2017.
[91] Assistance to Small-Business Concerns, 15 U.S.C. § 638(b)(5).
[92] David Sikora, Acting DoD SBIR/STTR Program Administrator, meeting with Section 809 Panel, May 4, 2017.
[93] Distinguishing Assistance from Procurement, 32 CFR § 22.205.

applicable to the SBIR program.[94] Small businesses also struggle to overcome the delays and costs inherent in DoD's contracting process and acquisition regulations,[95] which introduces difficulties and delays that can otherwise be avoided.[96] At a 2016 hearing on the SBIR program, a Navy senior official testified,

> *Our challenge…[is] the FAR and DFAR. When my SBIR companies have to comply with the same regulations, procedures, and processes that we expect of our defense primes, it is very difficult if it is two people in a garage.*[97]

Leveraging grants and cooperative agreements for Phases I and II, as is done by other SBIR administering agencies, could offer benefits in terms of speed and program flexibility. Grants and cooperative agreements require less preaward effort than contracts and facilitate awarding contracts faster.

By statute, companies can receive only one additional Phase II SBIR award for a given project, which further limits the flexibility of SBIR to support small companies and promote innovation.[98] New companies that may have more innovative, high-quality proposals, but also are in need of more capital to bridge the *valley of death*[99] are restricted to the same number of Phase II awards for a project as companies with prior SBIR experience. This situation limits DoD's ability to lend greater support to small businesses new to SBIR compared to companies that already understand SBIR and likely have greater knowledge of how to successfully commercialize their technologies.

Another challenge for small companies is the required audit of the firm's accounting systems and procedures. DCAA performs this function for DoD SBIR participants. According to DCAA, SBIR small businesses potentially are subject to two audits: a preaward audit of the financial system and a postaward audit of the contract.[100] During a roundtable held by the Section 809 Panel, Army contracting officers identified the requirements for DCAA audits and the onerous contracting process as a substantial impediment to SBIR participants.[101] Audit compliance, (see Section 2), is often burdensome and costly, especially for small businesses. DoD is by far the largest SBIR agency in terms of dollars and has the highest number of awardees. DCAA conducts many audits each year, especially if the awardees are new. Delays and backlogs can range from 6 months to more than a year.[102] These

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[94] National Research Council, Charles Wessner, ed., *Committee for Capitalizing on Science, Technology, and Innovation: An Assessment of the Small Business Innovation Research Program* (Washington, DC: National Academies Press, 2009), 25, 194, 201, 210.
[95] Ibid, 20.
[96] Ibid, 201.
[97] Robert Smith, *Commercializing on Innovation: Reauthorizing the Small Business Innovation Research and Small Business Technology Transfer Program*, testimony before United States House of Representatives Committee on Small Business, March 2, 2016.
[98] Express Authority for Awarding a Sequential Phase II Award, 15 U.S.C. § 638(ff)(1).
[99] The *valley of death* is a commonly used term in the technology and start-up industries. The term refers to the period of time between when a company first receives money to support research and development, to when the product becomes commercialized and generates steady revenue.
[100] Defense Contract Audit Agency, *Resource Guide for the Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR) Programs*, accessed August 4, 2017, http://www.acq.osd.mil/osbp/sbir/sb/resources/index.shtml.
[101] U.S. Army contracting officers, meeting with the Section 809 Panel, November 2016.
[102] National Research Council, Charles Wessner, ed., *Committee for Capitalizing on Science, Technology, and Innovation: An Assessment of the Small Business Innovation Research Program* (Washington, DC: National Academies Press, 2009), 201.

timelines, although normal for larger contractors, can introduce additional cost and risk analysis on potential SBIR firms.

Efforts to improve commercialization rates and processes date back to 1992;[103] nevertheless, problems remain. Federal agencies are required by statute to issue Phase III (commercialization) awards "to the greatest extent practicable."[104] Research indicates there is uneven emphasis on Phase III awards across DoD, with the Navy being a notable exception, accounting for 70 percent of all DoD Phase III awards.[105] Due to inadequate resources dedicated to Phase III, DoD struggles to help SBIR companies reach commercialization.[106] Given that Phase III resources are limited, and that the program receives funds by taking money from extramural R&D accounts, managers often view SBIR as a tax on their programs.[107] The fact that SBIR does not factor prominently in acquisition strategies and programs may also inhibit commercialization. The only reference to SBIR in DoDI 5000.02 is a single bullet point requiring program managers to "establish goals" for applying SBIR technologies in programs of record.[108]

Rapid Innovation Fund

The RIF was created in 2011.[109] In FY 2016, the program was appropriated $250 million.[110] DoD OSBP and ASD(R&E) Emerging Capability and Prototyping (EC&P) manage the RIF program jointly with funding administered by OSBP.[111] After appropriations, Congress disburses program funds to DoD OSBP, which allocates a portion of the RIF funds to each of the Military Services and retains a portion used for projects proposed by the Defense Agencies and Combatant Commands.[112] The Services select and manage their RIF projects, and OSBP and EC&P jointly select projects that defense agencies and combatant commands manage.[113] OSBP, as the program element manager, funds all RIF projects.[114]

RIF awards cannot exceed $3 million.[115] For RIF, BAAs solicit white papers and initiate a competitive selection process.[116] Small businesses receive preference; as of FY 2016, 88 percent of all RIF awards

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[103] Jacques Gansler, et al., *SBIR at the Department of Defense* (Washington, DC: The National Academies Press, 2014), 96-97.
[104] Phase III Awards, 15 U.S.C. § 638(r)(4).
[105] National Research Council, Charles Wessner, ed., *Committee for Capitalizing on Science, Technology, and Innovation: An Assessment of the Small Business Innovation Research Program* (Washington, DC: National Academies Press, 2009), 29.
[106] Jacques Gansler et al., *SBIR at the Department of Defense* (Washington, DC: The National Academies Press, 2014), 167.
[107] David Sikora, Acting DoD SBIR/STTR Program Administrator, meeting with Section 809 Panel, May 4, 2017. Jacques Gansler et al., *SBIR at the Department of Defense* (Washington, DC: The National Academies Press, 2014), 167, 211, 221.
[108] Operation of the Defense Acquisition System, DoDI 5000.02, Enclosure 1, 48 (2015).
[109] FY 2011 NDAA, Pub. L. No. 111-383, 124 Stat. 4137 (2011).
[110] Ellen Purdy and Ted Bujewski, *Rapid Innovation Fund (RIF): Program Overview*, accessed August 4, 2017, http://business.defense.gov/Portals/57/Documents/RIF_Overview-Feb2017.pdf.
[111] Ted Bujewski, DoD Office of Small Business Programs, email to Section 809 Panel, October 12, 2017.
[112] Ibid.
[113] Ibid. Memorandum from Office of the Undersecretary of Defense, Acquisition, Technology, and Logistics, *Announcement of Implementation Guidelines and Use of Technology Transition Best Practices for Components Planning to Participate in the Rapid Innovation Fund (RIF) Program for Fiscal Year 2017,* April 11, 2017.
[114] Ibid.
[115] Science and technology programs to be conducted so as to foster the transition of science and technology to higher levels of research, development, test, and evaluation, 10 U.S.C. § 2359.
[116] Ellen Purdy and Ted Bujewski, *Rapid Innovation Fund (RIF): Program Overview*, accessed August 4, 2017, http://business.defense.gov/Portals/57/Documents/RIF_Overview-Feb2017.pdf.

have gone to small businesses.[117] A large business can receive a RIF award if a small business cannot produce a mature prototype.[118]

RIF is a useful tool for enabling acquisition and integration of innovative capabilities developed by small businesses. For example, RIF provides fiscal resources to help DoD transition SBIR technologies from Phase II into Phase III; approximately 60 percent of RIF technologies are developed through SBIR.[119] RIF, however, is constrained by inflexibility. The program only posts BAAs once per year on FedBizOpps, the main source for businesses to find opportunities to contract with the federal government. Because the statute requires a competitive selection process for RIF awards,[120] unsolicited proposals for technologies may not receive a RIF contract outside the BAA cycle. It is unclear whether the SBIR process qualifies as a competitive process for RIF awards,[121] despite the statute allowing sole source Phase III awards for SBIR technologies.[122]

Survey feedback, as reported by DoD's OSBP, indicated more than 90 percent of RIF awardees stated that RIF helped their businesses, and 57 percent reported RIF succeeded in helping transition technology.[123] Given requirements to compete RIF awards, however, the process is slower than intended. One small company shared with the Section 809 Panel that it took nearly 2 years from a white paper through the proposal process to get on a RIF contract, concluding, "The Rapid Innovation Fund wasn't rapid at all."[124] A 2015 U.S. GAO report expressed similar concerns and indicated the process for awarding RIF contracts takes approximately 18 months.[125] The program's speed suffers, at least in part, from lack of dedicated contracting offices and infrastructure.[126] Executing a RIF contract, especially for organizations like combatant commands and defense agencies without contracting offices of their own, typically requires searching for a contracting office with the bandwidth and willingness to take on the work.[127]

The $3 million cap on RIF project funding (unless the Secretary of Defense or the Secretary's designee approves greater funding)[128] does not ensure the program can help small companies navigate past the *valley of death* and transition their technologies into programs of record. The same company that

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[117] Ibid.
[118] Ted Bujewski, DoD Office of Small Business Programs, meeting with Section 809 Panel, May 19, 2017.
[119] Ibid.
[120] Science and technology programs to be conducted so as to foster the transition of science and technology to higher levels of research, development, test, and evaluation, 10 U.S.C. § 2359.
[121] Ibid.
[122] Ibid.
[123] Ellen Purdy and Ted Bujewski, *Rapid Innovation Fund (RIF): Program Overview*, accessed August 4, 2017, http://business.defense.gov/Portals/57/Documents/RIF_Overview-Feb2017.pdf.
[124] Eric Patten, Ocean Aero, presentation to Section 809 Panel, June 21, 2017.
[125] GAO, *DoD Rapid Innovation Program: Some Technologies Have Transitioned to Military Users, but Steps Can Be Taken to Improve Program Metric and Outcome,* accessed August 5, 2017, http://www.gao.gov/assets/680/670090.pdf.
[126] Ted Bujewski, DoD Office of Small Business Programs, phone call with Section 809 Panel staff, September 29, 2017.
[127] Ibid.
[128] Science and technology programs to be conducted so as to foster the transition of science and technology to higher levels of research, development, test, and evaluation, 10 U.S.C. § 2359.

pointed to slowness in the program indicated $3 million is insufficient to develop the contracted platform. As a result, the company is taking a loss on the project.[129]

Mentor–Protégé Program

The Mentor–Protégé Program facilitates partnerships between small and large businesses, with the goal of leveraging large businesses' resources and expertise to help small companies win defense contracts and promote technology transfer.[130] DoD is not the only agency to administer a mentor–protégé program (although DoD's program is agency-specific, whereas other such programs across the federal government fall under the SBA's purview).[131]

Small business protégés with which the Section 809 Panel spoke, indicated that mentors occasionally pressure small business protégés to transfer their rights to intellectual property to the mentors. Because neither DoD nor SBA has tangible data on the program, however, the Section 809 Panel did not identify any compelling findings on the program's efficacy. Based on interviews with DoD's OSBP, efforts are underway to change the Mentor-Protégé Program's data collection and reporting requirements.[132]

Consortia and Accelerators

Consortia and accelerators (referred to as consortia here) are effective resources for DoD to access small business innovations and technologies. Consortia pool companies with specific technical capabilities and service offerings, effectively building a community of companies that can collaborate and compete with one another to deliver better products and services to DoD. Such organizations can tap into their communities to help connect small businesses with DoD, especially organizations executing other transaction authorities (OTAs) for R&D and prototyping, allowing DoD to quickly make awards to small businesses offering innovative capabilities and technologies.[133]

For instance, NSTXL helps small businesses pursue, win, and receive awards via OTAs within 80 to 100 days.[134] DIUx employs a similar approach to getting companies awards via OTAs.[135] The speed at which consortia can help DoD administer OTAs to acquire innovative capabilities and technologies meets the needs of small companies for DoD acquisitions to move more quickly, and is an important tool for enhancing DoD's warfighting capabilities.

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[129] Eric Patten, Ocean Aero, presentation to Section 809 Panel, June 21, 2017.
[130] "Mentor-Protégé Program (MPP)," U.S. Department of Defense Office of Small Business Programs, accessed August 5, 2017, http://www.acq.osd.mil/osbp/sb/programs/mpp/. Robert Stewart, *DOD Mentor Protégé Program*, accessed August 5, 2017, http://www.acq.osd.mil/osbp/docs/DoD-MPP_FY16_SlideDeck-15DEC15.pdf.
[131] Robert J. Dilger and Kate M. Manuel, *Small Business-Protégé Programs,* accessed August 5, 2017, https://fas.org/sgp/crs/misc/R41722.pdf.
[132] Alice Williams, Acting Deputy Director of DoD Office of Small Business Programs, meeting with Section 809 Panel, May 4, 2017
[133] OTAs are established in 10 U.S.C. § 2371 and give DoD the authority to enter into agreements other than contracts, grants, or cooperative agreements. OTAs are not covered by the FAR, and are intended for use on basic, applied, advance research and prototyping projects. The Section 809 Panel found that OTAs are of increased interest to DoD and an important vehicle for companies to deliver innovative products and services to the Department. The Section 809 Panel continues to research OTAs and may offer findings and recommendations in a later report.
[134] Tim Greeff, NSTXL, presentation to Section 809 Panel, April 25, 2017.
[135] Michael Bold, *Speed Contracting,* accessed August 5, 2017, https://www.army.mil/article/178968/speed_contracting.

Consortium managers have no incentives to search for new technologies and recruit new members into the community. Consortium managers search for technologies within the consortia in response to a specific DoD requirement, but consortia managers do not typically provide technology-scouting support to DoD.[136] Because consortium managers may not proactively identify new technologies for DoD application, finding new technologies by way of consortium managers is not consistent and may cause innovative technologies to remain unknown to, or overlooked by, DoD.

Some stakeholders the Section 809 Panel met with expressed concern that leveraging consortia to execute OTAs is creating a pay-to-play system in which small companies looking to do business with DoD through OTAs must pay consortium membership fees.[137] The panel noted, however, that consortium membership fees often are minimal, no more than a few hundred dollars per year.[138] Absent alternative revenue sources, membership fees and transaction administration fees are necessary to fund consortium operations.[139] Although this funding approach may not present a substantial barrier today, the situation may require future consideration if fees become a major barrier for businesses looking to enter the defense market.

Conclusions

Small business policy objectives and programs, as executed today, do not emphasize promoting small businesses that directly enable DoD to better execute its missions. The pressures that DoD faces, and will increasingly face, to execute its mission necessitate a clear-minded focus on leveraging small businesses to maximize warfighting effectiveness. DoD should refocus its small business policies, programs, and practices to maximize warfighting capabilities and capacities. A number of issues need resolution for DoD to work more effectively with small businesses:

- Greater unity of effort is necessary to direct and align DoD's small business policy, programs, and strategy with DoD's mission. DoD lacks the infrastructure and connectivity between the small business community and industrial base policy to align small business programs with the DoD's strategic needs. Regardless of the ultimate outcome of the current reorganization, it is important to increase the connectedness of DASD(MIBP), OSBP, and PTAP to develop a complete view of the defense market, support innovative small businesses, and leverage small businesses to meet the DoD's mission-related needs.

- DoD must better support small businesses, and in doing so, it should prioritize working with innovative small businesses that can directly enhance mission capabilities. DoD needs to articulate a strategy and implementation policy for how it will leverage the innovative capacity and potential of the small business community to meet critical, mission-related needs. DoD's small business professionals at the field-level are not focused on finding innovative small companies with offerings that can enhance DoD's warfighting capabilities and capacities. DoD should repurpose its small business assets to find and connect innovative small businesses with contract opportunities supporting DoD's strategic needs.

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[136] Chris Van Metre, Advanced Technology International, phone call with Section 809 Panel, May 11, 2017.
[137] Meagan Metzger, Dcode42, presentation to the Section 809 Panel, April 25, 2017.
[138] Chris Van Metre, Advanced Technology International, phone call with Section 809 Panel, May 11, 2017.
[139] Ibid.

- Small businesses seeking entry into the defense market need better communication and clearer points of entry. Small companies require coaching, support, and feedback to enable their growth, development, and success in supporting DoD. PTAP could help address the need for greater and more effective communication with small businesses; however, PTAP is not exclusively DoD-focused, lacks sufficient resources, and struggles to reach small businesses that may be interested in the defense market. In addition to increasing small businesses' awareness of PTACs and PTACs' capacities to help small businesses across the country, DoD needs to align PTAC goals and operations with DoD's strategic needs and priorities. Open innovation centers like SOFWERX present another viable approach because they could offer a low-cost, yet effective method of attracting innovators into the defense market. DoD should use such centers more widely to provide entry points and host challenges (like those put on by both SOFWERX and NASA iTech) to leverage small, innovative companies to solve unique DoD problems. The mentor–protégé program also helps small businesses grow and mature. To allow for detailed reviews and studies of the program in the future, DoD should continue to improve data collection and reporting should continue.

- DoD should invest more heavily in SBIR and RIF, as both effectively leverage small businesses to further DoD's mission-related capabilities; however, both programs could benefit from greater speed and flexibility. DoD should factor SBIR technologies more explicitly into its acquisition strategies and plans. Greater speed, as well as the ability to disburse large awards under both programs, will help companies bridge the *valley of death* and successfully commercialize their products.

- Consortia and technology accelerators can help DoD gain greater awareness of emerging technologies and quickly connect small businesses to DoD customers. Consortia need to provide greater technology scouting support and services to DoD to maximize their effect. Consortium fees need to remain affordable for small companies to prevent emergence of additional barriers to entry into the defense market.

Implementation

Legislative Branch

- Enact a Defense Small Business Act, consolidating all statutes pertaining to DoD's small business programs under Title 10.

Executive Branch

- Introduce policy directing a refocus to working with small businesses to support and enhance DoD's warfighting capabilities and capacities.

Subrecommendation 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.

Legislative Branch

- Introduce a requirement for DoD to develop a small business strategy within 180 days of enactment, to include the following provisions:
  - Integration of small business into a holistic view of industry;
  - Alignment of DoD small business programs with agency mission; and
  - Clarifying points of entry into the defense market, including enabling and promoting the PTAP to facilitate small business entry into the defense market.
- Amend 10 U.S.C. § 2504 to require DoD to include the following in its annual report to Congress on the defense base:
  - An analysis of capabilities and emerging technologies relevant to DoD's warfighting mission across the small business community and among non-traditional partners.
  - How DoD will incorporate small business goals and strategies into the greater industrial base strategy.
  - How relevant offices are integrating small business activities into a greater industrial base strategy.
- Amend Chapter 142 of 10 U.S.C. to provide PTACs the flexibility and resources necessary to conduct greater outreach and provide greater support to small businesses by: increasing funding of PTACs to cover all operational costs up to a cap that is double what can currently be allocated to each individual PTAC and eliminating the requirement for PTACs to secure matching funds.
- Increase the annual appropriation made to the Procurement Technical Assistance Cooperative Agreement Program to no less than $68 million.
- Encourage small DoD contractors to grow and mature their capabilities by allowing small businesses that grow beyond their size thresholds to retain their status as a small business and/or 8(a) for 3 years unless a large company acquires the small businesses.

Executive Branch

- No Executive Branch changes are required.

Subrecommendation 21b: Build on the successes of the SBIR/STTR and RIF programs.

Legislative Branch

- Amend 15 U.S.C. § 638 to make SBIR and STTR permanent.
- Amend 10 U.S.C., in recognition of the success of the SBIR program, to increase DoD's percentage allocation of extramural R&D funds allocated to SBIR to 7 percent, phased in during 5 years.
- Amend 10 U.S.C. to authorize DoD SBIR Phase I awards of $500,000 and Phase II awards of $1.5 million.
- Amend 10 U.S.C. to allow explicitly the application of simplified acquisition procedures to SBIR Phases I and II, while ensuring SBIR intellectual property protections remain.
- Amend 10 U.S.C. to allow DoD to issue sole-source SBIR Phase I and Phase II awards outside the master release schedule and to nonconforming proposals, not requiring a Justification and Approval (J&A), and not subject to protest.
- Amend 10 U.S.C. to allow for DoD SBIR Phase II awards without regard for whether a small business received a Phase I award.
- Amend U.S.C. Title 10 to ensure small business concerns participating in the SBIR program for the first time may receive more than two Phase II awards.
- Amend U.S.C. Title 10 to allow for the use of grants, cooperative agreements, and other transaction authority for SBIR and STTR.
- Amend 10 U.S.C. § 2359 to explicitly allow SBIR and STTR technologies entering into Phase III to be eligible for sole-source RIF awards, not requiring a J&A, and not subject to protest.
- Increase the annual appropriation to RIF to $750 million.
- Amend 10 U.S.C. § 2359 to eliminate the $3 million spending cap per RIF award, and allow agencies to issue sole-source RIF awards to unsolicited proposals deemed critical for enhancing DoD's warfighting capabilities and capacities.

Executive Branch

- Update DoD policy on major weapons system programs to emphasize SBIR technologies as essential components of acquisition strategies and plans.
- Change DoD policy to disburse a share of RIF money to the defense agencies, USSOCOM, U.S. Transportation Command, and any Combatant Command granted contracting authority; give those entities the ability to select and manage RIF projects.

- Create a specific exemption for the SBIR and STTR programs within Title 32 CFR § 22.205, and exempt SBIR and STTR funding agreements from Title 32 CFR § 22.205b and § 34.18.

Subrecommendation 21c: Enable innovation in the acquisition system and among industry partners.

Legislative Branch

- Authorize through legislation a DoD Nontraditional Technology Partner Initiative to incentivize outreach and working with nontraditional partners through the following:
  - Awards (to include cash prizes) to DoD civilians and uniformed personnel for efforts to leverage nontraditional partners for the delivery and/or development of new technologies directly enhancing warfighting capabilities.
  - Cash or noncash awards to DoD contractors for the identification of and subcontracting with nontraditional partners offering new technologies to DoD.
  - Cash or noncash awards to consortia that successfully assist non-traditional partners in obtaining DoD contracts (to include other transactions) for the first time.
- Direct the establishment of a Defense Innovation Center Program, expanding the use of robust open innovation centers, like SOFWERX, across DoD, the Services, and organizations. Under the program, DoD should do the following:
  - Identify DoD components with sufficient public recognition under which open innovation centers can be established.
  - Budget for the establishment and operation of open innovation centers in regions enabling small, innovative companies to interact directly with DoD end-users and operators.
  - Give sponsoring organizations under which the centers are established authority and necessary resources to execute business arrangements, to include OTAs and grants, and host challenges.

Executive Branch

- No Executive Branch changes are required.

Note: Recommended draft legislative text and sections affected display and a draft policy memo can be found in the Implementation Details subsection at the end of Section 6.

Implications for Other Agencies

- Because SBA oversees governmentwide small business activities, changes to DoD's small business activities and programs may affect SBA's oversight of DoD's programs. Some recommendations made by the Section 809 Panel may require coordination between SBA and DoD to implement.

Section 6
Small Business

Implementation Details

Recommendation 21

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDERSECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
COMMANDERS OF THE COMBATANT COMMANDS
ASSISTANT SECRETARIES OF DEFENSE
NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM EVALUATION
DIRECTOR, OFFICE OF SMALL BUSINESS PROGRAMS
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Refocusing Small Business Activities to Enhance Warfighting Effectiveness and Readiness

On February 17, 2017, I announced my expressed intent to field a larger, more capable and more lethal Joint force. In furtherance of my Memorandum on Implementation Guidance for Budget Directives in the National Security Presidential Memorandum on Rebuilding the U.S. Armed Forces, I am directing the Department to refocus its small business activities to fully capitalize on the small business community's unique capabilities to deliver lethality to the U.S. Armed Forces and align the Department's small business activities to its strategic priorities to better meet warfighting needs.

The Department was the first agency following World War II to establish a requirement to have a program leveraging small businesses to meet its mission. The Department continues to rely on and emphasize working with the small business community, evidenced by great progress towards meeting our small business utilization goals. Small businesses provide innovative capabilities to the Department, and are essential to maintaining warfighting dominance in an increasingly contested global environment. It is therefore critical that we take further steps to more fully align our commitment to small businesses with the Department's mission.

I am directing the Deputy Secretary of Defense, in conjunction with the Chief Management Officer (CMO), Undersecretary of Defense for Acquisition & Sustainment (USD (A&S)) and the Undersecretary of Defense for Research & Engineering (USD (R&E)), to develop a strategic plan for my approval within three (3) months from the release of this memorandum. The strategic plan shall provide, at a minimum, ways to accomplish the following objectives:

- Conduct deeper industrial assessments and build market awareness. To maintain dominance and most effectively deter threats from State and non-State actors, the Department must increase its market awareness, including intelligence on existing and emerging capabilities available in the market. Given the pace of technological advancement and sometimes rapid emergence of new threats, industrial base analysis must occur continuously. The strategic plan will therefore articulate how to leverage small business and industrial base-related functions currently performed by the Office of Small Business Programs, Deputy Assistance Secretary of Defense for Manufacturing and Industrial Base Policy (DASD (MIBP)), and small business offices throughout the Department and Services to:

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- deepen annual industrial assessments currently required by Congress to increase awareness and understanding of existing and emerging capabilities and technologies across the market;
- determine areas of opportunity and risk in how the Department accesses innovation and developmental technologies across the small business community and among non-traditional partners;
- identify how small businesses and emerging technologies can be better leveraged to enhance the U.S. Armed Forces' warfighting capabilities; and
- share industrial assessments and market intelligence with program managers and widely across the acquisition community, to inform acquisition strategies and programs.

- Increase outreach to small businesses. Establish a coordinated program to reach out to small, innovative businesses, including those without prior experience working with the Department. The outreach shall be informed by the industrial assessments discussed above to target new technologies and capabilities, build relationships with potential suppliers, and ensure the Department's access to small business capabilities that enhance warfighting capabilities and readiness.

- Enhance points of entry into the defense market. Establish and effectively communicate a plan for creating clear points of entry for small businesses seeking to provide the Department and its components with products, services and solutions that enhance warfighting capabilities and readiness. Points of entry should consist of easily accessible information for all companies irrespective of their experience with and knowledge of the Department of Defense. Points of entry should provide companies with information on how to present and share their capabilities with the Department of Defense, and provide for regular opportunity to interact directly with potential end-users and the acquisition community. In support of this objective, the Procurement Technical Assistance Program (PTAP) shall be revitalized. In keeping with Congressional direction regarding the PTAP, management of the PTAP will be integrated with this strategic plan and realigned small business capabilities (discussed below). Procurement Technical Assistance Centers should therefore become a central and effective point of entry for small business.

- Repurpose the Department's small business resources. Working with the Services, establish a plan to repurpose and realign the Department's small business resources, including personnel, as necessary to support the aforementioned strategic objectives.

To ensure execution of the strategic plan, it will also be codified in policy, regulation, processes, and, if necessary, in our organizational structure. Therefore, in addition to development of this strategic plan, I am directing USD (A&S) and USD (R&E) to oversee changes to relevant regulations, policies, and directives to reflect process changes, roles, and responsibilities necessary to execute the strategy. USD (A&S) and USD (R&E) shall also work with the Services to ensure performance management systems and program evaluation metrics promote organizational alignment with the Department's focus on leveraging small businesses to enhance warfighting capabilities.

Furthermore, I am directing USD (A&S) and USD (R&E) to lead changes to Department acquisition policies to maximize use of the Small Business Innovation Research (SBIR) program, Small Business Technology Transfer (STTR) program, and Rapid Innovation Fund (RIF) in all acquisition plans. Policies shall be updated to promote the usage of the RIF to facilitate SBIR and STTR technologies' maturation and optimization, as well as integration into programs of record.

Section 809 Panel

LEGISLATIVE PROVISIONS — 809 PANEL RECOMMENDATIONS RELATING TO SMALL BUSINESS AND INNOVATION PROGRAMS

[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 below.]

TITLE IV—SMALL BUSINESS AND INNOVATION PROGRAMS

Sec. 401. Department of Defense small business strategy.
Sec. 402. Permanent Government-wide authority for Small Business Innovation Research Program and Small Business Technology Transfer Program.
Sec. 403. Enhancements to Department of Defense authorities relating to Small Business Innovation Research Program and Small Business Technology Transfer Program.
Sec. 404. Enhancements to Department of Defense research and development rapid innovation program.
Sec. 405. Authority for Department of Defense small business contractors to retain small business status for limited period.
Sec. 406. Enhancements to Procurement Technical Assistance Cooperative Agreement Program.
Sec. 407. Department of Defense nontraditional technology partner initiative.
Sec. 408. Department of Defense innovation centers program.
Sec. 409. Additional elements in annual report on defense technology and industrial base policy.
Sec. 410. Cross references to certain small business provisions applicable to Department of Defense.
Sec. 411. Codification of NDAA section on role of Directors of Small Business Programs in Department of Defense acquisition processes.
Sec. 412. Codification of NDAA section on Department of Defense test program for negotiation of comprehensive small business subcontracting plans.
Sec. 413. Codification of Mentor-Protégé program.
Sec. 414. Repeal of certain obsolete NDAA provisions.

SEC. 401. DEPARTMENT OF DEFENSE SMALL BUSINESS STRATEGY.

(a) NEW TITLE 10 CHAPTER.—Part IV of subtitle A of title 10, United States Code, is amended by striking chapter 133 and inserting the following new chapter:

"CHAPTER 132—DEPARTMENT OF DEFENSE SMALL BUSINESS PROGRAMS

"Subchapter
"I. General …….…….. 2231
"II. SBIR and STTR Programs ……...……..… 2235
"III. Mentor-Protégé Program …….…...……. 2238

"Subchapter I—General

"Sec.
"2231. Department of Defense small business strategy.
"2231a. References to Directors and Offices of Small Business Programs.
"2232. References to certain programs provided in Small Business Act.
"2233. Department of Defense small business contractors: retention of small business status for limited period to complete contracts.
"2234. Role of the Directors of Small Business Programs in acquisition processes of the Department of Defense.
"2234a. Program for negotiation of comprehensive small business subcontracting plans.

"§ 2231. Department of Defense small business strategy

"(a) IN GENERAL.—The Secretary of Defense shall implement a small business strategy for the Department of Defense.

"(b) UNIFIED MANAGEMENT STRUCTURE.—As part of the Department of Defense small business strategy, the Secretary shall ensure that there is a unified management structure within the Department for the functions of the Department relating to—

"(1) small business programs;

"(2) manufacturing and industrial base policy; and

"(3) the Procurement Technical Assistance Program under chapter 142 of this title.

"(c) PURPOSE OF SMALL BUSINESS PROGRAMS IN DOD.—As part of the Department of Defense small business strategy, the Secretary shall ensure that Department of Defense small business activities and programs are carried out so as to further national defense programs and priorities and the statements of purpose for Department of Defense acquisition set forth in section 801 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91).

"(d) POINTS OF ENTRY INTO DEFENSE MARKET.—As part of the Department of Defense small business strategy, the Secretary shall ensure—

"(1) that points of entry for small business firms into opportunities for contracting with the Department of Defense are identified clearly and are provided in a form that allows convenient and universal user access; and

"(2) that small business firms are able to have access to end-item users, operators, program managers, and contracting officers to the extent necessary to inform them of emerging and existing capabilities.

"(e) ENHANCED OUTREACH UNDER PROCUREMENT TECHNICAL ASSISTANCE PROGRAM MARKET.—As part of the Department of Defense small business strategy, the Secretary shall enable and promote activities to provide coordinated outreach to small business concerns through the Procurement Technical Assistance Program under chapter 142 of this title to facilitate small business contracting with the Department of Defense.".

(b) IMPLEMENTATION.—

(1) DEADLINE.—The Secretary of Defense shall develop the small business strategy required by section 2231 of title 10, United States Code, as added by subsection (a), not later than 180 days after the date of the enactment of this Act.

(2) NOTICE TO CONGRESS AND PUBLICATION.—Upon completion of the defense small business strategy pursuant to paragraph (1), the Secretary shall–

(A) transmit the strategy to Congress; and

(B) publish the strategy on a public website of the Department of Defense.

(c) CLERICAL AMENDMENTS.—The tables of chapters at the beginning of subtitle A of title 10, United States Code, and at the beginning of part IV of such subtitle, are

amended by striking the item relating to chapter 133 and inserting the following new item:

"132. Department of Defense Small Business Programs …….…..……. 2231".

SEC. 402. PERMANENT GOVERNMENT-WIDE AUTHORITY FOR SMALL BUSINESS INNOVATION RESEARCH PROGRAM AND SMALL BUSINESS TECHNOLOGY TRANSFER PROGRAM.

(a) PERMANENT AUTHORITY FOR SBIR PROGRAM.—Section 9 of the Small Business Act (15 U.S.C. 638) is amended by striking subsection (m).

(b) PERMANENT AUTHORITY FOR STTR PROGRAM.—Subsection (n)(1) of such section is amended—

(1) by striking "With respect to each fiscal year through fiscal year 2022, each Federal agency" and inserting "Each Federal agency"; and

(2) by striking "for that fiscal year" and inserting "for any fiscal year".

(c) TECHNICAL AMENDMENT TO DELETE PROVISION REDUNDANT WITH CURRENT SUBSECTION (s).—Such section is further amended by striking subsection (oo).

SEC. 403. ENHANCEMENTS TO DEPARTMENT OF DEFENSE AUTHORITIES RELATING TO SMALL BUSINESS INNOVATION RESEARCH PROGRAM AND SMALL BUSINESS TECHNOLOGY TRANSFER PROGRAM.

Chapter 132 of title 10, United States Code, as added by section 401(a), is amended by adding at the end the following new subchapter:

"Subchapter II—SBIR and STTR Programs

"Sec.
"2235. Definitions.
"2235a. SBIR Program: required percentage of extramural research and development funds.

"2235b. SBIR and STTR Programs: use of grants, cooperative agreements, and other transaction authority; use of simplified acquisition procedures.
"2235c. SBIR Program: maximum award amounts.
"2235d. SBIR Program: sole-source awards.
"2235e. SBIR Program: authority for Phase II awards without Phase I awards.
"2235f. SBIR Program: additional Phase II awards for projects of critical importance.

"§2235. Definitions

"In this subchapter:

"(1) SBIR PROGRAM.—The term 'SBIR Program' has the meaning given the term 'Small Business Innovation Research Program' in section 2500(11) of this title.

"(2) STTR PROGRAM.—The term 'STTR Program' has the meaning given the term 'Small Business Technology Transfer Program' in section 2500(12) of this title.

"§2235a. SBIR Program: required percentage of extramural research and development funds

"The percentage applicable to the Department of Defense under section 9(f)(1) of the Small Business Act (15 U.S.C. 638(f)(1)) for any fiscal year beginning after the date of the enactment of this section is as follows (in lieu of the percentage specified in that section):

"(1) For the first fiscal year beginning after the date of the enactment of this section, 3.9 percent.

"(2) For the second fiscal year beginning after the date of the enactment of this section, 4.6 percent.

"(3) For the third fiscal year beginning after the date of the enactment of this section, 5.4 percent.

"(4) For the fourth fiscal year beginning after the date of the enactment of this section, 6.2 percent.

"(5) For the fifth fiscal year beginning after the date of the enactment of this section and each fiscal year thereafter, 7.0 percent.

"§2235b. SBIR and STTR Programs: use of grants, cooperative agreements, and other transaction authority; use of simplified acquisition procedures

"(a) USE OF GRANTS, COOPERATIVE AGREEMENTS, AND OTHER TRANSACTION AUTHORITY.—The Secretary of Defense shall provide that grants, cooperative agreements, and other transactions authorized under section 2371 of this title may be used in carrying out the SBIR Program and the STTR Program within the Department of Defense.

"(b) USE OF SIMPLIFIED ACQUISITION PROCEDURES FOR CONTRACTS IN AMOUNTS GREATER THAN SIMPLIFIED ACQUISITION THRESHOLD.—

"(1) AUTHORITY TO USE SIMPLIFIED ACQUISITION PROCEDURES.—In carrying out the SBIR Program and the STTR Program within the Department of Defense, the Secretary of Defense may use simplified acquisition procedures for a contract under such program without regard to the amount of the contract.

"(2) INAPPLICABLE LAWS.—Section 2302a(b) of this title, and any other provision of law for which the applicability of the provision depends on whether the amount of a contract is not greater than the simplified acquisition threshold, shall apply to a contract for which the Secretary uses simplified acquisition procedures by reason of the authority under paragraph (1) in the same manner as

if the amount of the contract were not greater than the simplified acquisition threshold.

"(3) INTELLECTUAL PROPERTY RIGHTS.—In carrying out paragraph (1), the Secretary shall ensure that the applicability of the provisions of the Small Business Act providing for the determination of the respective rights of the United States and the small business concern with respect to intellectual property rights, and with respect to any right to carry out follow-on research, under a funding agreement under the SBIR Program or the STTR Program is not affected by the use of simplified acquisition procedures.

"(4) DEFINITIONS.—In this subsection:

"(A) The term 'simplified acquisition procedures' means the simplified acquisition procedures described in section 2302b of this title.

"(B) The term 'simplified acquisition threshold' has the meaning given that term in section 134 of title 41.

"§2235c. SBIR Program: maximum award amounts

"(a) MAXIMUM AMOUNTS.—For purposes of the SBIR Program, the amounts in effect under section 9(j)(2)(D) of the Small Business Act (15 U.S.C. 638(j)(2)(D)) as the amounts generally established for awards for Phase I, and for Phase II, of an SBIR program shall, for the Department of Defense, be considered to be—

"(1) for Phase I awards, the amount of $500,000, as adjusted pursuant to subsection (b); and

"(2) for Phase II awards, the amount of $1,500,000, as adjusted pursuant to subsection (b).

"(b) ANNUAL ADJUSTMENT FOR INFLATION.—The Secretary of Defense shall adjust the amounts in effect under subsection (a) every year for inflation.

"§2235d. SBIR Program: sole-source awards

"(a) AUTHORITY.—In carrying out the SBIR Program in the Department of Defense, the Secretary of Defense may make an SBIR Phase I or Phase II award on a sole-source basis in response to an unsolicited proposal that was submitted outside the Department's solicitation schedule, and outside the master release schedule prepared by the Administrator of the Small Business Administration under section 9(b)(5) of the Small Business Act (15 U.S.C. 638(b0(5)), in order for the Department to invest rapidly in an innovative technology or solution that may not have been contemplated in relevant solicitations. When such a sole-source award is made, the Secretary may also make a follow-on SBIR Phase III award on a sole-source basis.

"(b) OTHER PROVISIONS OF LAW.—

"(1) INAPPLICABILITY OF LAWS REQUIRING USE OF COMPETITIVE PROCEDURES.—This section applies without regard to section 9(s) of the Small Business Act (15 U.S.C. 638(s)) or any other provision of law that otherwise requires the use of competitive procedures.

"(2) INAPPLICABILITY OF CERTAIN OTHER PROCEDURES.—An award may be made on a sole-source basis under this section without regard to any otherwise applicable requirement relating to justification and approval of the decision to make the award on a sole-source basis, and such an award under this section is not subject to any protest process.

"§2235e. SBIR Program: authority for Phase II awards without Phase I awards

"(a) INAPPLICABILITY OF TIME LIMIT UNDER SMALL BUSINESS ACT.—Subsection (cc) of section 9 of the Small Business Act (15 U.S.C. 638), relating to authority for the provision of a Phase II SBIR award to a small business concern for a project without regard to whether the small business concern was provided a Phase I SBIR award for the project, shall apply to the Department of Defense without regard to any limitation on the period of applicability of authority under that subsection that is otherwise in effect.

"(b) INAPPLICABILITY OF CERTAIN PROCEDURES.—A Phase II SBIR award may be made by the Department of Defense as authorized by section 9(cc) of the Small Business Act (15 U.S.C. 638(cc)) and subsection (a) of this section without regard to any otherwise applicable requirement relating to justification and approval of the decision to make the award, and such an award is not subject to any protest process.

"§2235f. SBIR Program: additional Phase II awards for projects of critical importance

"(a) AUTHORITY.—In carrying out the SBIR Program in the Department of Defense, in the case of a project for which the Secretary of Defense makes an additional Phase II SBIR award for continued work on the project under the authority of section 9(ff)(1) of the Small Business Act (15 U.S.C. 638(ff)(1)), the Secretary may subsequently make additional Phase II SBIR awards for the project if—

"(1) the small business concern developing the project is participating in the SBIR Program for the first time; and

"(2) the project is described in subsection (b),

"(b) COVERED PROJECTS.—A project described in this subsection is a project that is determined by the Secretary of Defense—

"(1) to be of critical importance to the national security; and

"(2) to have the potential to transition to SBIR Phase III.

(c) PUBLICATION OF DETERMINATION.—Any determination by the Secretary under subsection (b) shall be published on a publicly available website of the Department of Defense except to the extent that the determination includes classified information.".

SEC. 404. ENHANCEMENTS TO DEPARTMENT OF DEFENSE RESEARCH AND DEVELOPMENT RAPID INNOVATION PROGRAM.

(a) AUTHORITY FOR SBIR AND STTR TECHNOLOGIES ENTERING PHASE III TO BE ELIGIBLE FOR SOLE-SOURCE AWARDS.—Section 1073 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383; 10 U.S.C. 2359 note) is amended—

(1) in subsection (a), by inserting "and Small Business Technology Transfer Program" after "Small Business Innovation Research Program"; and

(2) in subsection (b)(6)—

(A) by inserting "(A)" after "(6)"; and

(B) by adding at the end the following new subparagraph:

"(B)(i) Use of selection procedures under the Small Business Innovation Research Program or the Small Business Technology Transfer Program shall be considered to be use of merit-based selection procedures for purposes of this paragraph, and, to accelerate the fielding of technologies developed pursuant to a phase II project under the Small Business Innovation Research Program or the Small Business Technology Transfer Program, the Secretary may authorize the selection of a proposal for Phase III funding under the program on a sole-source

basis (and without regard to any requirement for a broad agency announcement or use of other competitive procedures).

"(ii) An award may be made on a sole-source basis under this subparagraph without regard to any otherwise applicable requirement relating to justification and approval of the decision to make the award on a sole-source basis, and such an award is not subject to any protest process.".

(b) AUTHORITY FOR SOLE-SOURCE AWARDS FOR CERTAIN UNSOLICITED PROPOSALS.—Subsection (b) of such section is further amended by adding at the end the following new paragraph:

"(7) The Secretary may provide that, in the case of an unsolicited proposal for a technology that the Secretary determines would meet a critical need for enhancement of warfighting capabilities, funding may be provided for the proposal under the program on a sole-source basis (and without regard to any requirement for a broad agency announcement or use of other competitive procedures).'

(c) REPEAL OF LIMITATION RELATING TO AMOUNT OF FUNDS THAT MAY BE AWARDED TO ANY PROJECT.—Subsection (b) of such section is further amended by striking paragraph (3).

SEC. 405. AUTHORITY FOR DEPARTMENT OF DEFENSE SMALL BUSINESS CONTRACTORS TO RETAIN SMALL BUSINESS STATUS FOR LIMITED PERIOD.

Subchapter I of chapter 132 of title 10, United States Code, as added by section 401(a), is amended by inserting after section 2231 the following new section:

"§ 2233. Department of Defense small business contractors: retention of small business status for limited period to complete contracts

"(a) APPLICABILITY.—This section applies to a business concern (in this section referred to as a 'covered small business concern') that is a small business concern and is a party to a contract with the Department of Defense or to a subcontract (at any tier) under a contract with the Department of Defense.

"(b) RETENTION OF STATUS AS SMALL BUSINESS CONCERN FOR LIMITED PERIOD.—A small business concern that grows beyond a small business size standard while it is a covered small business concern shall, for the purpose of any later award of a contract (or subcontract) referred to in subsection (a), retain its status as a small business concern during the three-year period beginning on the date as of which the business concern grew beyond a small business size standard.

"(c) TERMINATION.—Subsection (b) shall cease to apply to a covered small business concern upon the acquisition of that business concern by another business concern, unless the acquiring business concern is a small business concern and the resulting entity is itself a small business concern.

"(d) DEFINITIONS.—In this section:

"(1) The term 'small business concern' means a business concern that is a small business concern under section 3 of the Small Business Act (15 U.S.C. 632).

"(2) The term 'small business size standard' means a size standard applicable to the determination of whether a business concern is a small business concern.".

SEC. 406. ENHANCEMENTS TO PROCUREMENT TECHNICAL ASSISTANCE COOPERATIVE AGREEMENT PROGRAM.

(a) MAXIMUM ANNUAL AMOUNT OF ASSISTANCE.—

(1) PROGRAMS OPERATED ON A STATEWIDE BASIS.—Subsection (a)(1) of section 2414 of title 10, United States Code, is amended by striking "$750,000" and inserting "$1,500,000".

(2) PROGRAMS OPERATED ON A LESS THAN A STATEWIDE BASIS.—Subsection (a)(2) of such section is amended by striking "$450,000" and inserting "$900,000".

(3) PROGRAMS OPERATED BY ELIGIBLE TRIBAL ORGANIZATIONS.—

(A) Subsection (a)(3) of such section is amended by striking "$300,000" and inserting "$600,000".

(B) Subsection (a)(4) of such section is amended by striking "$750,000" and inserting "$1,550,000".

(b) REPEAL OF MATCHING FUNDS REQUIREMENT.—Section 2413(b) of such title is amended—

(1) by striking "agreement, the eligible" and inserting "agreement—

"(1) the eligible";

(2) by striking "entities and the Secretary" and inserting "entities; and

"(2) the Secretary";

(3) by striking "defray not more than 65 percent of" and all that follows and inserting "furnish to the eligible entity the full cost of the assistance furnished

by the eligible entity under such programs, subject to the applicable annual limitation under section 2414(a) of this title.”.

SEC. 407. DEPARTMENT OF DEFENSE NONTRADITIONAL TECHNOLOGY PARTNER INITIATIVE.

(a) PROGRAM.—Subchapter II of chapter 148 of title 10, United States Code, is amended by adding at the end the following new section:

“§2509. Nontraditional technology partner initiative

“(a) PROGRAM.—The Secretary of Defense shall carry out a program to provide incentives for Department of Defense acquisition personnel and for Department of Defense contractors (and consortia of such contractors) to increase efforts to provide outreach to, and to contract with, technology firms that are nontraditional defense contractors. The program shall focus on technology firms with capacity for the development or delivery of new technologies directly enhancing warfighting capabilities.

“(b) INCENTIVES.—Incentives under the program may include the following:

“(1) Awards (including payment of cash prizes) to Department of Defense civilian employees and members of the armed forces for identifying, and entering into contracts, grants, and other transactions section under section 2371 of this title with nontraditional defense contractors for the development or delivery of new technologies directly enhancing warfighting capabilities.

“(2) Awards (including payment of cash prizes) to Department of Defense contractors for the identification of, and subcontracting with, nontraditional defense contractors offering new technologies to the Department of Defense that directly enhance warfighting capabilities.

"(3) Awards (including payment of cash prizes) to consortia which successfully assist nontraditional defense contractor in obtaining Department of Defense contracts, grants, and other transactions for the first time.

"(c) DEFINITION.—In this section, the term 'nontraditional defense contractor' has the meaning given that term in section 2302(9) of this title.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by adding at the end the following new item:

"2509. Nontraditional technology partner initiative.".

SEC. 408. DEPARTMENT OF DEFENSE INNOVATION CENTERS PROGRAM.

(a) PROGRAM.—Subchapter II of chapter 148 of title 10, United States Code, is amended by adding after section 2509, as added by section 406, the following new section:

"§2510. Defense Innovation Centers Program

"(a) USE OF OPEN INNOVATION CENTERS.—The Secretary of Defense shall carry out a program, to be known as the Defense Innovation Centers Program, to expand the use of robust open innovation centers across the Department of Defense (including within the military departments, appropriate Defense Agencies and Department of Defense Field Activities, and the combatant commands that have acquisition authority).

"(b) PROGRAM ACTIVITIES.—Under the program, Secretary shall—

"(1) identify Department of Defense components with sufficient public recognition under which an open innovation center may be established;

"(2) budget for the establishment and operation of open innovation centers in regions enabling small, innovative companies to interact directly with potential Department of Defense end-users and operators; and

"(3) provide any sponsoring organization under which such a center is established with authority and necessary resources to execute business arrangements, including use of other transaction authority and grants and prizes.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by adding after the item relating to section 2509, as added by section 407(b), the following new item:

"2510. Defense Innovation Centers Program.".

SEC. 409. ADDITIONAL ELEMENTS IN ANNUAL REPORT ON DEFENSE TECHNOLOGY AND INDUSTRIAL BASE POLICY.

Section 2504 of title 10, United States Code, is amended by adding at the end the following new paragraphs:

"(5) An analysis of capabilities and emerging technologies relevant to the warfighting mission of the Department of Defense across the small business community and among non-traditional partners.

"(6) A description of how the Department of Defense will incorporate small business goals and strategies into an overall industrial base strategy of the department.

"(7) A description of how relevant offices within the department are integrating small business activities into an overall industrial base strategy.".

SEC. 410. CROSS REFERENCES TO CERTAIN SMALL BUSINESS PROVISIONS APPLICABLE TO DEPARTMENT OF DEFENSE.

Subchapter I of chapter 132 of title 10, United States Code, as added by section 401(a), is amended by inserting after section 2231 the following new sections:

"§ 2231a. References to Directors and Offices of Small Business Programs

"(a) DEPARTMENT OF DEFENSE.—For the Director and the Office of Small Business Programs of the Department of Defense, see section 144 of this title.

"(b) MILITARY DEPARTMENTS.—For the Director and the Office of Small Business Programs of the Department of the Army, the Department of the Navy, and the Department of the Air Force, see sections 3024, 5028, and 8024, respectively, of this title.

"§ 2232. References to certain programs provided in Small Business Act

"Numerous programs that are applicable to contracting by the Department of Defense are set forth in the Small Business Act (15 U.S.C. 631et seq.), including the following:

"(1) The Business Development Program under section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

"(2) The Women-Owned Small Businesses Program, including the Economically Disadvantaged Women-Owned Small Business Program, under section 8(m) of the Small Business Act (15 U.S.C. 637(m)).

"(3) The Historically Underutilized Business Zones (HUBZone) Program under section 31 of the Small Business Act (15 U.S.C. 657a).

"(4) The Service Disabled Veteran-Owned Businesses Program under section 36 of the Small Business Act (15 U.S.C. 657f).

"(5) The Small Disadvantaged Business Set-Aside Program.

"(6) The Small Business Subcontracting Program.".

SEC. 411. CODIFICATION OF NDAA SECTION ON ROLE OF DIRECTORS OF SMALL BUSINESS PROGRAMS IN DEPARTMENT OF DEFENSE ACQUISITION PROCESSES.

(a) CODIFICATION.—Subchapter I of chapter 132 of title 10, United States Code, as added by section 401(a), is amended by inserting after section 2233, as added by section 405(a), the following new section:

"§ 2234. Role of the Directors of Small Business Programs in acquisition processes of the Department of Defense

"(a) GUIDANCE REQUIRED.—The Secretary of Defense shall issue guidance to ensure that the head of each Office of Small Business Programs of the Department of Defense is a participant as early as practicable in the acquisition processes—

"(1) of the Department, in the case of the Director of Small Business Programs of the Department of Defense; and

"(2) of the military department concerned, in the case of the Director of Small Business Programs of the Department of the Army, the Department of the Navy, and the Department of the Air Force.

"(b) MATTERS TO BE INCLUDED.—Such guidance shall—

"(1) require the Director of Small Business Programs of the Department of Defense to provide advice —

"(A) to the Defense Acquisition Board; and

"(B) to the Information Technology Acquisition Board; and

"(2) require coordination as early as practical in the relevant acquisition processes between—

"(A) the chiefs of staff of the armed forces and the service acquisition executives, as appropriate (or their designees); and

"(B) the Director of Small Business Programs of the military department concerned.".

(b) CONFORMING REPEAL OF CODIFIED SECTION.—Section 1611 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 10 U.S.C. 144 note) is repealed.

SEC. 412. CODIFICATION OF NDAA SECTION ON DEPARTMENT OF DEFENSE TEST PROGRAM FOR NEGOTIATION OF COMPREHENSIVE SMALL BUSINESS SUBCONTRACTING PLANS.

(a) CODIFICATION.—Subchapter I of chapter 132 of title 10, United States Code, as added by section 401(a), is amended by inserting after section 2234, as added by section 411(a)(1), the following new section:

"§ 2234a. Program for negotiation of comprehensive small business subcontracting plans

"(a) PROGRAM.—

"(1) IN GENERAL.—The Secretary of Defense shall establish a program under which contracting activities in the military departments and the Defense Agencies are authorized to undertake one or more demonstration projects to determine whether the negotiation and administration of comprehensive subcontracting plans will reduce administrative burdens on contractors while enhancing opportunities provided under Department of Defense contracts for covered small business concerns. In selecting the contracting activities to undertake demonstration projects, the Secretary shall take such action as is

necessary to ensure that a broad range of the supplies and services acquired by the Department of Defense are included in the test program.

"(2) CONSULTATION AND PUBLIC COMMENT.—In developing the program, the Secretary of Defense shall—

"(A) consult with the Administrator of the Small Business Administration; and

"(B) provide an opportunity for public comment on the test program.

"(b) COMPREHENSIVE SMALL BUSINESS SUBCONTRACTING PLAN.—

"(1) IN GENERAL.—In a demonstration project under the program, the Secretary of a military department or head of a Defense Agency shall negotiate, monitor, and enforce compliance with a comprehensive subcontracting plan with a Department of Defense contractor described in paragraph (4).

"(2) ELEMENTS OF COMPREHENSIVE PLAN.—The comprehensive subcontracting plan of a contractor—

"(A) shall apply to the entire business organization of the contractor or to one or more of the contractor's divisions or operating elements, as specified in the subcontracting plan; and

"(B) shall cover each Department of Defense contract that is entered into by the contractor and each subcontract that is entered into by the contractor as the subcontractor under a Department of Defense contract.

"(3) SEMIANNUAL REPORTS BY CONTRACTOR.—Each comprehensive subcontracting plan of a contractor shall require that the contractor report to the Secretary of Defense on a semiannual basis the following information:

"(A) The amount of first-tier subcontract dollars awarded during the six-month period covered by the report to covered small business concerns, with the information set forth separately—

"(i) by North American Industrial Classification System code;

"(ii) by major defense acquisition program, as defined in section 2430(a) of this title;

"(iii) by contract, if the contract is for the maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment and the total value of the contract, including options, exceeds $100,000,000; and

"(iv) by military department.

"(B) The total number of subcontracts active under the test program during the six-month period covered by the report that would have otherwise required a subcontracting plan under paragraph (4) or (5) of section 8(d) of the Small Business Act (15 U.S.C. 637(d)).

"(C) Costs incurred in negotiating, complying with, and reporting on comprehensive subcontracting plans.

"(D) Costs avoided by adoption of a comprehensive subcontracting plan.

"(4) COVERED CONTRACTORS.—A Department of Defense contractor referred to in paragraph (1) is, with respect to a comprehensive subcontracting plan negotiated in any fiscal year, a business concern that, during the immediately preceding fiscal year, furnished the Department of Defense with supplies or services (including professional services, research and development services, and construction services) pursuant to at least three Department of Defense contracts having an aggregate value of at least $100,000,000.

"(c) WAIVER OF CERTAIN SMALL BUSINESS ACT SUBCONTRACTING PLAN REQUIREMENTS.—A Department of Defense contractor is not required to negotiate or submit a subcontracting plan under paragraph (4) or (5) of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) with respect to a Department of Defense contract if—

"(1) the contractor has negotiated a comprehensive subcontracting plan under the test program that includes the matters specified in section 8(d)(6) of the Small Business Act (15 U.S.C. 637(d)(6));

"(2) such matters have been determined acceptable by the Secretary of the military department or head of a Defense Agency negotiating such comprehensive subcontracting plan; and

"(3) the comprehensive subcontracting plan applies to the contract.

"(d) FAILURE TO MAKE A GOOD FAITH EFFORT TO COMPLY WITH A COMPREHENSIVE SUBCONTRACTING PLAN.—

"(1) LIQUIDATED DAMAGES.—A contractor that has negotiated a comprehensive subcontracting plan under the test program shall be subject to section 8(d)(4)(F) of the Small Business Act (15 U.S.C. 637(d)(4)(F)) regarding the assessment of liquidated damages for failure to make a good faith effort to comply with its comprehensive subcontracting plan and the goals specified in that plan. In addition, any such failure shall be a factor considered as part of the evaluation of past performance of an offeror.

"(2) Effective in fiscal year 2016 and each fiscal year thereafter in which the program is in effect, the Secretary of Defense shall report to Congress on any negotiated comprehensive subcontracting plan that the Secretary determines did not meet the subcontracting goals negotiated in the plan for the prior fiscal year.

"(e) PROGRAM PERIOD.—The program authorized by subsection (a) shall terminate on December 31, 2027.

"(f) COVERED SMALL BUSINESS CONCERN DEFINED.—In this section, the term 'covered small business concern' includes each of the following:

"(1) A small business concern, as that term is defined under section 3(a) of the Small Business Act (15 U.S.C. 632(a)).

"(2) A small business concern owned and controlled by veterans, as that term is defined in section 3(q)(3) of such Act (15 U.S.C. 632(q)(3)).

"(3) A small business concern owned and controlled by service-disabled veterans, as that term is defined in section 3(q)(2) of such Act (15 U.S.C. 632(q)(2)).

"(4) A qualified HUBZone small business concern, as that term is defined in section 3(p)(5) of such Act (15 U.S.C. 632(p)(5)) and effective January 1, 2020, as defined in section 31(b) of such Act (15 U.S.C. 657a(b)).

"(5) A small business concern owned and controlled by socially and economically disadvantaged individuals, as that term is defined in section 8(d)(3)(C) of such Act (15 U.S.C. 637(d)(3)(C)).

"(6) A small business concern owned and controlled by women, as that term is defined in section 3(n) of such Act (15 U.S.C. 632(n)).".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter I of chapter 132 of title 10, United States Code, as added by section 401(a), is amended by inserting after the item relating to section 2234, as added by section 411(a)(2), the following new item:

"2234a. Test program for negotiation of comprehensive small business subcontracting plans.".

(b) CONFORMING REPEAL OF CODIFIED SECTION.—Section 834 of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101–189; 15 U.S.C. 637 note) is repealed.

SEC. 413. CODIFICATION OF MENTOR-PROTÉGÉ PROGRAM.

(a) CODIFICATION.—Chapter 132 of title 10, United States Code, as added by section 401(a), is amended by adding after subchapter II, as added by section 403, the following new subchapter:

"Subchapter III—Mentor Protégé Program

[Sec 831 of the FY91 NDAA, Public Law 101–510 (10 USC 2302 note)]

"Sec.
"2238. [Sec 831(a)&(b)] Mentor-Protégé Program.
"2238a. [Sec 831(c)&(d)] Program participants.

"2238b. [Sec 831(e)] Mentor-protégé agreement.
"2238c. [Sec 831(f)] Forms of assistance.
"2238d. [Sec 831(g)] Incentives for mentor firms.
"2238e. [Sec 831(h)] Relationship to Small Business Act.
"2238f. [Sec 831(i)] Participation in Mentor-Protégé Program not to be a condition for award of a contract or subcontract.
"2238g. [Sec 831(j)] Expiration of authority.
"2238h. [Sec 831(k)] Regulations.
"2238i. [Sec 831(l)&(m)] Annual reports by mentor firms.
"2238j. [Sec 831(n)] Definitions.

"§ 2238. [Sec 831(a)&(b)] Mentor-Protégé Program

"(a) ESTABLISHMENT OF PROGRAM.—The Secretary of Defense shall carry out a program to be known as the 'Mentor-Protégé Program'.

"(b) PURPOSE.—The purpose of the program is to provide incentives for major Department of Defense contractors to furnish disadvantaged small business concerns with assistance designed to—

"(1) enhance the capabilities of disadvantaged small business concerns to perform as subcontractors and suppliers under Department of Defense contracts and other contracts and subcontracts; and

"(2) increase the participation of such business concerns as subcontractors and suppliers under Department of Defense contracts, other Federal Government contracts, and commercial contracts.

"§ 2238a. [Sec 831(c)&(d)] Program participants

" (a) **[831(c)(1)]** MENTOR FIRMS.—A business concern meeting the eligibility requirements set out in subsection (d) may enter into agreements under section 2238b of this title and furnish assistance to disadvantaged small business concerns upon making application to the Secretary of Defense and being approved for participation in the program by the Secretary. A business concern participating in the program pursuant to such an approval shall be known, for the purposes of the program, as a 'mentor firm'.

"(b) **[831(c)(2)]** PROTÉGÉ FIRMS.—A disadvantaged small business concern eligible for the award of Federal contracts may obtain assistance from a mentor firm upon entering into an agreement with the mentor firm as provided in section 2238b of this title. A disadvantaged small business concern may not be a party to more than one agreement concurrently, and the authority to enter into agreements under such section shall only be available to such concern during the five-year period beginning on the date such concern enters into the first such agreement. A disadvantaged small business concern receiving such assistance shall be known, for the purposes of the program, as a 'protégé firm'.

"(c) **[831(c)(3)]** STATUS OF BUSINESS CONCERNS AS DISADVANTAGED SMALL BUSINESS CONCERNS.—In entering into an agreement pursuant to section 2238b of this title, a mentor firm may rely in good faith on a written representation of a business concern that such business concern is a disadvantaged small business concern. The Small Business Administration shall determine the status of such business concern as a disadvantaged small business concern in the event of a protest regarding the status of such business concern. If at any time the business concern is determined by the Small Business Administration not to be a disadvantaged small business concern, assistance furnished such business concern by the mentor firm after the date of the determination may not be considered assistance furnished under the program.

"(d) **[831(d)]** MENTOR FIRM ELIGIBILITY.—

"(1) **[831(d)(1)(A)]** IN GENERAL.—Subject to subsection (a), a mentor firm may enter into an agreement with one or more protégé firms under section 2238b of this title and provide assistance under the program pursuant to that agreement if

the mentor firm is eligible for award of Federal contracts and meets the requirements of paragraph (2).

"(2) **[831(d)(1)(B)]** REQUIREMENTS FOR MENTOR FIRM—A mentor firm may enter into an agreement as described in paragraph (1) only if it demonstrates that it meets each of the following requirements:

"(A) That it is qualified to provide assistance that will contribute to the purpose of the program.

"(B) That it is of good financial health and character and does not appear on a Federal list of debarred or suspended contractors.

"(C) That it can impart value to a protégé firm—

"(i) because of experience gained as a Department of Defense contractor; or

"(ii) through knowledge of general business operations and government contracting.

"(3) DEMONSTRATION THAT MENTOR FIRM CAN IMPART VALUE.—Whether a mentor firm can impart value to a protégé firm for purposes of meeting the requirement of subparagraph (C) of paragraph (2) shall be demonstrated by evidence that—

"(A) during the fiscal year preceding the fiscal year in which the mentor firm enters into the agreement, the total amount of the Department of Defense contracts awarded such mentor firm and the subcontracts awarded such mentor firm under Department of Defense contracts was equal to or greater than $100,000,000; or

"(B) the mentor firm demonstrates the capability to assist in the development of protégé firms, and is approved by the Secretary of "Defense pursuant to criteria specified in the regulations prescribed for purposes of the Mentor-Protégé program.

"(4) EFFECT OF AFFILIATION BETWEEN MENTOR FIRM AND PROTÉGÉ FIRM.—

"(A) **[831(d)(2)]** AGREEMENT PROHIBITED.—A mentor firm may not enter into an agreement with a protégé firm under section 2238b of this title if the Administrator of the Small Business Administration has made a determination finding affiliation between the mentor firm and the protégé firm.

"(B) **[831(d)(3)]** REQUEST FOR DETERMINATION.—If the Administrator of the Small Business Administration has not made such a determination and if the Secretary has reason to believe (based on the regulations promulgated by the Administrator regarding affiliation) that the mentor firm is affiliated with the protégé firm, the Secretary shall request a determination regarding affiliation from the Administrator of the Small Business Administration.

"§ 2238b. [Sec 831(e)] Mentor-protégé agreement

" (a) AGREEMENT.—Before providing assistance to a protégé firm under the program, a mentor firm shall enter into a mentor-protégé agreement with the protégé firm regarding the assistance to be provided by the mentor firm.

"(b) MATTERS TO BE INCLUDED.—The agreement shall include the following:

"(1) DEVELOPMENTAL PROGRAM.—A developmental program for the protégé firm, in such detail as may be reasonable, including—

"(A) factors to assess the protégé firm's developmental progress under the program;

"(B) a description of the quantitative and qualitative benefits to the Department of Defense from the agreement, if applicable;

"(C) goals for additional awards that the protégé firm can compete for outside the Mentor-Protégé Program; and

"(D) the assistance the mentor firm will provide to the protégé firm in understanding contract regulations of the Federal Government and the Department of Defense (including the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement) after award of a subcontract under this section, if applicable.

"(2) PROGRAM PARTICIPATION TERM.—A program participation term for any period of not more than three years, except that the term may be a period of up to five years if the Secretary of Defense determines in writing that unusual circumstances justify a program participation term in excess of three years.

"(3) PROCEDURES FOR AGREEMENT TERMINATION.—Procedures for the protégé firm to terminate the agreement voluntarily and for the mentor firm to terminate the agreement for cause.

"§ 2238c. [Sec 831(f)] Forms of assistance

"(a) **[Sec 831(f)(1)-(5)]** FORMS OF ASSISTANCE FROM MENTOR FIRM.—A mentor firm may provide a protégé firm the following:

"(1) Assistance, by using mentor firm personnel, in—

"(A) general business management, including organizational management, financial management, and personnel management, marketing, and overall business planning;

"(B) engineering and technical matters such as production, inventory control, and quality assurance; and

"(C) any other assistance designed to develop the capabilities of the protégé firm under the developmental program referred to in section 2238b of this title.

"(2) Award of subcontracts on a noncompetitive basis to the protégé firm under the Department of Defense or other contracts.

"(3) Payment of progress payments for performance of the protégé firm under such a subcontract in amounts as provided for in the subcontract, but in no event may any such progress payment exceed 100 percent of the costs incurred by the protégé firm for the performance.

"(4) Advance payments under such subcontracts.

"(5) Loans.

"(b) **[Sec 831(f)(6)]** ASSISTANCE FROM OTHER SOURCES.—In addition to assistance provided under subsection (a), a mentor firm may provide a protégé firm assistance obtained by the mentor firm for the protégé firm from one or more of the following:

"(1) A small business development center established pursuant to section 21 of the Small Business Act (15 U.S.C. 648).

"(2) An entity providing procurement technical assistance pursuant to chapter 142 of this title.

"(3) A historically Black college or university or a minority institution of higher education.

"(4) A women's business center described in section 29 of the Small Business Act (15 U.S.C. 656).

"§ 2238d. [Sec 831(g)] Incentives for mentor firms

"(a) **[Sec 831(g)(1)]** REIMBURSEMENT FOR PROGRESS PAYMENTS AND ADVANCE PAYMENTS.—The Secretary of Defense may provide to a mentor firm reimbursement for the total amount of any progress payment or advance payment made under the program by the mentor firm to a protégé firm in connection with a Department of Defense contract awarded the mentor firm.

"(b) **[Sec 831(g)(2)]** REIMBURSEMENT FOR COSTS OF ASSISTANCE.—

"(1) IN GENERAL.—The Secretary of Defense may provide to a mentor firm reimbursement for the costs of the assistance furnished to a protégé firm pursuant to section 2238c of this title (except as provided in paragraph (4)) as provided for in a line item in a Department of Defense contract under which the mentor firm is furnishing products or services to the Department, subject to a maximum amount of reimbursement specified in such contract. However, the preceding sentence does not apply in a case in which the Secretary of Defense determines in writing that unusual circumstances justify reimbursement using a separate contract.

"(2) ANNUAL PERFORMANCE REVIEWS AS FACTOR IN DETERMINATION OF AMOUNT.—The determinations made in annual performance reviews of a mentor firm's mentor-protégé agreement shall be a major factor in the determinations of amounts of reimbursement, if any, that the mentor firm is eligible to receive in the remaining years of the program participation term under the agreement.

"(3) LIMITATION ON TOTAL AMOUNT OF REIMBURSEMENT FOR COSTS OF ASSISTANCE.—The total amount reimbursed under this subsecton to a mentor firm for costs of assistance furnished in a fiscal year to a protégé firm may not exceed $1,000,000, except in a case in which the Secretary of Defense determines in writing that unusual circumstances justify a reimbursement of a higher amount.

"(4) NO REIMBURSEMENT FOR CERTAIN FEES.—The Secretary may not reimburse any fee assessed by the mentor firm—

"(A) for services provided to the protégé firm pursuant to section 2238c(b) of this title; or

"(B) for business development expenses incurred by the mentor firm under a contract awarded to the mentor firm while participating in a joint venture with the protégé firm.

"(c) **[Sec 831(g)(3)]** CERTAIN UNREIMBURSED EXPENSES CREDITED TOWARD ATTAINMENT OF SUBCONTRACTING GOALS.—

"(1) IN GENERAL.—Costs incurred by a mentor firm in providing assistance to a protégé firm that are not reimbursed pursuant to subsection (b) shall be recognized as credit in lieu of subcontract awards for purposes of determining whether the mentor firm attains a subcontracting participation goal

applicable to such mentor firm under a Department of Defense contract, under a contract with another executive agency, or under a divisional or company-wide subcontracting plan negotiated with the Department of Defense or another executive agency.

"(2) AMOUNT OF CREDIT.—The amount of the credit given a mentor firm for any such unreimbursed costs shall be equal to—

"(A) four times the total amount of such costs attributable to assistance provided by entities described in section 2238c(b) of this title;

"(B) three times the total amount of such costs attributable to assistance furnished by the mentor firm's employees; and

"(C) two times the total amount of any other such costs.

"(3) AUTHORITY FOR ADJUSTMENT TO AMOUNT OF CREDIT.—Under regulations prescribed to carry out the Mentor-Protégé Program, the Secretary of Defense shall adjust the amount of credit given a mentor firm pursuant to paragraphs (1) and (2) if the Secretary determines that the firm's performance regarding the award of subcontracts to disadvantaged small business concerns has declined without justifiable cause.

"(d) **[Sec 831(g)(4)]** CREDITS TOWARD ATTAINMENT OF SUBCONTRACTING GOALS IN CASE OF CERTAIN BUSINESS CONCERNS OWNED AND CONTROLLED BY SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS.—A mentor firm shall receive credit toward the attainment of a subcontracting participation goal applicable to such mentor firm for each subcontract for a product or service awarded under such contract by a mentor firm to a business concern that, except for its size, would be a small business

concern owned and controlled by socially and economically disadvantaged individuals, but only if—

"(1) the size of such business concern is not more than two times the maximum size specified by the Administrator of the Small Business Administration for purposes of determining whether a business concern furnishing such product or service is a small business concern; and

"(2) the business concern formerly had a mentor-protégé agreement with such mentor firm that was not terminated for cause.

"§ 2238e. [Sec 831(h)] Relationship to Small Business Act

"(a) **[Sec 831(h)(1)]** LIMITATION ON DETERMINATIONS OF AFFILIATION OR CONTROL BETWEEN MENTOR FIRMS AND PROTÉGÉ FIRMS.—For purposes of the Small Business Act (15 U.S.C. 631 et seq.), no determination of affiliation or control (either direct or indirect) may be found between a protégé firm and its mentor firm on the basis that the mentor firm has agreed to furnish (or has furnished) to its protégé firm pursuant to a mentor-protégé agreement any form of developmental assistance described in section 2238c of this title.

"(b) **[Sec 831(h)(2)]** LIMITATION ON DETERMINATIONS OF DISADVANTAGED SMALL BUSINESS CONCERNS AS BEING INELIGIBLE FOR ASSISTANCE UNDER SMALL BUSINESS ACT.—Notwithstanding section 8 of the Small Business Act (15 U.S.C. 637), the Small Business Administration may not determine a disadvantaged small business concern to be ineligible to receive any assistance authorized under the Small Business Act on the basis that such business concern has participated in the Mentor-Protégé

Program or has received assistance pursuant to any developmental assistance agreement authorized under such program.

"(c) **[Sec 831(h)(3)]** MENTOR-PROTÉGÉ AGREEMENTS AND CERTAIN OTHER PROGRAM DOCUMENTS NOT REQUIRED TO BE SUBMITTED TO SBA.—The Small Business Administration may not require a firm that is entering into, or has entered into, an agreement under section 2238b of this title as a protégé firm to submit the agreement, or any other document required by the Secretary of Defense in the administration of the Mentor-Protégé Program, to the Small Business Administration for review, approval, or any other purpose.

"§ 2238f. [Sec 831(i)] Participation in Mentor-Protégé Program not to be a condition for award of a contract or subcontract

"A mentor firm may not require a business concern to enter into an agreement with the mentor firm pursuant to section 2238b of this title as a condition for being awarded a contract by the mentor firm, including a subcontract under a contract awarded to the mentor firm.

"§ 2238g. [Sec 831(j)] Expiration of authority

"(a) AUTHORITY TO ENTER INTO AGREEMENTS.—No mentor-protégé agreement may be entered into under section 2238b of this title after **September 30, 2018**.

"(b) AUTHORITY TO PAY REIMBURSEMENTS AND GRANT CREDITS.—No reimbursement may be paid, and no credit toward the attainment of a subcontracting goal may be granted, under section 2238d of this title for any cost incurred after the date that is three years after the date specified in subsection (a).

"§ 2238h. [Sec 831(k)] Regulations

"(a) IN GENERAL.—The Secretary of Defense shall prescribe regulations to carry out the Mentor-Protégé Program. Such regulations—

"(1) shall include the requirements set forth in section 8(d) of the Small Business Act (15 U.S.C. 637(d)); and

"(2) shall prescribe procedures by which mentor firms may terminate participation in the program.

"(b) APPENDIX TO DFARS.—The Department of Defense policy regarding the Mentor-Protégé Program shall be published and maintained as an appendix to the Department of Defense Supplement to the Federal Acquisition Regulation.

"§ 2238i. [Sec 831(l)&(m)] Annual reports by mentor firms

"(a) **[Sec 831(l)]** REPORT BY MENTOR FIRMS.—To comply with section 8(d)(7) of the Small Business Act (15 U.S.C. 637(d)(7)), each mentor firm shall submit to the Secretary not less than once each fiscal year a report that includes, for the preceding fiscal year, the following:

"(1) All technical or management assistance provided by mentor firm personnel for the purposes described in section 2238b(a)(1) of this title.

"(2) Any new awards of subcontracts on a competitive or noncompetitive basis to the protégé firm under Department of Defense contracts or other contracts, including the value of such subcontracts.

"(3) Any extensions, increases in the scope of work, or additional payments not previously reported for prior awards of subcontracts on a competitive or noncompetitive basis to the protégé firm under Department of Defense contracts or other contracts, including the value of such subcontracts.

"(4) The amount of any payment of progress payments or advance payments made to the protégé firm for performance under any subcontract made under the Mentor-Protégé Program.

"(5) Any loans made by the mentor firm to the protégé firm.

"(6) All Federal contracts awarded to the mentor firm and the protégé firm as a joint venture, designating whether the award was a restricted competition or a full and open competition.

"(7) Any assistance obtained by the mentor firm for the protégé firm from one or more—

"(A) small business development centers established pursuant to section 21 of the Small Business Act (15 U.S.C. 648);

"(B) entities providing procurement technical assistance pursuant to chapter 142 of this title; or

"(C) historically Black colleges or universities or minority institutions of higher education.

"(8) Whether there have been any changes to the terms of the mentor-protégé agreement.

"(9) A narrative—

"(A) describing the success assistance provided under section 2238b of this title has had in addressing the developmental needs of the protégé firm and the impact on Department of Defense contracts, and

"(B) addressing any problems encountered.

"(b) **[Sec 831(m)]** REVIEW OF MENTOR FIRM REPORTS BY THE OFFICE OF SMALL BUSINESS PROGRAMS.—The Office of Small Business Programs of the Department of Defense shall review each report required by subsection (a) and, if the Office finds that the mentor-protégé agreement is not furthering the purpose of the Mentor-Protégé Program, may decide not to approve any continuation of the agreement.

"§ 2238j. [Sec 831(n)] Definitions

"In this subchapter:

"(1) The term 'small business concern' has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

"(2) The term 'disadvantaged small business concern' means a firm that—

"(A) has less than half the size standard corresponding to its primary North American Industry Classification System code;

"(B) is not owned or managed by individuals or entities that directly or indirectly have stock options or convertible securities in the mentor firm; and

"(C) is any of the following:

"(i) A small business concern owned and controlled by socially and economically disadvantaged individuals.

"(ii) A business entity owned and controlled by an Indian tribe as defined by section 8(a)(13) of the Small Business Act (15 U.S.C. 637(a)(13)).

"(iii) A business entity owned and controlled by a Native Hawaiian Organization as defined by section 8(a)(15) of the Small Business Act (15 U.S.C. 637(a)(15)).

"(iv) A qualified organization employing severely disabled individuals.

"(v) A small business concern owned and controlled by women, as defined in section 8(d)(3)(D) of the Small Business Act (15 U.S.C. 637(d)(3)(D)).

"(vi) A small business concern owned and controlled by service–disabled veterans (as defined in section 8(d)(3) of the Small Business Act (15 U.S.C. 637(d)(3))).

"(vii) A qualified HUBZone small business concern (as defined in section 3(p) of the Small Business Act (15 U.S.C. 632(p)) and effective January 1, 2020, as defined in section 31(b) of the Small Business Act (15 U.S.C. 657a(b))).

"(viii) A small business concern that—

"(I) is a nontraditional defense contractor, as such term is defined in section 2302 of this title; or

"(II) currently provides goods or services in the private sector that are critical to enhancing the capabilities of the defense supplier base and fulfilling key Department of Defense needs.

"(3) The term 'small business concern owned and controlled by socially and economically disadvantaged individuals' has the meaning given that term in section 8(d)(3)(C) of the Small Business Act (15 U.S.C. 637(d)(3)(C)).

"(4) The term 'historically Black college and university' means any of the historically Black colleges and universities referred to in section 2323 of this title.

"(5) The term 'minority institution of higher education' means an institution of higher education with a student body that reflects the composition specified in section 312(b)(3), (4), and (5) of the Higher Education Act of 1965 (20 U.S.C. 1058(b)(3), (4), and (5)).

"(6) The term 'subcontracting participation goal', with respect to a Department of Defense contract, means a goal for the extent of the participation by disadvantaged small business concerns in the subcontracts awarded under such contract, as established pursuant to section 2323 of this title and section 8(d) of the Small Business Act (15 U.S.C. 637(d)).

"(7) The term 'qualified organization employing the severely disabled' means a business entity operated on a for-profit or nonprofit basis that—

"(A) uses rehabilitative engineering to provide employment opportunities for severely disabled individuals and integrates severely disabled individuals into its workforce;

"(B) employs severely disabled individuals at a rate that averages not less than 20 percent of its total workforce;

"(C) employs each severely disabled individual in its workforce generally on the basis of 40 hours per week; and

"(D) pays not less than the minimum wage prescribed pursuant to section 6 of the Fair Labor Standards Act (29 U.S.C. 206) to those employees who are severely disabled individuals.

"(8) The term 'severely disabled individual' means an individual—

"(A) who is blind (as defined in section 8501 of title 41); or

"(B) who is a severely disabled individual (as defined in such section).

"(9) The term 'affiliation', with respect to a relationship between a mentor firm and a protégé firm, means a relationship described under section 121.103 of title 13, Code of Federal Regulations (or any successor regulation).".

(b) CONFORMING REPEAL OF CODIFIED SECTION.—Section 831 of the NDAA for Fiscal Year 1991 (Public Law 101–510; 10 U.S.C. 2302 note) is repealed.

SEC. 414. REPEAL OF CERTAIN OBSOLETE NDAA PROVISIONS.

(a) REPEAL OF OBSOLETE NDAA PROVISION RELATING TO SBIR PROGRAM.—Section 4237 of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102–484; 15 U.S.C. 638 note) is repealed.

(b) REPEAL OF OBSOLETE NDAA PROVISION RELATING TO CONTRACT BUNDLING.—Section 801(b) of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136; 10 U.S.C. 2302 note) is repealed.

SECTIONS AFFECTED BY THE PROPOSAL

[The material below shows changes proposed to be made by the proposal 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*. (Where an amendment in the

proposal would add a full new section to existing law, the text of that proposed new section is NOT set forth below since it is set out in full in the legislative text above.)]

[NOTE: Text shown as current law incorporates amendments made by the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91, enacted Dec. 12, 2017)]

Section 9 of the Small Business Act
(15 U.S.C. 638)

SEC. 9. (a) ***

*****

~~(m) TERMINATION.—The authorization to carry out the Small Business Innovation Research Program established under this section shall terminate on September 30, 2022.~~

(n) REQUIRED EXPENDITURES FOR STTR BY FEDERAL AGENCIES.—

(1) REQUIRED EXPENDITURE AMOUNTS.—

(A) IN GENERAL.~~—With respect to each fiscal year through fiscal year 2022, each~~ ***Each*** Federal agency that has an extramural budget for research, or research and development, in excess of $1,000,000,000 for ~~that~~ ***any*** fiscal year, shall expend with small business concerns not less than the percentage of that extramural budget specified in subparagraph (B), specifically in connection with STTR programs that meet the requirements of this section and any policy directives and regulations issued under this section.

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~~(oo) COMPETITIVE SELECTION PROCEDURES FOR SBIR AND STTR PROGRAMS.—All funds awarded, appropriated, or otherwise made available in accordance with subsection (f) or (n) must be awarded pursuant to competitive and merit-based selection procedures.~~

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Section 1073 of the National Defense Authorization Act for Fiscal Year 2011
(P. L. 111–383; 10 USC 2359 note)

SEC. 1073. DEFENSE RESEARCH AND DEVELOPMENT RAPID INNOVATION PROGRAM.

(a) PROGRAM ESTABLISHED.—The Secretary of Defense shall establish a competitive, merit-based program to accelerate the fielding of technologies developed

pursuant to phase II Small Business Innovation Research Program ***and Small Business Technology Transfer Program*** projects, technologies developed by the defense laboratories, and other innovative technologies (including dual use technologies). The purpose of this program is to stimulate innovative technologies and reduce acquisition or lifecycle costs, address technical risks, improve the timeliness and thoroughness of test and evaluation outcomes, and rapidly insert such products directly in support of primarily major defense acquisition programs, but also other defense acquisition programs that meet critical national security needs.

(b) GUIDELINES.—Not later than 180 days after the date of the enactment of this Act [Jan. 7, 2011], the Secretary shall issue guidelines for the operation of the program. At a minimum such guidance shall provide for the following:

(1) The issuance of an annual broad agency announcement or the use of any other competitive or merit-based processes by the Department of Defense for candidate proposals in support of defense acquisition programs as described in subsection (a).

(2) The review of candidate proposals by the Department of Defense and by each military department and the merit-based selection of the most promising cost-effective proposals for funding through contracts, cooperative agreements, and other transactions for the purposes of carrying out the program.

~~(3) The total amount of funding provided to any project under the program shall not exceed $3,000,000, unless the Secretary, or the Secretary's designee, approves a larger amount of funding for the project.~~

(4) No project shall receive more than a total of two years of funding under the program, unless the Secretary, or the Secretary's designee, approves funding for any additional year.

(5) Mechanisms to facilitate transition of follow-on or current projects carried out under the program into defense acquisition programs, through the use of the authorities of section 819 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111–84; 10 U.S.C. 2302 note) or such other authorities as may be appropriate to conduct further testing, low rate production, or full rate production of technologies developed under the program.

(6)***(A)*** Projects are selected using merit-based selection procedures and the selection of projects is not subject to undue influence by Congress or other Federal agencies.

(B)(i) Use of selection procedures under the Small Business Innovation Research Program or the Small Business Technology Transfer Program shall be considered to be use of merit-selection procedures for purposes of this paragraph, and, for the purpose of accelerating the fielding of technologies developed pursuant to a phase II project under the Small Business Innovation Research Program or the Small Business Technology Transfer Program, the Secretary may authorize the selection of a proposal for funding for such a project on a sole-source basis (and without regard to any requirement for a broad agency announcement or use of other competitive procedures).

(ii) An award may be made on a sole-source basis under this subparagraph without regard to any otherwise applicable requirement relating

to justification and approval of the decision to make the award on a sole-source basis, and such an award is not subject to any protest process.

(7) The Secretary may provide that, in the case of an unsolicited proposal for a technology that the Secretary determines would meet a critical national security need for enhancement of warfighting capabilities, funding may be provided for the proposal under the program under this section on a sole-source basis (and without regard to any requirement for a broad agency announcement or use of other competitive procedures).

(c) TREATMENT PURSUANT TO CERTAIN CONGRESSIONAL RULES.—Nothing in this section shall be interpreted to require or enable any official of the Department of Defense to provide funding under this section to any earmark as defined pursuant to House Rule XXI, clause 9, or any congressionally directed spending item as defined pursuant to Senate Rule XLIV, paragraph 5.

(d) FUNDING.—Subject to the availability of appropriations for such purpose, the amounts authorized to be appropriated for research, development, test, and evaluation for a fiscal year may be used for such fiscal year for the program established under subsection (a).

(e) TRANSFER AUTHORITY.—The Secretary may transfer funds available for the program to the research, development, test, and evaluation accounts of a military department, defense agency, or the unified combatant command for special operations forces pursuant to a proposal, or any part of a proposal, that the Secretary determines would directly support the purposes of the program. The transfer authority provided in this subsection is in addition to any other transfer authority available to the Department of Defense.

TITLE 10, UNITED STATES CODE

CHAPTER 142—PROCUREMENT TECHNICAL ASSISTANCE COOPERATIVE AGREEMENT PROGRAM

Sec.
2411. Definitions.
2412. Purposes.
2413. Cooperative agreements.
2414. Limitation [should be “Funding”].
2415. Distribution.
2416. Subcontractor information.
2417. Administrative costs.
2418. Authority to provide certain types of technical assistance.
2419. Advancing small business growth.
2420. Regulations.

§2411. Definitions

In this chapter:

(1) The term "eligible entity" means any of the following:

(A) A State.

(B) A local government.

(C) A private, nonprofit organization.

(D) A tribal organization, as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (Public Law 93–638; 25 U.S.C. 450b(l)),[1] or an economic enterprise, as defined in section 3(e) of the Indian Financing Act of 1974 (Public Law 93–262; 25 U.S.C. 1452(e)), whether or not such economic enterprise is organized for profit purposes or nonprofit purposes.

(2) The term "distressed area" means—

(A) the area of a unit of local government (or such area excluding the area of any defined political jurisdiction within the area of such unit of local government) that—

(i) has a per capita income of 80 percent or less of the State average; or

(ii) has an unemployment rate that is one percent greater than the national average for the most recent 24-month period for which statistics are available; or

(B) a reservation, as defined in section 3(d) of the Indian Financing Act of 1974 (Public Law 93–262; 25 U.S.C. 1452(d)).

(3) The term "Secretary" means the Secretary of Defense acting through the Director of the Defense Logistics Agency.

(4) The terms "State" and "local government" have the meaning given those terms in section 6302 of title 31.

§2412. Purposes

The purposes of the program authorized by this chapter are—

(1) to increase assistance by the Department of Defense to eligible entities furnishing procurement technical assistance to business entities; and

(2) to assist eligible entities in the payment of the costs of establishing and carrying out new procurement technical assistance programs and maintaining existing procurement technical assistance programs.

§2413. Cooperative agreements

(a) The Secretary, in accordance with the provisions of this chapter, may enter into cooperative agreements with eligible entities to carry out the purposes of this chapter.

(b) Under any such cooperative ~~agreement,~~ ***agreement—***

(1) the eligible entity shall agree to sponsor programs to furnish procurement technical assistance to business entities***;*** and

(2) the Secretary shall agree to ~~defray not more than 65 percent of~~ ***furnish to the eligible entity the full cost of the assistance furnished by*** the eligible entity~~'s cost of furnishing such assistance~~ under such programs,~~-~~ ***subject to the applicable annual limitation under section 2414(a) of this title*** ~~except that—~~

~~(1) in the case of a program sponsored by such an entity that provides services solely in a distressed area, the Secretary may agree to furnish more than 65~~

~~percent, but not more than 75 percent, of such cost with respect to such program; and~~

~~(2) in the case of a program sponsored by such an entity that provides assistance for covered small businesses pursuant to section 2419(b) of this title, the Secretary may agree to furnish the full cost of such assistance~~.

(c) In entering into cooperative agreements under subsection (a), the Secretary shall assure that at least one procurement technical assistance program is carried out in each Department of Defense contract administration services district during each fiscal year.

(d) In conducting a competition for the award of a cooperative agreement under subsection (a), the Secretary shall give significant weight to successful past performance of eligible entities under a cooperative agreement under this section.

(e) In determining the level of funding to provide under an agreement under subsection (b), the Secretary shall consider the forecast by the eligible entity of demand for procurement technical assistance, and, in the case of an established program under this chapter, the outlays and receipts of such program during prior years of operation.

§2414. Funding

(a) IN GENERAL.—Except as provided in subsection (c), the value of the assistance furnished by the Secretary to any eligible entity to carry out a procurement technical assistance program under a cooperative agreement under this chapter during any fiscal year may not exceed—

(1) in the case of a program operating on a Statewide basis, other than a program referred to in clause (3) or (4), ~~$750,000~~ ***$1,500,000***;

(2) in the case of a program operating on less than a Statewide basis, other than a program referred to in clause (3) or (4), ~~$450,000~~ ***$900,000***;

(3) in the case of a program operated wholly within one service area of the Bureau of Indian Affairs by an eligible entity referred to in section 2411(1)(D) of this title, ~~$300,000~~ ***$600,000***; or

(4) in the case of a program operated wholly within more than one service area of the Bureau of Indian Affairs by an eligible entity referred to in section 2411(1)(D) of this title, ~~$750,000~~ ***$1,500,000***.

(b) DETERMINATIONS ON SCOPE OF OPERATIONS.—A determination of whether a procurement technical assistance program is operating on a Statewide basis or on less than a Statewide basis or is operated wholly within one or more service areas of the Bureau of Indian Affairs by an eligible entity referred to in section 2411(1)(D) of this title shall be made in accordance with regulations prescribed by the Secretary of Defense.

(c) Exception.—The value of the assistance provided in accordance with section 2419(b) of this title is not subject to the limitations in subsection (a).

(d) USE OF PROGRAM INCOME.—

(1) An eligible entity that earned income in a specified fiscal year from activities carried out pursuant to a procurement technical assistance program funded under this chapter may expend an amount of such income, not to exceed 25 percent of the cost of furnishing procurement technical assistance in such specified fiscal year, during the fiscal year following such specified fiscal year, to carry out a procurement technical assistance program funded under this chapter.

(2) An eligible entity that does not enter into a cooperative agreement with the Secretary for a fiscal year—

(A) shall notify the Secretary of the amount of any income the eligible entity carried over from the previous fiscal year; and

(B) may retain an amount of such income equal to 10 percent of the value of assistance furnished by the Secretary under this section during the previous fiscal year.

(3) In determining the value of assistance furnished by the Secretary under this section for any fiscal year, the Secretary shall account for the amount of any income the eligible entity carried over from the previous fiscal year.

§2415. Distribution

The Secretary shall allocate funds available for assistance under this chapter equally to each Department of Defense contract administrative services district. If in any such fiscal year there is an insufficient number of satisfactory proposals in a district for cooperative agreements to allow effective use of the funds allocated to that district, the funds remaining with respect to that district shall be reallocated among the remaining districts.

§2416. Subcontractor information

(a) The Secretary of Defense shall require that any defense contractor in any year shall provide to an eligible entity with which the Secretary has entered into a cooperative agreement under this chapter, on the request of such entity, the information specified in subsection (b).

(b) Information to be provided under subsection (a) is a listing of the name of each appropriate employee of the contractor who has responsibilities with respect to entering into contracts on behalf of such contractor that constitute subcontracts of contracts being performed by such contractor, together with the business address and telephone number and area of responsibility of each such employee.

(c) A defense contractor need not provide information under this section to a particular eligible entity more frequently than once a year.

(d) In this section, the term "defense contractor", for any year, means a person awarded a contract with the Department of Defense in that year for an amount in excess of $1,000,000**.**

§2417. Administrative costs

The Director of the Defense Logistics Agency may use, out of the amount appropriated for a fiscal year for operation and maintenance for the procurement technical assistance program authorized by this chapter, an amount not exceeding three percent of such amount to defray the expenses of administering the provisions of this chapter during such fiscal year.

§2418. Authority to provide certain types of technical assistance

(a) The procurement technical assistance furnished by eligible entities assisted by the Department of Defense under this chapter may include technical assistance relating to

contracts entered into with (1) Federal departments and agencies other than the Department of Defense, and (2) State and local governments.

(b) An eligible entity assisted by the Department of Defense under this chapter also may furnish information relating to assistance and other programs available pursuant to the Defense Conversion, Reinvestment, and Transition Assistance Act of 1992.

(c) An eligible entity assisted by the Department of Defense under this chapter also may furnish education on the requirements applicable to small businesses under the regulations issued—

(1) under section 38 of the Arms Export Control Act (22 U.S.C. 2778), and on compliance with those requirements; and

(2) under section 9 of the Small Business Act (15 U.S.C. 638), and on compliance with those requirements.

§2419. Advancing small business growth

(a) CONTRACT CLAUSE REQUIRED.—(1) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall require the clause described in paragraph (2) to be included in each covered contract awarded by the Department of Defense.

(2) The clause described in this paragraph is a clause that—

(A) requires the contractor to acknowledge that acceptance of the contract may cause the business to exceed the applicable small business size standards (established pursuant to section 3(a) of the Small Business Act) for the industry concerned and that the contractor may no longer qualify as a small business concern for that industry; and

(B) encourages the contractor to develop capabilities and characteristics typically desired in contractors that are competitive as an other-than-small business in that industry.

(b) AVAILABILITY OF ASSISTANCE.—Covered small businesses may be provided assistance as part of any procurement technical assistance furnished pursuant to this chapter.

(c) DEFINITIONS.—In this section:

(1) The term "covered contract" means a contract—

(A) awarded to a qualified small business concern as defined pursuant to section 3(a) of the Small Business Act; and

(B) with an estimated annual value—

(i) that will exceed the applicable receipt-based small business size standard; or

(ii) if the contract is in an industry with an employee-based size standard, that will exceed $70,000,000.

(2) The term "covered small business" means a qualified small business concern as defined pursuant to section 3(a) of the Small Business Act that has entered into a contract with the Department of Defense that includes a contract clause described in subsection (a)(2).

§2420. Regulations

The Secretary of Defense shall prescribe regulations to carry out this chapter.

Section 1611 of the National Defense Authorization Act for Fiscal Year 2013

(P. L. 112–239; 10 USC 144 note)

[Note that the proposal proposes to codify this section in title 10, USC]

~~SEC. 1611. ROLE OF THE DIRECTORS OF SMALL BUSINESS PROGRAMS IN ACQUISITION PROCESSES OF THE DEPARTMENT OF DEFENSE.~~

~~(a) GUIDANCE REQUIRED.—The Secretary of Defense shall develop and issue guidance to ensure that the head of each Office of Small Business Programs of the Department of Defense is a participant as early as practicable in the acquisition processes—~~

~~(1) of the Department, in the case of the Director of Small Business Programs in the Department of Defense; and~~

~~(2) of the military department concerned, in the case of the Director of Small Business Programs in the Department of the Army, in the Department of the Navy, and in the Department of the Air Force.~~

~~(b) MATTERS TO BE INCLUDED.—Such guidance shall, at a minimum—~~

~~(1) require the Director of Small Business Programs in the Department of Defense—~~

~~(A) to provide advice to the Defense Acquisition Board; and~~

~~(B) to provide advice to the Information Technology Acquisition Board; and~~

~~(2) require coordination between the chiefs of staff of the Armed Forces and the service acquisition executives, as appropriate (or their designees), the Director of Small Business Programs in each military department as early as practical in the relevant acquisition processes.~~

Section 834 of the National Defense Authorization Act For Fiscal Years 1990 and 1991

(Pub. L. 101–189; 15 U.S.C. 637 note)

[Note that the proposal proposes to codify this section in title 10, USC]

~~SEC. 834. TEST PROGRAM FOR NEGOTIATION OF COMPREHENSIVE SMALL BUSINESS SUBCONTRACTING PLANS.~~

~~(a) TEST PROGRAM.—(1) The Secretary of Defense shall establish a test program under which contracting activities in the military departments and the Defense Agencies are authorized to undertake one or more demonstration projects to determine whether the negotiation and administration of comprehensive subcontracting plans will reduce~~

~~administrative burdens on contractors while enhancing opportunities provided under Department of Defense contracts for covered small business concerns. In selecting the contracting activities to undertake demonstration projects, the Secretary shall take such action as is necessary to ensure that a broad range of the supplies and services acquired by the Department of Defense are included in the test program.~~

~~(2) In developing the test program, the Secretary of Defense shall—~~

~~(A) consult with the Administrator of the Small Business Administration; and~~

~~(B) provide an opportunity for public comment on the test program.~~

~~(b) COMPREHENSIVE SMALL BUSINESS SUBCONTRACTING PLAN.—(1) In a demonstration project under the test program, the Secretary of a military department or head of a Defense Agency shall negotiate, monitor, and enforce compliance with a comprehensive subcontracting plan with a Department of Defense contractor described in paragraph (4).~~

~~(2) The comprehensive subcontracting plan of a contractor—~~

~~(A) shall apply to the entire business organization of the contractor or to one or more of the contractor's divisions or operating elements, as specified in the subcontracting plan; and~~

~~(B) shall cover each Department of Defense contract that is entered into by the contractor and each subcontract that is entered into by the contractor as the subcontractor under a Department of Defense contract.~~

~~(3) Each comprehensive subcontracting plan of a contractor shall require that the contractor report to the Secretary of Defense on a semi-annual basis the following information:~~

~~(A) The amount of first-tier subcontract dollars awarded during the six-month period covered by the report to covered small business concerns, with the information set forth separately—~~

~~(i) by North American Industrial Classification System code;~~

~~(ii) by major defense acquisition program, as defined in section 2430(a) of title 10, United States Code;~~

~~(iii) by contract, if the contract is for the maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment and the total value of the contract, including options, exceeds $100,000,000; and~~

~~(iv) by military department.~~

~~(B) The total number of subcontracts active under the test program during the six-month period covered by the report that would have otherwise required a subcontracting plan under paragraph (4) or (5) of section 8(d) of the Small Business Act (15 U.S.C. 637(d)).~~

~~(C) Costs incurred in negotiating, complying with, and reporting on comprehensive subcontracting plans.~~

~~(D) Costs avoided by adoption of a comprehensive subcontracting plan.~~

~~(4) A Department of Defense contractor referred to in paragraph (1) is, with respect to a comprehensive subcontracting plan negotiated in any fiscal year, a business concern that, during the immediately preceding fiscal year, furnished the Department of Defense with supplies or services (including professional services, research and~~

~~development services, and construction services) pursuant to at least three Department of Defense contracts having an aggregate value of at least $100,000,000.~~

~~(c) WAIVER OF CERTAIN SMALL BUSINESS ACT SUBCONTRACTING PLAN REQUIREMENTS.—A Department of Defense contractor is not required to negotiate or submit a subcontracting plan under paragraph (4) or (5) of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) with respect to a Department of Defense contract if—~~

~~(1) the contractor has negotiated a comprehensive subcontracting plan under the test program that includes the matters specified in section 8(d)(6) of the Small Business Act (15 U.S.C. 637(d)(6));~~

~~(2) such matters have been determined acceptable by the Secretary of the military department or head of a Defense Agency negotiating such comprehensive subcontracting plan; and~~

~~(3) the comprehensive subcontracting plan applies to the contract.~~

~~(d) FAILURE TO MAKE A GOOD FAITH EFFORT TO COMPLY WITH A COMPREHENSIVE SUBCONTRACTING PLAN.—(1) A contractor that has negotiated a comprehensive subcontracting plan under the test program shall be subject to section 8(d)(4)(F) of the Small Business Act (15 U.S.C. 637(d)(4)(F)) regarding the assessment of liquidated damages for failure to make a good faith effort to comply with its comprehensive subcontracting plan and the goals specified in that plan. In addition, any such failure shall be a factor considered as part of the evaluation of past performance of an offeror.~~

~~(2) Effective in fiscal year 2016 and each fiscal year thereafter in which the test program is in effect, the Secretary of Defense shall report to Congress on any negotiated comprehensive subcontracting plan that the Secretary determines did not meet the subcontracting goals negotiated in the plan for the prior fiscal year.~~

~~(e) TEST PROGRAM PERIOD.—The test program authorized by subsection (a) shall begin on October 1, 1990, unless Congress adopts a resolution disapproving the test program. The test program shall terminate on December 31, 2027.~~

~~(f) REPORT.—Not later than September 30, 2015, the Comptroller General of the United States shall submit a report on the results of the test program to the Committees on Armed Services and on Small Business of the House of Representatives and the Committees on Armed Services and on Small Business and Entrepreneurship of the Senate.~~

~~(g) DEFINITIONS.—In this section, the term 'covered small business concern' includes each of the following:~~

~~(1) A small business concern, as that term is defined under section 3(a) of the Small Business Act (15 U.S.C. 632(a)).~~

~~(2) A small business concern owned and controlled by veterans, as that term is defined in section 3(q)(3) of such Act (15 U.S.C. 632(q)(3)).~~

~~(3) A small business concern owned and controlled by service-disabled veterans, as that term is defined in section 3(q)(2) of such Act (15 U.S.C. 632(q)(2)).~~

~~(4) A qualified HUBZone small business concern, as that term is defined under section 31(b) of such Act.~~

~~(5) A small business concern owned and controlled by socially and economically disadvantaged individuals, as that term is defined in section 8(d)(3)(C) of such Act (15 U.S.C. 637(d)(3)(C)).~~

~~(6) A small business concern owned and controlled by women, as that term is defined under section 3(n) of such Act (15 U.S.C. 632(n)).~~

SECTION 831 OF THE FISCAL YEAR 1991 NDAA, AS AMENDED

(P. L. 101–510; 10 U.S.C. 2302 note)

[Note that the proposal proposes to codify this section in title 10, USC]

~~SEC. 831. MENTOR-PROTÉGÉ PILOT PROGRAM.~~

~~(a) ESTABLISHMENT OF PILOT PROGRAM.—The Secretary of Defense shall establish a pilot program to be known as the "Mentor-Protégé Program".~~

~~(b) PURPOSE.—The purpose of the program is to provide incentives for major Department of Defense contractors to furnish disadvantaged small business concerns with assistance designed to—~~

~~(1) enhance the capabilities of disadvantaged small business concerns to perform as subcontractors and suppliers under Department of Defense contracts and other contracts and subcontracts; and~~

~~(2) increase the participation of such business concerns as subcontractors and suppliers under Department of Defense contracts, other Federal Government contracts, and commercial contracts.~~

~~(c) PROGRAM PARTICIPANTS.—(1) A business concern meeting the eligibility requirements set out in subsection (d) may enter into agreements under subsection (e) and furnish assistance to disadvantaged small business concerns upon making application to the Secretary of Defense and being approved for participation in the pilot program by the Secretary. A business concern participating in the pilot program pursuant to such an approval shall be known, for the purposes of the program, as a "mentor firm".~~

~~(2) A disadvantaged small business concern eligible for the award of Federal contracts may obtain assistance from a mentor firm upon entering into an agreement with the mentor firm as provided in subsection (e). A disadvantaged small business concern may not be a party to more than one agreement concurrently, and the authority to enter into agreements under subsection (e) shall only be available to such concern during the 5-year period beginning on the date such concern enters into the first such agreement. A disadvantaged small business concern receiving such assistance shall be known, for the purposes of the program, as a "protégé firm".~~

~~(3) In entering into an agreement pursuant to subsection (e), a mentor firm may rely in good faith on a written representation of a business concern that such business concern is a disadvantaged small business concern. The Small Business Administration shall determine the status of such business concern as a disadvantaged small business concern in the event of a protest regarding the status of such business concern. If at any time the business concern is determined by the Small Business Administration not to be a disadvantaged small business concern, assistance furnished such business concern by the~~

~~mentor firm after the date of the determination may not be considered assistance furnished under the program.~~

~~(d) MENTOR FIRM ELIGIBILITY.—~~

~~(1) Subject to subsection (c)(1), a mentor firm may enter into an agreement with one or more protégé firms under subsection (e) and provide assistance under the program pursuant to that agreement if the mentor firm—~~

~~(A) is eligible for award of Federal contracts; and~~

~~(B) demonstrates that it—~~

~~(i) is qualified to provide assistance that will contribute to the purpose of the program;~~

~~(ii) is of good financial health and character and does not appear on a Federal list of debarred or suspended contractors; and~~

~~(iii) can impart value to a protégé firm because of experience gained as a Department of Defense contractor or through knowledge of general business operations and government contracting, as demonstrated by evidence that—~~

~~(I) during the fiscal year preceding the fiscal year in which the mentor firm enters into the agreement, the total amount of the Department of Defense contracts awarded such mentor firm and the subcontracts awarded such mentor firm under Department of Defense contracts was equal to or greater than $100,000,000; or~~

~~(II) the mentor firm demonstrates the capability to assist in the development of protégé firms, and is approved by the Secretary of Defense pursuant to criteria specified in the regulations prescribed pursuant to subsection (k).~~

~~(2) A mentor firm may not enter into an agreement with a protégé firm if the Administrator of the Small Business Administration has made a determination finding affiliation between the mentor firm and the protégé firm.~~

~~(3) If the Administrator of the Small Business Administration has not made such a determination and if the Secretary has reason to believe (based on the regulations promulgated by the Administrator regarding affiliation) that the mentor firm is affiliated with the protégé firm, the Secretary shall request a determination regarding affiliation from the Administrator of the Small Business Administration.~~

~~(e) MENTOR-PROTÉGÉ AGREEMENT.—Before providing assistance to a protégé firm under the program, a mentor firm shall enter into a mentor-protégé agreement with the protégé firm regarding the assistance to be provided by the mentor firm. The agreement shall include the following:~~

~~(1) A developmental program for the protégé firm, in such detail as may be reasonable, including—~~

~~(A) factors to assess the protégé firm's developmental progress under the program;~~

~~(B) a description of the quantitative and qualitative benefits to the Department of Defense from the agreement, if applicable;~~

~~(C) goals for additional awards that protégé firm can compete for outside the Mentor-Protégé Program; and~~

~~(D) the assistance the mentor firm will provide to the protégé firm in understanding contract regulations of the Federal Government and the Department of Defense (including the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement) after award of a subcontract under this section, if applicable.~~

~~(2) A program participation term for any period of not more than three years, except that the term may be a period of up to five years if the Secretary of Defense determines in writing that unusual circumstances justify a program participation term in excess of three years.~~

~~(3) Procedures for the protégé firm to terminate the agreement voluntarily and for the mentor firm to terminate the agreement for cause.~~

~~(f) FORMS OF ASSISTANCE.—A mentor firm may provide a protégé firm the following:~~

~~(1) Assistance, by using mentor firm personnel, in—~~

~~(A) general business management, including organizational management, financial management, and personnel management, marketing, and overall business planning;~~

~~(B) engineering and technical matters such as production, inventory control, and quality assurance; and~~

~~(C) any other assistance designed to develop the capabilities of the protégé firm under the developmental program referred to in subsection (e).~~

~~(2) Award of subcontracts on a noncompetitive basis to the protégé firm under the Department of Defense or other contracts.~~

~~(3) Payment of progress payments for performance of the protégé firm under such a subcontract in amounts as provided for in the subcontract, but in no event may any such progress payment exceed 100 percent of the costs incurred by the protégé firm for the performance.~~

~~(4) Advance payments under such subcontracts.~~

~~(5) Loans.~~

~~(6) Assistance obtained by the mentor firm for the protégé firm from one or more of the following—~~

~~(A) small business development centers established pursuant to section 21 of the Small Business Act (15 U.S.C. 648);~~

~~(B) entities providing procurement technical assistance pursuant to chapter 142 of this title;~~

~~(C) a historically Black college or university or a minority institution of higher education; or~~

~~(D) women's business centers described in section 29 of the Small Business Act (15 U.S.C. 656).~~

~~(g) INCENTIVES FOR MENTOR FIRMS.—(1) The Secretary of Defense may provide to a mentor firm reimbursement for the total amount of any progress payment or advance payment made under the program by the mentor firm to a protégé firm in connection with a Department of Defense contract awarded the mentor firm.~~

~~(2)(A) The Secretary of Defense may provide to a mentor firm reimbursement for the costs of the assistance furnished to a protégé firm pursuant to paragraphs (1) and (6) of subsection (f) (except as provided in subparagraph (D)) as provided for in a line item in a Department of Defense contract under which the mentor firm is furnishing products or services to the Department, subject to a maximum amount of reimbursement specified in such contract, except that this sentence does not apply in a case in which the Secretary of Defense determines in writing that unusual circumstances justify reimbursement using a separate contract.~~

~~(B) The determinations made in annual performance reviews of a mentor firm's mentor-protégé agreement shall be a major factor in the determinations of amounts of reimbursement, if any, that the mentor firm is eligible to receive in the remaining years of the program participation term under the agreement.~~

~~(C) The total amount reimbursed under this paragraph to a mentor firm for costs of assistance furnished in a fiscal year to a protégé firm may not exceed $1,000,000, except in a case in which the Secretary of Defense determines in writing that unusual circumstances justify a reimbursement of a higher amount.~~

~~(D) The Secretary may not reimburse any fee assessed by the mentor firm for services provided to the protégé firm pursuant to subsection (f)(6) or for business development expenses incurred by the mentor firm under a contract awarded to the mentor firm while participating in a joint venture with the protégé firm.~~

~~(3)(A) Costs incurred by a mentor firm in providing assistance to a protégé firm that are not reimbursed pursuant to paragraph (2) shall be recognized as credit in lieu of subcontract awards for purposes of determining whether the mentor firm attains a subcontracting participation goal applicable to such mentor firm under a Department of Defense contract, under a contract with another executive agency, or under a divisional or company-wide subcontracting plan negotiated with the Department of Defense or another executive agency.~~

~~(B) The amount of the credit given a mentor firm for any such unreimbursed costs shall be equal to—~~

~~(i) four times the total amount of such costs attributable to assistance provided by entities described in subsection (f)(6);~~

~~(ii) three times the total amount of such costs attributable to assistance furnished by the mentor firm's employees; and~~

~~(iii) two times the total amount of any other such costs.~~

~~(C) Under regulations prescribed pursuant to subsection (k), the Secretary of Defense shall adjust the amount of credit given a mentor firm pursuant to subparagraphs (A) and (B) if the Secretary determines that the firm's performance regarding the award of subcontracts to disadvantaged small business concerns has declined without justifiable cause.~~

~~(4) A mentor firm shall receive credit toward the attainment of a subcontracting participation goal applicable to such mentor firm for each subcontract for a product or service awarded under such contract by a mentor firm to a business concern that, except for its size, would be a small business concern owned and controlled by socially and economically disadvantaged individuals, but only if—~~

~~(A) the size of such business concern is not more than two times the maximum size specified by the Administrator of the Small Business~~

~~Administration for purposes of determining whether a business concern furnishing such product or service is a small business concern; and~~

~~(B) the business concern formerly had a mentor-protégé agreement with such mentor firm that was not terminated for cause.~~

~~(h) RELATIONSHIP TO SMALL BUSINESS ACT.—For purposes of the Small Business Act (15 U.S.C. 631 et seq.), no determination of affiliation or control (either direct or indirect) may be found between a protégé firm and its mentor firm on the basis that the mentor firm has agreed to furnish (or has furnished) to its protégé firm pursuant to a mentor-protégé agreement any form of developmental assistance described in subsection (f).~~

~~(2) Notwithstanding section 8 of the Small Business Act (15 U.S.C. 637), the Small Business Administration may not determine a disadvantaged small business concern to be ineligible to receive any assistance authorized under the Small Business Act on the basis that such business concern has participated in the Mentor-Protégé Program or has received assistance pursuant to any developmental assistance agreement authorized under such program.~~

~~(3) The Small Business Administration may not require a firm that is entering into, or has entered into, an agreement under subsection (e) as a protégé firm to submit the agreement, or any other document required by the Secretary of Defense in the administration of the Mentor-Protégé Program, to the Small Business Administration for review, approval, or any other purpose.~~

~~(i) PARTICIPATION IN MENTOR-PROTÉGÉ PROGRAM NOT TO BE A CONDITION FOR AWARD OF A CONTRACT OR SUBCONTRACT.—A mentor firm may not require a business concern to enter into an agreement with the mentor firm pursuant to subsection (e) as a condition for being awarded a contract by the mentor firm, including a subcontract under a contract awarded to the mentor firm.~~

~~(j) EXPIRATION OF AUTHORITY.—(1) No mentor-protégé agreement may be entered into under subsection (e) after September 30, 2018.~~

~~(2) No reimbursement may be paid, and no credit toward the attainment of a subcontracting goal may be granted, under subsection (g) for any cost incurred after September 30, 2021.~~

~~(k) REGULATIONS.—The Secretary of Defense shall prescribe regulations to carry out the pilot Mentor-Protégé Program. Such regulations shall include the requirements set forth in section 8(d) of the Small Business Act (15 U.S.C. 637(d)); and shall prescribe procedures by which mentor firms may terminate participation in the program. The Secretary shall publish the proposed regulations not later than the date 180 days after the date of the enactment of this Act [Nov. 5, 1990]. The Secretary shall promulgate the final regulations not later than the date 270 days after the date of the enactment of this Act. The Department of Defense policy regarding the pilot Mentor-Protégé Program shall be published and maintained as an appendix to the Department of Defense Supplement to the Federal Acquisition Regulation.~~

~~(l) REPORT BY MENTOR FIRMS.—To comply with section 8(d)(7) of the Small Business Act (15 U.S.C. 637(d)(7)), each mentor firm shall submit to the Secretary not less than once each fiscal year a report that includes, for the preceding fiscal year—~~

~~(1) all technical or management assistance provided by mentor firm personnel for the purposes described in subsection (f)(1);~~

~~(2) any new awards of subcontracts on a competitive or noncompetitive basis to the protégé firm under Department of Defense contracts or other contracts, including the value of such subcontracts;~~

~~(3) any extensions, increases in the scope of work, or additional payments not previously reported for prior awards of subcontracts on a competitive or noncompetitive basis to the protégé firm under Department of Defense contracts or other contracts, including the value of such subcontracts;~~

~~(4) the amount of any payment of progress payments or advance payments made to the protégé firm for performance under any subcontract made under the Mentor-Protégé Program;~~

~~(5) any loans made by mentor firm to the protégé firm;~~

~~(6) All Federal contracts awarded to the mentor firm and the protégé firm as a joint venture, designating whether the award was a restricted competition or a full and open competition;~~

~~(7) Any assistance obtained by the mentor firm for the protégé firm from one or more—~~

~~(A) small business development centers established pursuant to section 21 of the Small Business Act (15 U.S.C. 648);~~

~~(B) entities providing procurement technical assistance pursuant to chapter 142 of this title; or~~

~~(C) historically Black colleges or universities or minority institutions of higher education;~~

~~(8) whether there have been any changes to the terms of the mentor-protégé agreement; and~~

~~(9) a narrative—~~

~~(A) describing the success assistance provided under subsection (f) has had in addressing the developmental needs of the protégé firm and the impact on Department of Defense contracts, and~~

~~(B) addressing any problems encountered.~~

~~(m) REVIEW OF REPORT BY THE OFFICE OF SMALL BUSINESS PROGRAMS.—The Office of Small Business Programs of the Department of Defense shall review the report required by subsection (l) and, if the Office finds that the mentor-protégé agreement is not furthering the purpose of the Mentor-Protégé Program, decide not to approve any continuation of the agreement.~~

~~(n) DEFINITIONS.—In this section:~~

~~(1) The term "small business concern" has the meaning given such term under section 3 of the Small Business Act (15 U.S.C. 632).~~

~~(2) The term "disadvantaged small business concern" means a firm that has less than half the size standard corresponding to its primary North American Industry Classification System code, is not owned or managed by individuals or entities that directly or indirectly have stock options or convertible securities in the mentor firm, and is—~~

~~(A) a small business concern owned and controlled by socially and economically disadvantaged individuals;~~

~~(B) a business entity owned and controlled by an Indian tribe as defined by section 8(a)(13) of the Small Business Act (15 U.S.C. 637(a)(13));~~

~~(C) a business entity owned and controlled by a Native Hawaiian Organization as defined by section 8(a)(15) of the Small Business Act (15 U.S.C. 637(a)(15));~~

~~(D) a qualified organization employing severely disabled individuals;~~

~~(E) a small business concern owned and controlled by women, as defined in section 8(d)(3)(D) of the Small Business Act (15 U.S.C. 637(d)(3)(D));~~

~~(F) a small business concern owned and controlled by service-disabled veterans (as defined in section 8(d)(3) of the Small Business Act); and~~

~~(G) a qualified HUBZone small business concern (as defined in section 3(p) of the Small Business Act (15 U.S.C. 632(p)); or~~

~~(H) a small business concern that—~~

~~(i) is a nontraditional defense contractor, as such term is defined in section 2302 of title 10, United States Code; or~~

~~(ii) currently provides goods or services in the private sector that are critical to enhancing the capabilities of the defense supplier base and fulfilling key Department of Defense needs.~~

~~(3) The term "small business concern owned and controlled by socially and economically disadvantaged individuals" has the meaning given such term in section 8(d)(3)(C) of the Small Business Act (15 U.S.C. 637(d)(3)(C)).~~

~~(4) The term "historically Black college and university" means any of the historically Black colleges and universities referred to in section 2323 of title 10, United States Code.~~

~~(5) The term "minority institution of higher education" means an institution of higher education with a student body that reflects the composition specified in section 312(b)(3), (4), and (5) of the Higher Education Act of 1965 (20 U.S.C. 1058(b)(3), (4), and (5)).~~

~~(6) The term "subcontracting participation goal", with respect to a Department of Defense contract, means a goal for the extent of the participation by disadvantaged small business concerns in the subcontracts awarded under such contract, as established pursuant to section 2323 of title 10, United States Code and section 8(d) of the Small Business Act (15 U.S.C. 637(d)).~~

~~(7) The term "qualified organization employing the severely disabled" means a business entity operated on a for-profit or nonprofit basis that—~~

~~(A) uses rehabilitative engineering to provide employment opportunities for severely disabled individuals and integrates severely disabled individuals into its workforce;~~

~~(B) employs severely disabled individuals at a rate that averages not less than 20 percent of its total workforce;~~

~~(C) employs each severely disabled individual in its workforce generally on the basis of 40 hours per week; and~~

~~(D) pays not less than the minimum wage prescribed pursuant to section 6 of the Fair Labor Standards Act (29 U.S.C. 206) to those employees who are severely disabled individuals.~~

~~(8) The term "severely disabled individual" means an individual—~~

~~(A) who is blind (as defined in section 8501 of title 41); or~~

~~(B) who is a severely disabled individual (as defined in such section).~~

~~(9) The term "affiliation", with respect to a relationship between a mentor firm and a protégé firm, means a relationship described under section 121.103 of title 13, Code of Federal Regulations (or any successor regulation).~~

Section 4237 of the National Defense Authorization Act for Fiscal Year 1993

(P. L. 102–484; 15 U.S.C. 638 note)

[Note contingent effective date in subsection (h)]

~~SEC. 4237. SMALL BUSINESS INNOVATION RESEARCH PROGRAM IN DEPARTMENT OF DEFENSE.~~

~~(a) EXTENSION OF PROGRAM.—[Amended section 5 of Pub. L. 97–219.]~~

~~(b) LIMITATION ON PROGRAM AWARDS.—Amounts paid to a small business concern by the Department of Defense under the Small Business Innovation Research Program for a project—~~

~~(1) in phase I under the program may not exceed $100,000; and~~

~~(2) in phase II under the program may not exceed $750,000.~~

~~(c) COMMERCIAL APPLICATIONS STRATEGY.—Not later than 270 days after the date of the enactment of this Act [Oct. 23, 1992], the Secretary of Defense, in consultation with the Administrator of the Small Business Administration, shall develop and issue a strategy for effectuating the transition of successful projects under the Small Business Innovation Research Program from phase II under the program into phase III under the program.~~

~~(d) REPEAL OF EXCLUSION OF CERTAIN ACTIVITIES.—[Amended section 9 of the Small Business Act.]~~

~~(e) PERCENTAGE OF REQUIRED EXPENDITURES FOR SBIR CONTRACTS.—(1) The Small Business Innovation Research Program shall apply to the Department of Defense (including the military departments) as if the percentage specified in section 9(f)(1) of the Small Business Act (15 U.S.C. 638(f)(1)) with respect to fiscal years after fiscal year 1982 were determined in accordance with the table set forth in paragraph (2) (rather than 1.25 percent).~~

~~(2)(A) The percentage under section 9(f)(1) of the Small Business Act (15 U.S.C. 638(f)(1)) for any fiscal year for the Department of Defense and each military department shall be determined in accordance with the following table:~~

~~**For fiscal year:**~~	~~**The percentage is:**~~

~~1993~~	~~1.25~~
~~1994~~	~~1.5~~
~~1995~~	~~1.75~~
~~1996~~	~~2.0~~
~~1997~~	~~2.25~~
~~1998 and thereafter~~	~~2.5.~~

~~(B) If the determination of the Secretary of Defense under subparagraph (C) is a negative determination (as set forth in that paragraph), then the percentage under section 9(f)(1) of the Small Business Act (15 U.S.C. 638(f)(1)) for the Department of Defense and each military department for fiscal years after fiscal year 1996 shall remain at the level applicable for fiscal year 1996 (notwithstanding the percentages specified in subparagraph (A) for fiscal years after fiscal year 1996).~~

~~(C) Not later than June 30, 1996, the Secretary of Defense during fiscal year 1996 shall determine whether there has been a demonstrable reduction in the quality of research performed under funding agreements awarded by the Department of Defense under the SBIR program since the beginning of fiscal year 1993 such that increasing the percentage under subparagraph (A) for fiscal years after fiscal year 1996 with respect to the department would adversely affect the performance of the department's research programs. If the determination of the Secretary is that there has been such a demonstrable reduction in the quality of research such that increasing the percentage under subparagraph (B) for fiscal years after fiscal year 1996 with respect to the department would adversely affect the performance of the department's research programs, the Secretary shall be considered for purposes of subparagraph (B) to have made a negative determination. The determination of the Secretary concerned under this paragraph shall be made after considering the assessment of the Comptroller General with respect to that department in the report transmitted under subparagraph (D).~~

~~(D) Not later than March 30, 1996, the Comptroller General shall transmit to the Congress and the Secretary of Defense a report setting forth the Comptroller General's assessment, with respect to the Department of Defense of whether there has been a demonstrable reduction in the quality of research performed under funding agreements awarded by the department under the SBIR program since the beginning of fiscal year 1993 such that increasing the percentage under subparagraph (A) for fiscal years after fiscal year 1996 with respect to the department would adversely affect the performance of the department's research programs.~~

~~(E) The results of each determination under subparagraph (C) shall be transmitted to the Congress not later than June 30, 1996.~~

~~(f) DEFINITIONS.—In this section:~~

~~(1) The term "Small Business Innovation Research Program" means the program established under the following provisions of section 9 of the Small Business Act (15 U.S.C. 638):~~

~~(A) Paragraphs (4) through (7) of subsection (b).~~

~~(B) Subsections (e) through (k).~~

~~(2) The term "phase I", with respect to the Small Business Innovation Research Program, means the first phase described in subsection (e)(4)(A) of section 9 of the Small Business Act.~~

~~(3) The term "phase II", with respect to the Small Business Innovation Research Program, means the second phase described in subsection (e)(4)(B) of such section.~~

~~(4) The term "phase III", with respect to the Small Business Innovation Research Program, means the third phase described in subsection (e)(4)(C) of such section.~~

~~(g) EFFECTIVE DATE.—Subject to subsection (h), this section, and the amendments made by this section, shall take effect on October 1, 1992, and shall apply with respect to fiscal years after fiscal year 1992.~~

~~(h) EFFECTIVENESS OF SECTION CONDITIONAL ON FAILURE TO ENACT OTHER LEGISLATION.—(1) In the event of the enactment of H.R. 4400 or S. 2941 [S. 2941 was enacted into law as Pub. L. 102–564 on Oct. 28, 1992], 102d Congress, on or before the date of the enactment of this Act [Oct. 23, 1992], then this section and the amendments made by this section shall not take effect.~~

~~(2)(A) In the event of the enactment of H.R. 4400 or S. 2941, 102d Congress, after the date of the enactment of this Act, then, effective immediately before the enactment of H.R. 4400 or S. 2941, 102d Congress—~~

~~(i) this section shall cease to be effective; and~~

~~(ii) the provisions of a small business law that are amended by this section shall be effective and read as such provisions of that law were in effect immediately before the enactment of this Act, except that to the extent that any amendment is made to such a provision of a small business law by any other provision of law referred to in subparagraph (B), such provision of a small business law shall be effective and shall read as amended by that other provision of law.~~

~~(B) For the purposes of subparagraph (A)(ii), a provision of law referred to in this subparagraph is the following:~~

~~(i) A provision of this Act other than a provision of this section.~~

~~(ii) A provision of any other Act if the provision takes effect during the period beginning on the date of the enactment of this Act and ending immediately before the enactment of H.R. 4400 or S. 2941, 102d Congress.~~

~~(C) In this paragraph, the term 'small business law' means—~~

~~(i) the Small Business Act (15 U.S.C. 631 et seq.); and~~

~~(ii) the Small Business Innovation Development Act of 1982 [Pub. L. 97–219] (15 U.S.C. 638 note).~~

Section 801(b) of the National Defense Authorization Act for Fiscal Year 2004

(P. L. 108–136; 10 USC 2302 note)

~~(b) DATA REVIEW.—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 section 2382(c)(1) of title 10, United States Code.~~

~~(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)).~~

Section 7
Statutory Offices and Designated Officials

Grant the Secretary of Defense the flexibility to structure the DoD organization consistent with the intent of the FY 2017 NDAA.

RECOMMENDATIONS

Rec. 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.

22a: Repeal the statutory requirement for Department of Defense Test Resource Management Center, 10 U.S.C. § 196.

22b: Repeal the statutory requirement for Office of Corrosion Policy and Oversight, 10 U.S.C. § 2228.

22c: Repeal the statutory requirement for Director for Performance Assessment and Root Cause Analysis (PARCA), 10 U.S.C. § 2438.

Recommendations continue on following page.

RECOMMENDATIONS

22d: Repeal the statutory requirement for Office of Technology Transition, 10 U.S.C. § 2515.

22e: Repeal the statutory requirement for Office for Foreign Defense Critical Technology Monitoring and Assessment, 10 U.S.C. § 2517.

22f: Repeal the statutory requirement at 10 U.S.C. § 204 for a Small Business Ombudsman within each defense audit agency.

22g: Repeal the statutory requirement for Secretary of Defense to designate a competition advocate for the Defense Logistics Agency, 10 U.S.C. § 2318.

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).

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).

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).

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).

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).

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).

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.

INTRODUCTION

The Section 809 Panel identified statutorily mandated offices and designated senior officials that perform specified acquisition-related functions. In line with the organizational reforms in USD(AT&L), as required by Section 901 of the FY 2017 NDAA,[1] Congress should remove the statutory requirements for some of these offices.

Congress has from time to time created statutory requirements for positions within DoD that are not offices to which appointments are made by the President, by and with the advice and consent of the Senate, but which are filled by officials appointed by the Secretary of Defense. Unlike most DoD positions below the *advice-and-consent* level, these positions are not subject to internal reorganization or restructuring. To afford the Secretary of Defense the ability to implement the best structure for DoD (both now and in the future), Congress should repeal a number of these requirements for specified positions. This recommendation is consistent with provisions of the FY 2018 NDAA. Repeal of these statutory requirements would not itself abolish the affected positions, but would allow the Secretary of Defense to restructure those positions should such action to be warranted.

Codifying the existence and structure of certain offices may unnecessarily restrict the Secretary of Defense's ability to adapt the DoD organizational structure to improve efficiency and effectiveness consistent with the intent of the FY 2017 NDAA. The following recommendations do not constitute an assessment of the offices' individual missions or roles in the acquisition process, but rather are an effort to remove unnecessarily prescriptive and obsolete requirements from the U.S. Code. The recommendations address whether DoD could have increased flexibility, defined as freedom of action to adapt the organization in the future to best suit the needs of USD(R&E) and USD(A&S). In its analysis, the Section 809 Panel considered whether the provisions examined provide authority that the Secretary of Defense would not otherwise have.

In most cases, removing statutory requirements would enhance the Secretary's authority. The recommendations in this section focus on whether mandating certain offices in statute may unnecessarily restrict the Secretary's ability to pursue acquisition-related missions and may limit the Secretary's ability to construct a proactive and adaptive organization. Included here are those cases in which recommendations are based on rationale other than direct effect on the Section 901 reorganization. This section does not include recommendations regarding the role or mission, leaving such decisions to appropriate decision-makers in DoD.

The analysis below only reviews OSD acquisition-related offices designated in statute or those that require the Secretary of Defense to designate an official. The following offices or officials are designated in statute; however, the Section 809 Panel is not making any recommendations to change the related statute applicable to these offices at this time:

- Director of Operational Test and Evaluation (10 U.S.C. § 139)
- Cost Accounting Standards Board (10 U.S.C. § 190)

[1] FY 2017 NDAA, Pub. L. No. 114–328 (2016).

- Director of Small Business Programs (10 U.S.C. § 144)
- Secretary of Defense Waiver of Acquisition Laws to Acquire Vital National Security Capabilities—designation of responsible official (Section 806(b) of the FY 2016 NDAA (10 U.S.C. § 2302 note))

RECOMMENDATION

Recommendation 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.

Problem

Codifying the existence and structure of certain offices may unnecessarily restrict the Secretary's ability to adapt the DoD organizational structure to improve efficiency and effectiveness consistent with the intent of the FY 2017 NDAA. The subsections below provide analysis of 14 congressionally mandated, acquisition-related offices and positions.

THE REQUIREMENT FOR THE FOLLOWING STATUTORY OFFICES SHOULD BE REPEALED.

Subrecommendation 22a: Repeal the statutory requirement for Department of Defense Test Resource Management Center, 10 U.S.C. § 196.

Background

As stipulated in 10 U.S.C. § 196, "The Secretary of Defense shall establish within the Department of Defense under section 191 of this title a Department of Defense Test Resource Management Center [TRMC]….The Secretary shall designate the Center as a Department of Defense Field Activity."[2] The statute also states that there will be a director and deputy director who will "be selected by the Secretary," and be "subject to the supervision" of the USD(AT&L). The pending Section 901 reorganization affects TRMC.[3]

Congress established TRMC in statute in the FY 2003 NDAA.[4] TRMC provides oversight of proposed budgets and expenditures for the test and evaluation (T&E) facilities and resources of DoD's Major Range and Test Facility Base (MRTFB).

DoDI 5105.71 serves as TRMC's charter, and the director is DoD's senior advisor on all matters related to the adequacy of the T&E infrastructure in support of its acquisition process.[5] TRMC provides strategic guidance on a biennial basis for DoD's T&E infrastructure based on future and near-term warfighting requirements. It also annually certifies the proposed budgets and expenditures for the Military Services' and Agencies' T&E facilities and resources (to include workforce) except for the "budgets and expenditures for activities described in section 10 U.S.C. § 139(j)," which the Director of Operational Test and Evaluation (DOT&E) administers.[6]

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[2] Department of Defense Test Resource Management Center, 10 U.S.C. § 196.
[3] Ibid.
[4] FY 2003 NDAA, Pub. L. No. 107–314, 116 Stat. 2487 (2002).
[5] Department of Defense Test Resource Management Center (TRMC), DoDD 5107.71 (2004).
[6] Director of Operational Test and Evaluation, 10 U.S.C. § 139.

Findings

TRMC oversees the management and operations of the Major Range and Test Facility Base (MRTFB), which the designated core set of DoD's most critical T&E infrastructure dispersed across 23 locations and employing more than 30,000 T&E personnel. TRMC also maintains awareness of the T&E capabilities of the rest of the federal government, the private sector, and allies and partners. TRMC approves substantial modifications—including expansion, divestment, consolidation, or curtailment of activities—for all non-MRTFB T&E facilities and resources within DoD prior to implementation by the Military Services or agencies.[7] New weapons systems and technologies undergo T&E at MRTFBs and are essential to DoD's future.[8] TRMC cooperates closely with the Deputy Assistant Secretary of Defense for Developmental Test and Evaluation (DASD[DT&E]), and details personnel to that organization as supplemental workforce.[9]

DoD field activities provide, "on a DoD-wide basis, a supply or service activity common to more than one Military Department or DoD headquarters function when it is more effective, economical, or efficient to do so."[10] The Secretary of Defense maintains the authority to establish and continue a field activity. TRMC is currently the only one of the eight field activities mandated in statute.[11]

Conclusions

New weapons systems and technologies undergo T&E at MRTFBs and are essential to the future of warfighting.[12] TRMC's primary mission is to enable acquisition programs to execute successfully through adequate testing supported by the right T&E capabilities at the right time and place.[13] Congress should remove the statutory provision that established TRMC to facilitate freedom of action throughout the Section 901 reorganization of the offices of the USD(AT&L) and enhance the Secretary's authority to designate field activities.

Subrecommendation 22b: Repeal the statutory requirement for Office of Corrosion Policy and Oversight, 10 U.S.C. § 2228.

Background

In December 2002, the FY 2003 NDAA[14] amended Title 10, U.S.C., to add 10 U.S.C. § 2228, which establishes the Office of Corrosion Policy and Oversight (Corrosion Office).[15] Section 2228 states:

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[7] OUSD(AT&L), submission to 809 Panel, October 13, 2017.
[8] DoD, *Deputy Assistant Secretary of Defense for Development Test & Evaluation/Director, Test Resource Management Center*, accessed September 18, 2017, http://www.acq.osd.mil/dte-trmc/TRMC_1.html.
[9] DoD, *Developmental Test and Evaluation FY 2016 Annual Report,* accessed November 4, 2017, https://www.acq.osd.mil/dte-trmc/docs/FY2016_DTE_AnnualReport.pdf.
[10] DoD, *Agency Strategic Plan Fiscal Years 2015-2018,* accessed November 4, 2018, http://dcmo.defense.gov/Portals/47/Documents/Publications/ASP/FY2016_2018ASP.pdf.
[11] DoD, *Defense Agencies and DoD Field Activities Common Supply or Service Agency Per 10 U.S.C. §191*, accessed November 4, 2017, http://dcmo.defense.gov/Portals/47/Documents/OSD%20DAFA%20Organization.pdf.
[12] DoD, *Deputy Assistant Secretary of Defense for Development Test & Evaluation / Director, Test Resource Management Center*, accessed September 18, 2017, http://www.acq.osd.mil/dte-trmc/TRMC_1.html.
[13] OUSD(AT&L), submission to 809 Panel, October 13, 2017.
[14] FY 2003 NDAA, Pub. L. No. 107–314, § 1067 (2002).
[15] GAO, *Defense Management: DOD Should Enhance Oversight of Equipment-Related Corrosion Projects*, accessed June 9, 2017, http://www.gao.gov/assets/660/657498.pdf. Office of Corrosion Policy and Oversight, 10 U.S.C. § 2228.

> *There is an Office of Corrosion Policy and Oversight within the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.*
>
> *(2) The Office shall be headed by a Director of Corrosion Policy and Oversight, who shall be assigned to such position by the Under Secretary from among civilian employees of the Department of Defense with the qualifications described in paragraph (3).*[16]

Congress mandated the Corrosion Office to bolster DoD's capacity to abate and avoid problems associated with corrosion of military equipment.[17]

Findings

Since the Corrosion Office's development in 2002, DoD has issued multiple regulations on DoD policy toward corrosion prevention and mitigation. DoDI 5000.67 closely reflects, at times verbatim, the text in 10 U.S.C. § 2228.

The House of Representatives version of the FY 2018 NDAA proposed to repeal the statutory requirement for the Corrosion Office.[18] The report of the House Armed Services Committee (HASC) to accompany the bill notes that the bill "would repeal section 2228 of title 10, United States Code, requiring that there be an Office of Corrosion Policy and Oversight within [AT&L]."[19] The final FY 2018 NDAA instead requested the Secretary of Defense provide a report "(1) evaluating the continued need for the Office of Corrosion Policy and Oversight; and (2) containing a recommendation regarding whether to retain or terminate the Office."[20] It also amends the requirements surrounding the corrosion control and prevention executive at the military departments but does not make changes to the OSD position and office.[21]

Conclusions

Congress should repeal the statutory requirement for the OSD Office of Corrosion Policy and Oversight in 10 U.S.C. § 2228.

Subrecommendation 22c: Repeal the statutory requirement for Director for Performance Assessment and Root Cause Analysis (PARCA), 10 U.S.C. § 2438.

Background

According to 10 U.S.C. § 2438, the Secretary of Defense must "designate a senior official in the Office of the Secretary of Defense as the principal official of the Department of Defense responsible for conducting and overseeing performance assessments and root cause analyses for major defense

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[16] Office of Corrosion Policy and Oversight, 10 U.S.C. § 2228.
[17] GAO, *Defense Management: DOD Should Enhance Oversight of Equipment-Related Corrosion Projects*, *GAO-13-661*, accessed June 9, 2017, http://www.gao.gov/assets/660/657498.pdf.
[18] HASC, *Section 902 of H.R. 2810 as passed the House of Representatives on July 14, 2017*, accessed October 31, 2017, https://www.congress.gov/115/bills/hr2810/BILLS-115hr2810pcs.pdf.
[19] HASC, *Report of the Committee on H.R. 2810*, House Report 115-200, accessed November 3, 2017, https://www.congress.gov/115/crpt/hrpt200/CRPT-115hrpt200.pdf.
[20] House of Representatives, FY 2018 NDAA, *Conference Report to Accompany H.R. 2810*, accessed January 6, 2018, http://docs.house.gov/billsthisweek/20171113/HRPT-115-HR2810.pdf.
[21] Ibid.

acquisition programs."[22] It further stipulates that DoD assign the director "appropriate staff and resources necessary to carry out the senior official's function under this section."[23] Congress created this position through Section 103 of the Weapons System Acquisition Reform Act of 2009 (WSARA).[24]

Findings

WSARA was a direct response to the GAO's reports that uncovered "significant delays and cost overruns" for MDAPs.[25] A 2009 GAO report showed that cost growth for MDAPs in FY 2009 had reached $296 billion and that the average "delay in delivering initial capabilities" was 22 months.[26]

WSARA defines PARCA's role as the body responsible for performance assessing MDAPs. PARCA completes these assessments semiannually to provide the USD(AT&L) with situational awareness of the portfolio.[27] The PARCA director must also uncover "the root causes of cost growth and other problems on programs that experience a critical Nunn McCurdy cost breach."[28]

In accordance with the FY 2017 NDAA two new positions—the USD(R&E) and the USD(A&S))— will replace the USD(AT&L).[29] This reorganization, set to take effect in February 2018, directly affects the PARCA office and directorship because the PARCA director currently reports to the USD(AT&L).[30]

Congress's statutory mandate for a PARCA director may limit DoD's organizational flexibility in a rapidly evolving strategic environment. The proposed restructuring of USD(AT&L) does not currently include a plan for PARCA.[31] Maintaining a statutory requirement for a PARCA director might unnecessarily preclude appropriate placement within the new organization.

Conclusions

The Section 901 report on the forthcoming reforms to USD(AT&L) postpones alignment of the PARCA office.[32] The proposed USD(A&S) organization, which contains the Assistant Secretary for Defense (Acquisition), does not include the PARCA office and its directorship. According to the report, DoD "will assess the best placement of the Program Assessment and Root Cause Analysis function within USD(A&S)."[33] Ongoing evaluation of the placement of PARCA provides the opportunity to also

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[22] Performance Assessments and Root Cause Analyses, 10 U.S.C. §2438.
[23] Ibid.
[24] Weapon Systems Acquisition Reform Act of 2009, Pub. L. No. 111–23 (2009).
[25] GAO, *Defense Acquisitions: Assessments of Selected Weapon Programs, GAO-09-326SP*, accessed August 8, 2017, http://www.gao.gov/assets/290/287947.pdf. United States Senate Democrats, *S. 454, the Weapons Acquisition Reform Act of 2009*, accessed August 8, 2017, https://democrats.senate.gov/2009/05/06/s-454-the-weapons-acquisition-reform-act-of-2009/#.WYn413eGN-V.
[26] Ibid.
[27] "About PARCA," PARCA, accessed August 31, 2017, http://www.acq.osd.mil/parca/about.shtml.
[28] GAO, *Weapons Acquisition Reform: Reform Act Is Helping DOD Acquisition Programs Reduce Risk, but Implementation Challenges Remain*, *GAO-12-103*, accessed August 8, 2017, http://www.gao.gov/assets/660/650908.pdf.
[29] Under Secretary of Defense for Research and Engineering, 10 U.S.C. § 133a. Under Secretary of Defense for Acquisition and Sustainment, 10 U.S.C. § 133b.
[30] DoD, *Report to Congress Restructuring the Department of Defense Acquisition, Technology and Logistics Organization and Chief Management Officer Organization*, accessed August 8, 2017, https://www.defense.gov/Portals/1/Documents/pubs/Section-901-FY-2017-NDAA-Report.pdf.
[31] Ibid.
[32] Ibid.
[33] Ibid.

evaluate its tasks and role. Removing the statutory provision does not remove the Secretary's authority to continue using PARCA as a conduit to understanding the progress of MDAPS.

Subrecommendation 22d: Repeal the statutory requirement for Office of Technology Transition, 10 U.S.C. § 2515.

Background

Congress established the OSD Office of Technology Transition (OTT)[34] in the FY 1993 NDAA to track research and development activities to ensure DoD integrates technology developed for national security into the private sector where applicable.[35]

The provision states that the intent is to "enhance the U.S.'s national technology and industrial base, reinvestment, and conversion activities."[36] DoD has found additional ways to meet this mandate, and the establishment of the new USD(R&E) will further fulfill the requirement. In line with Section 901 of the FY 2017 NDAA,[37] the new organization will benefit from increased flexibility by removing 10 U.S.C. § 2515.

Findings

Since enactment of this provision in 1992, 20 other technology transition offices have emerged in the Military Services and OSD.[38] OTT presumably ceased operations as a separate entity, as there is no reference to it in the Section 901 report, though the required functions of the provision have been subsumed under the USD(R&E).[39]

The definition of *technology transition* is also broader than what is encompassed in 10 U.S.C. § 2515. Technology transition incorporates, but is more than, transitioning technology to the private sector. DoDD 5000.01 includes a broad definition of technology development and transition that states it shall include

- E1.1.28.1. Address user needs;
- E1.1.28.2. Maintain a broad-based program spanning all Defense-relevant sciences and technologies to anticipate future needs and those not being pursued by civil or commercial communities;
- E1.28.3. Preserve long-range research; and

[34] Office of Technology Transition, 10 U.S.C. § 2515.
[35] FY 1993 NDAA, Pub. L. No. 102–484, 106 Stat. 2683 (1992).
[36] Office of Technology Transition, 10 U.S.C. § 2515.
[37] FY 2017 NDAA, Pub. L. No. 114–328 (2016).
[38] GAO, *Technology Transition Programs Support Military Users, but Opportunities Exist to Improve Measurement of Outcomes,* accessed June 13, 2017, http://www.gao.gov/assets/660/652852.pdf.
[39] DoD, *Report to Congress Restructuring the Department of Defense Acquisition, Technology and Logistics Organization and Chief Management Officer Organization*, accessed August 8, 2017, https://www.defense.gov/Portals/1/Documents/pubs/Section-901-FY-2017-NDAA-Report.pdf.

- E1.28.4. Enable rapid, successful transition from the S&T base to useful military products.[40]

Technology transition provides "opportunities to transition technologies from the science and technology (S&T) environment to a user, such as a weapon system acquisition program or the warfighter in the field," and technology transition is not precisely defined.[41]

In 2011, Congress removed the required reporting mechanism for OTT as part of its report downsizing.[42] In a 2013 report, GAO identified the 20 technology transition programs managed by DoD and the Military Departments that provide structured mechanisms and funding to facilitate technology transition.[43] These programs target different areas of technology sharing, such as the Joint Capability Technology Demonstration, which addresses the joint warfighting needs of combatant commands and, since 2015, initiates projects in support of the four Defense Emerging and Capability Prototyping focus areas.[44] Foreign Comparative Testing looks at other countries' technologies and investigates whether they would be useful for the United States.[45]

Conclusions

To update the provision and appropriately align DoD's research focus and approach to technology transition, Congress should eliminate 10 U.S.C. § 2515. This change will provide the Secretary of Defense with maximum flexibility to meet the technology transition mission as set forth in Section 901. Removing this provision from the code will support reorganization within AT&L.

Subrecommendation 22e: Repeal the statutory requirement for Office for Foreign Defense Critical Technology Monitoring and Assessment, 10 U.S.C. § 2517.

Background

Congress established the Foreign Defense Critical Technology Monitoring and Assessment (FCTMA) office in the FY 1992 NDAA.[46] Originally, the provision for the FCTMA office was contained in 10 U.S.C. § 2525.[47] To address concerns related to foreign technology, Congress amended the statutory requirement for the FCTMA office through the FY 1993 NDAA to contain the provision in 10 U.S.C. § 2517.[48] It states, "The Secretary of Defense shall establish within the Office of the Assistant Secretary of Defense for Research and Engineering an office known as the "Office for Foreign Defense Critical Technology Monitoring and Assessment."[49]

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[40] The Defense Acquisition System, DoDD 5000.01 (2007).
[41] GAO, *Technology Transition Programs Support Military Users, but Opportunities Exist to Improve Measurement of Outcomes, GAO-13-286,* Accessed June 13, 2017, http://www.gao.gov/assets/660/652852.pdf.
[42] FY 2012 NDAA, Pub. L. No. 112–81, 125 Stat. 1584 (2011).
[43] GAO, *Technology Transition Programs Support Military Users, but Opportunities Exist to Improve Measurement of Outcomes, GAO-13-286,* Accessed June 13, 2017, http://www.gao.gov/assets/660/652852.pdf.
[44] "Joint Capability Technology Demonstration," Department of Defense Emerging Capability and Prototyping, http://www.acq.osd.mil/ecp/PROGRAMS/JCTD.html.
[45] "Comparative Technology Office," Department of Defense Emerging Capability and Prototyping, http://www.acq.osd.mil/ecp/PROGRAMS/CTO.html.
[46] FY 1992–1993 NDAA, Pub. L. No. 102–190, 105 Stat. 1427–1431 (1991).
[47] FY 1992–1993 NDAA, Pub. L. No. 102–190, 105 Stat. 1430 (1991).
[48] FY 1993 NDAA, Pub. L. No. 102—484, 106 Stat. 2685 (1992).
[49] Office for Foreign Defense Critical Technology Monitoring, 10 U.S.C. § 2517.

The provision assigns the task "to maintain within the Department of Defense a central library for the compilation and appropriate dissemination of unclassified and classified information and assessments regarding significant foreign activities in research, development, and applications of defense critical technologies."[50] FCTMA's task is to "perform certain liaison activities," to publicize information, and to coordinate with the Department of Commerce "in the dissemination of information and assessments regarding defense critical technologies having potential commercial uses."[51]

Findings

In 1989, GAO released a report noting that the federal government lacked a central entity for monitoring foreign dual-use (i.e., commercial and military) technology.[52] A 1990 GAO report reiterated the 1989 report, stating, "although many DOD organizations produce, collect, store, or distribute foreign science and technology information … no central DOD entity coordinates foreign technology monitoring."[53] One suggestion the GAO report cited was that DoD "should establish a focal point for coordinating foreign science and technology monitoring programs."[54] The 1990 GAO report briefly addressed the importance of being able to conduct research on foreign technology development to maintain U.S. commercial competitiveness and warfighting capabilities.[55]

The FY 1992 and 1993 NDAA markedly emphasized foreign technology monitoring and assessment.[56] The law established other provisions and programs related to foreign critical technology, including an overseas foreign critical technology monitoring and assessment financial assistance program, a critical technology application centers assistance program, and a defense dual-use critical technology partnership program.[57]

The mandate for foreign critical technology monitoring has manifested as the Militarily Critical Technologies Program (MCTP) within DoD.[58] The purpose and responsibilities of MCTP largely mirror those outlined in 10 U.S.C. § 2517.[59] A 2016 Inspector General report stated that MCTP's public database, the Military Critical Technologies List (MCTL), was out-of-date and failed to meet users'

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[50] Ibid.
[51] United States Congress, *H.R.2100 – National Defense Authorization Act for Fiscal Years 1992 and 1993*, accessed July 17, 2017, https://www.congress.gov/bill/102nd-congress/house-bill/2100.
[52] GAO, *Foreign Technology: U.S. Monitoring and Dissemination of the Results of Foreign Research, GAO/NSIAD-9-117*, accessed July 17, 2017, http://www.gao.gov/assets/150/148898.pdf. GAO, "Foreign Technologies: Federal Agencies Efforts to Track Developments," accessed July 17, 2017, http://www.gao.gov/assets/220/211477.pdf.
[53] GAO, *Foreign Technology: U.S. Monitoring and Dissemination of the Results of Foreign Research, GAO/NSIAD-9-117*, accessed July 17, 2017, http://www.gao.gov/assets/150/148898.pdf.
[54] Ibid.
[55] Ibid.
[56] FY 1992–1993 NDAA, Pub. L. No. 102–190, 105 Stat. 1427–1431 (1991).
[57] Ibid.
[58] OSD, *Mission Description and Budget Item Justification,* accessed August 11, 2017, http://www.dtic.mil/descriptivesum/Y2013/OSD/stamped/0605110D8Z_6_PB_2013.pdf.
[59] Ibid.

needs.[60] Due to budget cuts, DoD stopped updating MCTL altogether and removed it from the World Wide Web.[61]

Conclusions

With the Section 901 restructuring of AT&L, the Strategic Intelligence Analysis Cell (SIAC) fulfills the same mission as the FCTMA office by providing analysis of enemy nations' capabilities and vulnerabilities.[62] SIAC would assess "potential and emerging threats and/or future opportunities that warrant action, that (sic) merit investment."[63] In light of the reorganization of AT&L, Congress should remove the statutory provision at 10 U.S.C. § 2517.

Subrecommendation 22f: Repeal the statutory requirement at 10 U.S.C. § 204 for a Small Business Ombudsman within each defense audit agency.

Background

Congress provided for the designation of a Small Business Ombudsman for defense audit agencies through the FY 2013 NDAA, establishing the position in Pub. L. No. 112–239, 126 Stat. 2064 (2013) and containing it in 10 U.S.C. § 204.[64] The statute states the Secretary of Defense "shall designate a Small Business Ombudsman within each defense audit agency," applying to both Defense Contract Audit Agency (DCAA) and the Defense Contract Management Agency (DCMA).[65]

Findings

The responsibilities of the Small Business Ombudsman include the following:

- Inform each defense audit agency director of small business problems.
- Act as eac defense audit agency's point of contact for small businesses.
- Oversee the respective defense audit agency's "conduct of audits of small businesses."
- Ensure the defense audit agency conducts small business audits and responds to small business concerns in a timely fashion.[66]

Congressional committee reports and conference reports for the FY 2013 NDAA lack further explanation of Congress' decision to create the statutory requirement for small business ombudsmen. According to DoD's former Director for the OSBP Andre Gudger, DoD supported the appointment of a

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[60] Assessment of the Department of Defense Militarily Critical Technologies Program (Project No. D2015-DISPA2-0175.000), accessed September 25, 2017, http://www.dodig.mil/pubs/report_summary.cfm?id=7142.
[61] GAO, *Protecting Defense Technologies: DOD Assessment Needed to Determine Requirement for Critical Technologies List, GAO-13-157,* accessed August 11, 2017, https://www.gao.gov/assets/660/651410.pdf.
[62] DoD, *Report to Congress Restructuring the Department of Defense Acquisition, Technology and Logistics Organization and Chief Management Officer Organization*, accessed August 31, 2017, https://www.defense.gov/Portals/1/Documents/pubs/Section-901-FY-2017-NDAA-Report.pdf.
[63] Ibid.
[64] Small Business Ombudsman for Defense Audit Agencies, 10 U.S.C. § 204. Pub. L. No. 112-239, 126 Stat. 2064.
[65] Ibid.
[66] Ibid.

Small Business Ombudsman to "reduce barriers for small businesses and [to]… strengthen the partnership between DCAA, DCMA and industry."[67] Others have informed the Section 809 Panel that ombudsman role is valuable, stating that after establishing the DCAA focal point (which has direct access to the OSBP Director) and increasing awareness at small business venues, DCAA frequently was able to address and resolve issues in a timely manner.[68]

Conclusions

Although DoD should retain the Small Business Ombudsman role, eliminating the statutory requirement at 10 U.S.C. § 204 would allow flexibility should alternative approaches be warranted. DCAA and DCMA could continue to provide the Small Business Ombudsman role without a statutory requirement. This recommendation aligns with Section 6, Small Business.

Subrecommendation 22g: Repeal the statutory requirement for Secretary of Defense to designate a competition advocate for the Defense Logistics Agency, 10 U.S.C. § 2318.

Background

Pursuant to 10 U.S.C. § 2318, Advocates for Competition, the Secretary of Defense is required to designate "an officer or employee of the Defense Logistics Agency [DLA] to serve as the advocate for competition of the agency."[69] Congress provided for this position through Section 1216 of the Department of Defense Authorization Act, 1985.[70]

Findings

In July 1984, prior to the requirement for the designation of an officer or employee to serve as the DLA competition advocate, the Competition in Contracting Act (CICA) came into effect via the Deficit Reduction Act.[71] The overarching purpose of CICA was to reduce procurement costs and encourage small business participation by promoting more competition.[72] According to GAO, CICA was a response to excessive sole-source (or noncompetitive) contract awards.[73]

41 U.S.C. § 1705, "requires the head of each executive agency to designate an employee… to serve as an advocate for competition for the agency and for each procuring activity of the agency."[74] Because DLA is not an executive agency under 41 U.S.C. § 133, the requirement to designate an advocate for competition under 41 U.S.C. § 1705 does not apply to DLA. There is an advocate for competition for

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[67] OUSD(AT&L), *Small Business Program Works Closely with DCAA and DCMA*, accessed July 21, 2017, https://www.acq.osd.mil/osbp/docs/Small_Business_DCAA_and_DCMA_Final.pdf.
[68] Patrick Fitzgerald, Baker Tilly Virchow Krause, LLP, email to Section 809 Panel, September 26, 2017.
[69] Advocates for Competition, 10 U.S.C. § 2318.
[70] FY 1985 NDAA, Pub. L. No. 98–525, 98 Stat. 2593 (1984).
[71] Curtis Lee Coy, "The Competition in Contracting Act of 1984," (master thesis, Naval Postgraduate School, 1986), http://www.dtic.mil/dtic/tr/fulltext/u2/a171394.pdf. United States Congress, "H.R.4170 - Deficit Reduction Act of 1984," accessed August 7, 2017, https://www.congress.gov/bill/98th-congress/house-bill/4170?q=%7B%22search%22%3A%5B%22PL98-369%22%5D%7D&r=1.
[72] "The Competition in Contracting Act (CICA)," GSA Interact, accessed August 7, 2017, https://interact.gsa.gov/blog/competition-contracting-act-cica.
[73] GAO, *Procurement: Better Compliance With the Competition in Contracting Act Is Needed*, accessed August 8, 2017, http://www.gao.gov/assets/150/145671.pdf.
[74] Advocates for Competition, 41 U.S.C. § 1705.

DoD as a whole, but Congress determined that DLA should have its own advocate for competition, leading to enactment of 10 U.S.C. § 2218(a).[75]

The central function of all competition advocates is to foster full and open competition in agency procurement activities.[76] In addition to this core duty, the DLA advocate for competition must write an annual report to DLA's senior procurement executive, and recommend strategies and targets for enhancing competition.[77] 10 U.S.C. § 2218provides that the DLA advocate for competition have the same advocate for competition responsibilities and functions as provided under 41 U.S.C. § 1705.[78]

DoD produces and publishes annual competition reports via the Defense Procurement and Acquisition Policy (DPAP) office. These departmental competition reports comprise the individual competition reports from the Army, Navy, Air Force, and DLA.

DLA has its own agencywide directive (DLAD), which further establishes the DLA competition advocate role. The DLAD reiterates the requirement for a DLA competition advocate, and it reiterates the responsibilities and duties of the DLA advocate as specified in FAR Part 6.5, Advocates for Competition, and 41 U.S.C. § 1705.[79]

Conclusions

As DoD's acquisition framework continues to evolve, DoD would benefit from greater flexibility by eliminating the statutory requirement of the DLA competition advocate in 10 U.S.C. § 2318. The DLAD demonstrates DLA's commitment to promoting open competition in DLA procurements.

Subrecommendation 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).

Background

Section 218 of the FY 2007 NDAA, (Pub. L. No. 109–364, 120 Stat. 2126; 10 U.S.C. § 2358 note) established a Joint Technology Office on Hypersonics (JTOH) in DoD that commenced operations in FY 2007. The statute states the following:

> *The Secretary of Defense shall establish within the Office of the Secretary of Defense a joint technology office on hypersonics. The office shall carry out the program required under subsection (b), and shall have such other responsibilities relating to hypersonics as the Secretary shall specify.*[80]

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[75] Advocates for Competition, 10 U.S.C. § 2318.
[76] Kate Manuel, CRS, *Competition in Federal Contracting: An Overview of the Legal Requirements*, accessed August 7, 2017, www.dtic.mil/get-tr-doc/pdf?AD=ADA497721.
[77] Advocates for Competition, 10 U.S.C. §2318. Advocates for Competition, 41 U.S.C. § 1705.
[78] Advocates for Competition, 41 U.S.C. § 1705.
[79] "Defense Logistics Agency Directive," DLA, accessed August 9, 2017, http://www.dla.mil/Portals/104/Documents/J7Acquisition/DLAD_Rev_5_and_PGI_PDF_Version_%207-27-16.pdf?ver=2016-07-28-074058-590.
[80] FY 2007 NDAA, Pub. L. No. 109–364, 120 Stat. 2126 (2006).

Findings

Hypersonic weapons are the latest version of precision-guided munitions. Hypersonic weapons development is the technology of "high-precision conventional weapons capable of striking a target anywhere in the world within one hour's time."[81]

Although Congress prioritized a coordinated strategic vision for hypersonic development by the mid-2000s, Russia and China were already years into their hypersonic research and development with ballistic missile-launched hypersonic weapons and hypersonic glide vehicles when Congress mandated JTOH.[82] In 2006, hypersonics programs were not integrated or coordinated internally to DoD or with the ongoing research at NASA.[83]

JTOH's purpose is to coordinate and integrate current and future research, development, tests, evaluation, and system demonstration programs on hypersonics for defense purposes.[84] Congress also requires JTOH to provide a *roadmap* for the hypersonic program, coordinated with NASA and the Joint Staff. This roadmap included mission requirements; short-, mid-, and long-term goals for the office; a schedule for meeting such goals; and test and evaluation facilities needed. DoD was to submit the roadmap to Congress every 2 years.[85] The section originally placed a sunset deadline on the reporting requirement to Congress in 2012, but later extended the deadline to 2016.[86] Despite Congress's mandate for a hypersonic roadmap biannual report, the only readily available report DoD filed was in 2008.

From the beginning, DoD has met the intent of the code, without maintaining a physical location. As stated in the 2008 roadmap document, "JTOH is designed to be a lean organization that efficiently leverages existing management structures and personnel and is operated as a virtual office." The other form of reporting to Congress was the biannual roadmaps mandated in subsection (d).

As a complementary mission, Section 1687 of the FY 2017 NDAA appointed the director of the Missile Defense Agency (MDA) to serve as the executive agent for Hypersonic Defense Capability Development.[87] The director develops architectures for hypersonic defense capability (to include detecting and intercepting threats) and establishes a program of record to develop and field a defensive system to defeat adversaries' potential hypersonic boost-glide and maneuvering ballistic missiles.[88]

In 2016, the Committee on Future Air Force Needs for Defense Against High-Speed Weapons Systems, together with the National Academy of Sciences, released an unclassified summary of *A Threat to*

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[81] Eleni Ekmektsioglou, "Hypersonic Weapons and Escalation Control in East Asia," *Strategic Studies Quarterly*, 9, no. 2 (2015): 43-68.
[82] "*The Future of Hypersonic Weapons*," Daniel Norton, RAND Corporation, accessed June 20, 2017, https://www.rand.org/blog/2016/10/the-future-of-hypersonic-weapons.html.
[83] "Advanced Hypersonic Weapons," GlobalSecurity.org, accessed June 20, 2017, http://www.globalsecurity.org/military/systems////munitions/ahw.htm.
[84] Peter Ouzts, "The Joint Technology Office on Hypersonics" (paper, 15th AIAA International Space Planes and Hypersonic Systems and Technologies Conference), accessed June 12, 2017, https://arc.aiaa.org/doi/abs/10.2514/6.2008-2576.
[85] FY 2007 NDAA, Pub. L. No. 109–364, 120 Stat. 2126 (2006).
[86] FY 2012 NDAA, Pub. L. No. 112–81, 125 Stat. 1343 (2011).
[87] FY 2017 NDAA, Pub. L. No. 114–238, 130 Stat. 2629 (2016).
[88] Committee on Future Air Force Needs for Defense Against High-Speed Weapons Systems and Air Force Studies Board, *A Threat to America's Global Vigilance, Reach, and Power: High-speed Maneuvering Weapons*, (Washington, DC: The National Academies Press, 2016), doi: 10.17226/23667.

America's Global Vigilance, Reach, and Power: High-speed Maneuvering Weapons.[89] This report highlights the challenge of potential adversaries' growing capabilities in hypersonic weapons. The committee also raised concerns that it could "find no formal strategic operational concept or organizational sense of urgency."[90]

Section 214 of the FY 2018 NDAA changes the name of the office to Joint Hypersonics Transition Office, "with the responsibility to coordinate and integrate programs, ensure coordination of current and future programs of the Department of Defense on hypersonics, and approve demonstrations."[91]

Conclusions

Recognizing that emerging technologies are strategically important to prepare for defensive and potential adversarial use, DoD needs the freedom of action required to best address challenges associated with these technologies. The requirement to establish a JTOH as laid out in Pub. L. No. 109–364, 120 Stat. 2126 and 10 U.S.C. § 2358 note *Hypersonics Development* is not necessary for DoD's handling of this mission set and does not provide additional authorities to the Secretary of Defense. Congress should eliminate the statutory requirement in an effort to afford the Secretary flexibility to more appropriately address the mission set, but keep the language from the FY 2017 that appoints the director of MDA to serve as the executive agent for Hypersonic Defense Capability Development.

Subrecommendation 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).

Background

Section 1006 of the FY 1989 NDAA (Pub. L. No. 100-456; 10 U.S.C. § 133 note) states, "The Secretary of Defense, in consultation with the Under Secretary of Defense for Acquisition, shall designate for duty in Israel an individual or individuals to serve as the primary liaison between the procurement and research and development activities of the United States Armed Forces and those of the State of Israel."[92] Currently, the Defense Cooperation in Armaments officer located in the Office of Defense Cooperation in the U.S. embassy in Israel fulfills this role, with the primary responsibility for armaments cooperation activities and secondary responsibilities in security assistance programs.[93]

Findings

Israel is the largest recipient of American military aid, and the structures managing that relationship are longstanding and robust.[94] Section 1006 of the FY 1989 NDAA (Pub. L. No.100–456; 10 U.S.C. § 133 note) stems from a 1987 memorandum of understanding (MOU) between the presidents that institutionalized the political, military, and economic agreements negotiated in the annual aid package

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[89] Ibid.
[90] Ibid.
[91] House of Representatives, FY 2018 NDAA, *Conference Report to Accompany H.R. 2810*, accessed January 6, 2018, http://docs.house.gov/billsthisweek/20171113/HRPT-115-HR2810.pdf.
[92] Section 1006 of the FY 1989 NDAA (Pub. L. No. 100-456; 10 U.S.C. § 133 note).
[93] OUSDP, email to Section 809 Panel, September 15, 2017.
[94] Jason Gewirtz, "Big US military aid package to Israel has strings attached," *CNBC*, September 15, 2016, https://www.cnbc.com/2016/09/15/big-us-military-aid-package-to-israel-has-strings-attached.html.

to Israel.[95] The relationship between the United States and Israel established in the MOU further addressed the principles governing cooperation in research and development, scientist and engineer exchange, and procurement and logistic support of defense equipment.[96]

The earliest MOU describes the unique military relationship between the United States and Israel, specifically regarding the Defense Procurement and Acquisition Policy (DPAP). The United States has 26 similar DPAP MOUs with nations around the world, yet no other country has a procurement liaison codified in U.S. law.[97]

Conclusions

The Defense Cooperation in Armaments officer located in the Office of Defense Cooperation fulfills the mandate of this provision. Congress should repeal the statutory provision at Pub. L. No. 10–456 and 10 U.S.C. § 133 note because it unnecessarily restricts the Secretary's authority to organize security cooperation arrangements in a manner appropriate to pursue its current acquisition-related mission and limits DoD's ability to construct a proactive and adaptive organization.

Subrecommendation 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).

Background

Section 231 of the FY 2008 NDAA (Pub. L. No. 110–181, 10 U.S.C. § 1701 note) states:

> *(a) In General.—The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall coordinate and manage human systems integration activities throughout the acquisition programs of the Department of Defense.*
>
> *(b) Administration.—In carrying out subsection (a), the Secretary shall designate a senior official to be responsible for the effort.*[98]

The statute further stipulates this official hold responsibility for coordinating the planning, management, and execution of human systems integration (HSI) activities and for recommending resource requirements.[99] The Office of the Secretary of Defense Acquisitions Technology and Logistics (OSD(AT&L)) leads these efforts in the Office of the Director Defense Research and Engineering

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[95] Timothy McNulty, "Strife strains special U.S.-Israeli kinship," *Chicago Tribune,* April 25, 1988, accessed November 27, 2017, http://articles.chicagotribune.com/1988-04-25/news/8803110673_1_american-jews-israel-jewish-state.
[96] The Memorandum of Understanding Between the Government of the United States of America and the Government of Israel Concerning the Principles Governing Mutual Cooperation in Research and Development, Scientist and Engineer Exchange, Procurement and Logistic Support of Defense Equipment of December 14, 1987 can be viewed in DoD, *Amendment 1 to the Memorandum of Understanding Between the Government of the United States of America and the Government of Israel*, accessed November 27, 2017, https://www.acq.osd.mil/dpap/Docs/mou-israel.pdf.
[97] DoD, *Amendment 1 to the Memorandum of Understanding Between the Government of the United States of America and the Government of Israel*, accessed November 27, 2017, https://www.acq.osd.mil/dpap/Docs/mou-israel.pdf.
[98] Section 231 of FY 2008 NDAA, Pub. L. No. 110–181, 10 U.S.C. § 1701 note.
[99] Ibid.

(DDR&E) through the directors for Mission Assurance and Human Performance, Training, and Biosystems.[100]

Findings

HSI includes humans in their different roles in the system (e.g., operator, maintainer, trainer, designer); systems, including hardware, software, and processes (including the acquisition process and the design process); and integration of these elements to optimize the performance and safety of the whole.[101] DDR&E's FY *2011 Department of Defense Human Systems Integration Management Plan*, states:

> *Systems, composed of hardware and software, enable the ability of humans to perform tasks that successfully project combat power in difficult and lethal environments. High levels of human effectiveness are typically required for a system to achieve its desired effectiveness. The synergistic interaction between the human and the system is key to attaining improvements total system performance and minimizing total ownership costs.*[102]

Unmanned aerial systems (UASs) serve as one example within DoD. The National Research Council presented the following in its 2007 report *Human-System Integration in the System Development Process: A New Look:*

> *UASs are airplanes or helicopters operated remotely by humans on the ground or in some cases from a moving air, ground, or water vehicle. Until recently the term 'unmanned aerial vehicle' (UAV) was used in the military services in reference to such vehicles as Predators, Global Hawks, Pioneers, Hunters, and Shadows. The term 'unmanned aerial system' acknowledges the fact that the focus is on much more than a vehicle. The vehicle is only part of a large interconnected system that connects other humans and machines on the ground and in the air to carry out tasks ranging from UAS maintenance and operation to data interpretation and sensor operation.*[103]

Prior to the inclusion of HSI in the FY 2008 NDAA, both the Army and the Navy had active HSI programs. The Air Force was planning to establish similar programs but without coordination with the other military branches. The Army's program, commonly known as MANPRINT (Manpower and Personnel Integration), has been operating since 1986. The Navy's system, commonly known as SEAPRINT (Systems Engineering, Acquisition, and Personnel Integration) was formalized in 2003 to establish a MANPRINT-like approach to Navy system design and acquisition.[104] The Military Services had control over all decisions related to development, fielding, staffing, and operation of their new

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[100] DoD, FY *2011 Department of Defense Human Systems Integration Management Plan*, accessed November 8, 2017, https://www.acq.osd.mil/se/docs/FY11-DoD-HSI-Management-Plan-101213.pdf.
[101] "Human Systems Integration," ACQuipedia, accessed August 3, 2017, https://dap.dau.mil/acquipedia/Pages/ArticleDetails.aspx?aid=4d39f620-2f41-4522-a1b0-64958c8aa0eb.
[102] DoD, FY *2011 Department of Defense Human Systems Integration Management Plan*, accessed November 8, 2017, https://www.acq.osd.mil/se/docs/FY11-DoD-HSI-Management-Plan-101213.pdf.
[103] Richard W. Pew and Anne S. Mavor, *Human-System Integration in the System Development Process: A New Look*, (Washington, D.C. National Academies Press, 2007), accessed November 27, 2017, https://www.nap.edu/read/11893/chapter/3#18.
[104] Department of the Army, *Army FY09 Human Systems Integration Plan,* accessed August 10, 2017, http://www.acq.osd.mil/se/docs/Army-FY09-HSI-Plan.pdf. Jennifer McGovern Narkevicius, *An Integrated Process for Incorporating Human Models into Systems Engineering*, accessed August 10, 2017, http://cc.ist.psu.edu/BRIMS/archives/2005/other/05-BRIMS-086.pdf.

systems.[105] The Navy and Air Force closely followed the Army's blueprint for HSI programs; there was no formalized coordination among the branches.

In the FY 2008 NDAA, Congress directed the OSD(AT&L) to develop a comprehensive plan for HSI.[106] The Office of the Deputy Under Secretary of Defense (Acquisition and Technology) and the Director of Biological Systems within the Office of the Deputy Under Secretary of Defense (Science and Technology) jointly submitted the first HSI report to Congress in March 2009. The DoD HSI Management Plan defines how HSI is administered within DoD and serves as the blueprint for future activities.[107]

The Human Systems Community of Interest—led by a steering group of six DoD officials representing all Military Services and OSD—created the recent *Human Systems Roadmap for 2016*. The purpose of the roadmap is to "develop and deliver new human-centered technologies to quantify mission effectiveness and to select, train, design, protect, and operate for measurably improved mission effectiveness."[108] The roadmap provides a path forward for the future of HSI through 2022. The strategies described include advancing HSI throughout DoD to exploit social data to understand human aspects of military environments and developing strategies for critical stressor mitigation to ensure warfighter safety and survivability.

Conclusions

As HSI continues to develop new technologies and systems for DoD, the senior official leading HSI may need more flexibility within the role to address future concerns. The statute grants no additional authority to a senior official. Removing Section 231 of the FY 2008 NDAA (Pub. L. No. 110–181 and 10 U.S.C. § 1701 note) will facilitate freedom of action throughout the Section 901 reorganization of t OUSD(AT&L) and enhance the Secretary's authority. This change would not eliminate the role, but eliminate parts of the code that may inhibit flexibility.

Subrecommendation 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).

Background

Congress created a position for a senior official for urgent operational needs and rapid acquisition through Section 902 of the FY 2013 NDAA (Pub. L. No. 112–239; 10 U.S.C. § 2302 note).[109] It states:

> *Designation of Senior Official Responsible for Focus on Urgent Operational Needs and Rapid Acquisition.*

[105] Richard W. Pew and Anne S. Mavor, *Human-System Integration in the System Development Process: A New Look*, (Washington, D.C. National Academies Press, 2007), accessed November 27, 2017, https://www.nap.edu/read/11893/chapter/3#18.
[106] FY 2009 NDAA, Pub. L. No. 110–181, 122 Stat. 45 (2008).
[107] "INITIATIVES: Human Systems Integration," Office of the Deputy Assistant Secretary of Defense: Systems Engineering, accessed July 27, 2017, http://www.acq.osd.mil/se/initiatives/init_hsi.html.
[108] DUSD (S&T), *Human Systems Roadmap Review*, accessed July 27, 2017, http://www.dtic.mil/ndia/2016/Human/S&TPanel.pdf.
[109] Section 902 of the FY 2013 NDAA, Pub. L. No. 112–239; 10 U.S.C. § 2302 note.

> *(1) In general.-The Secretary of Defense, after consultation with the Secretaries of the military departments, shall designate a senior official in the Office of the Secretary of Defense as the principal official of the Department of Defense responsible for leading the Department's actions on urgent operational needs and rapid acquisition, in accordance with this section.*[110]

The senior official's responsibilities include advocating for issues and funding related to rapid response to the military's operational needs. The senior official is also responsible for enhancing transparency concerning DoD's operational needs. Finally, the senior official tracks the state of, and ensures rapid responses to, DoD's most pressing technical or capability deficits, reporting directly to the Secretary of Defense.[111]

Findings

A 2011 GAO report noted that U.S. "forces in Iraq and Afghanistan have faced significant risks of mission failure and loss of life due to rapidly changing enemy threats."[112] DoD had made multiple attempts to quickly develop and field new technology for countering emerging and evolving threats in theater; however, GAO found that at least 31 discrete offices and entities within DoD were responsible for responding to urgent operational needs and rapid acquisition. According to the report, these efforts appeared fragmented and potentially resulted in redundancies. GAO recommended DoD designate "a focal point to lead urgent needs efforts."[113]

In the FY 2013 NDAA conference report, members of Congress cited the GAO report as a primary motive for creating a statutory mandate for a senior official for urgent operational needs and rapid acquisition. The committee wrote it was concerned about the existence of "multiple funding streams, lack of coordination, and the need for consolidation as well as improved oversight" and contended that designating a senior-level focal point was a necessary step in mitigating this issue.[114]

There is a director of the Joint Rapid Acquisition Cell (JRAC) within USD(AT&L). The Director and the Cell exist to "provide a single point of contact in the OSD for tracking the timeliness of immediate war-fighter need actions for the senior leadership and facilitating coordination with other government agencies."[115] The role of senior official for urgent operational needs and rapid acquisition may align with the purview of this office.

Conclusions

Although Section 902 of the FY 2013 NDAA (Pub. L. 112–239; 10 U.S.C. § 2302 note) does not specify who the senior official reports to, the JRAC, in accordance with DoDD 5000.71, falls under the operational control of the Deputy Secretary of Defense and the administrative control of USD(AT&L). The 2017 NDAA reorganized the USD(AT&L), into two new positions: the USD(R&E) and the

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[110] Ibid.
[111] Ibid.
[112] GAO, *Warfighter Support: DOD's Urgent Needs Processes Need a More Comprehensive Approach and Evaluation for Potential Consolidation, GAO-11-273*, accessed July 20, 2017, http://www.gao.gov/assets/320/316068.pdf.
[113] Ibid.
[114] H.R. Rep. No. 112-705 (2017) (Conf. Rep. to accompany H.R. 4310).
[115] "AT&L Offices," OSD, accessed August 11, 2017, http://www.acq.osd.mil/atlOffices.html.

USD(A&S).[116] The Section 901 report aligns the JRAC with the USD(A&S) for administrative control. Repealing the statutory requirement will afford DoD the flexibility to forge a new and bold path toward achieving "technological superiority, affordable systems, and well managed business operations."[117]

Subrecommendation 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).

Background

Section 203(c) of the FY 1998 NDAA (Pub. L. No. 105–85; 10 U.S.C. § 2511 note) requires the Secretary of Defense to designate "a senior official in the Office of the Secretary of Defense to carry out responsibilities for dual-use projects under this subsection."[118] The subsection refers to the defense dual-use critical technology program. The pending Section 901 reorganization affects this senior official, who must report to the USD(AT&L).[119]

The primary responsibility of the senior official for dual-use programs is to supervise "the establishment of, and adherence to, procedures for ensuring that dual-use projects are initiated and administered effectively."[120] The senior official also ensures the military adopts "commercial technologies" as appropriate.[121] Finally, the senior official coordinates the military departments' and defense agencies' dual-use efforts "to avoid unnecessary duplication."[122]

Findings

According to the Senate Armed Services Committee (SASC) report for the FY 1998 NDAA, one of the primary motives for creating the dual-use programs senior official position was to help DoD better facilitate upcoming changes to dual-use funding. The changes included terminating DoD-wide funding by FY 1999 for dual-use technology projects, and requiring the Military Services to fund dual-use programs through their respective science and technology programs, rather than through the OSD. According to the SASC report, this change left DoD at a "critical turning point" in which DoD needed to devise a more "specific process to ensure that such a transition will take place, despite the Military Services' resistance to dual-use technology development."[123]

Section 203(c) of the FY 1998 NDAA further stipulates that this individual ensure dual-use projects are consistent with the joint warfighting science and technology plan referred to in section 270 of the FY 1997 NDAA (Public Law 104–201; 10 U.S.C. § 2501 note). This document was released in 1998, and

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[116] Under Secretary of Defense for Research and Engineering, 10 U.S.C. § 133a. Under Secretary of Defense for Acquisition and Sustainment, 10 U.S.C. § 133b.
[117] DoD, *Report to Congress Restructuring the Department of Defense Acquisition, Technology and Logistics Organization and Chief Management Officer Organization*, accessed August 8, 2017, https://www.defense.gov/Portals/1/Documents/pubs/Section-901-FY-2017-NDAA-Report.pdf.
[118] Section 203(c) of the FY 1998 NDAA, Pub. L. No. 105–85; 10 U.S.C. § 2511 note.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Senate Armed Services Committee, NDAA for FY 1998 Report.

appears to have been supplanted in practice by documents such as *A 21st Century Science, Technology, and Innovation Strategy for America's National Security*.

The dual-use science and technology programs support research and development for those technologies with dual-use applications.[124] In establishing these programs, the government laid out two goals:

- Partnering with industry to jointly fund the development of dual-use technologies needed to maintain the DoD's technological superiority on the battlefield and industry's competitiveness in the marketplace.
- Making the dual-use development of technologies with industry a normal way of doing business in the services.[125]

These programs appear to be the evolution of the Clinton-era Technology Reinvestment Project (TRP), one in a series of programs sponsored by DoD to increase engagement with industry on dual-use technologies.[126] DoD continues to consider appropriate models for this kind of engagement with industry to include today's iterations like DIUx, SOFWERX, and AFwerX. In the intervening years, DoD has established policies and processes to address the challenges related to dual-use technology. DoDI 2040.02 establishes the department's policy and assigns responsibility for the international transfer of dual-use and defense-related technology, articles, and services.[127]

Conclusions

DoD has found ways to meet the intent of this provision for a Secretary of Defense designated official since 1998. The provision appears outdated and repealing it would allow DoD to organize appropriately to the challenge of dual-use technologies and supporting these dual-use science and technology programs, particularly during the Section 901 reorganization. Congress should eliminate the statutory requirement for a dual-use programs official contained in Section 203(c) of the FY 1998 NDAA (Pub. L. No. 105–85; 10 U.S.C. § 2511 note).

Subrecommendation 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).

Background

Congress directed establishment of the executive agent (EA) for printed circuit boards (PrCBs) in Section 256 of the FY 2009 NDAA, which states, "Not later than 90 days after the date of the enactment

[124] Defense Dual-Use Critical Technology Program, 10.U.S.C. § 2511.
[125] DoD, *A Manager's Guide to Technology Transition In an Evolutionary Acquisition Environment: A Contact Sport, Workshop Draft, 2002,* accessed November 9, 2017, http://www.acq.osd.mil/dpap/Docs/RandD%20Text.doc.
[126] Jay Stowsky, "The Dual-Use Dilemma," *Issues in Science and Technology,* Volume XIII Issue 2, Winter 1997, accessed November 29, 2017, http://issues.org/13-2/stowsky/.
[127] International Transfers of Technology, Articles, and Services, DoDI 2040.02 (2014).

of this Act, the Secretary of Defense shall designate a senior official of the Department of Defense to act as the EA for printed circuit board technology."[128]

The EA's primary duties include ensuring DoD has access to manufacturing capabilities and technical expertise necessary to meet future military requirements regarding PrCBs and overseeing the supply chain. The agent assesses the vulnerabilities, trustworthiness, and diversity of the PrCB supply chain. Section (c) ensures that the Military Departments, Defense Agencies, and other Components of DoD provide the EA with the appropriate support and resources needed to perform the assigned roles, responsibilities, and authorities of the EA.[129]

DoDD 5101.18E, Executive Agent for Printed Circuit Board and Interconnect Technology, affirms the position of an EA for PrCB and interconnect technology.[130] It designates USD(AT&L) as the principal staff assistant for PrCB and interconnect technology to oversee the DoD EA for PrCB and Interconnect Technology.[131] DoD has directed the Naval Sea Systems Command to the EA role through its Crane Division.[132]

Findings

PrCBs connect a variety of active components (e.g., microchips and transistors) and passive components (e.g., capacitors and fuses) into electronic assemblies that control systems.[133] Virtually every electronic device in the marketplace, from military programs to commercial products, uses PrCBs.

In a 2005 report on the industry titled *Linkages: Manufacturing Trends in Electronics Interconnect Technology*, the National Research Council found that U.S. production of PrCBs had fallen below 10 percent of world output (down from 40 percent or more in the 1980s).[134] Although the Buy-American Act would not necessarily prevent DoD from buying PrCBs from foreign countries, suitable domestic supplies of the technology are limited.[135]

William Landay testified in a congressional hearing leading up to the FY 2009 NDAA that the Militarily Critical Technologies Program addresses PrCBs protection.[136] Anthony Tether of the Defense Advanced Research Projects Agency also asserted that DoD had begun a new "TRUST in Integrated Circuits" program in 2007.[137] The goal of the latter program has been to ensure the trustworthiness of PrCBs

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[128] FY 2009 NDAA, Pub. L. No. 110–417, 122 Stat. 4404 (2008).
[129] Ibid.
[130] DoD Executive Agent for Printed Circuit Board and Interconnect Technology, DoDI 5101.18E (2016).
[131] Ibid.
[132] Naval Sea Systems Command *Warfare Centers: NSWC Crane Division*, accessed July 25, 2017, http://www.navsea.navy.mil/Home/Warfare-Centers/NSWC-Crane/What-We-Do/Technical-Capabilities/Advanced-Electronics-Energy-Systems/.
[133] The National Academies of Science Engineering and Medicine, *Linkages: Manufacturing Trends in Electronics Interconnection Technology*, accessed July 24, 2017, https://www.nap.edu/read/11515/chapter/1.
[134] Ibid.
[135] Ibid.
[136] William Landay and Anthony Tether, *Hearing on National Defense Authorization Act for Fiscal Year 2009*, Washington, DC, March 13, 2008.
[137] Ibid.

regardless of where they are designed or manufactured. DoD coordinates the two programs, but administers them under the two separate umbrella organization.

As personal electronic devices become more common, American companies have abandoned the PrCBs marketplace.[138] Lower labor costs allow Asian companies to mass produce less expensive PrCBs compared to American companies that focused on low-quantity complex PrCBs.[139] A decrease in PrCB production within the United States has created a supply chain dilemma. DoD has lacked an adequate network of trustworthy suppliers for the crucial technology while it has invested less in its own R&D over the past 2 decades.[140]

Since the Naval Systems Warfare Center (NSWC) became the EA responsible for PrCBs, it has worked in conjunction with IPC (Association Connecting Electronics Industries) to address PrCB concerns. In a 2016 report, IPC recommended that DoD expand its role in fostering new PrCB design and manufacturing technology, as well as developing explicit mechanisms to integrate emerging commercial PrCB technologies into new defense systems.[141] Because of the recent incorporation of the EA into NSWC, the effectiveness of these recommendations in action has not yet been determined.

The purpose of assigning an executive agent is to meet a need when no other means to meet it exists, when DoD resources need to be focused on a specific area or areas of responsibility to minimize duplication or redundancy, or when law requires.[142]

Conclusions

Designating a senior official to serve as executive agent limits the Secretary's flexibility and is overly prescriptive. Removing the statutory provision designating an executive agent will facilitate freedom of action throughout the Section 901 reorganization of OUSD(AT&L) and enhance the Secretary's authority.

THE REQUIREMENT FOR THE FOLLOWING STATUTORY OFFICE SHOULD BE SUNSET.

Subrecommendation 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.

Background

In the 2017 NDAA, Congress mandated the "Secretary of Defense shall designate a senior official already serving within the Department of Defense as the official with principal responsibility for the development and demonstration of directed energy weapons for the Department."[143]

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[138] Lucintel, *Growth Opportunities in the Global Printed Circuit Board Market*, accessed July 25, 2017, http://www.reportlinker.com/p04804598/Growth-Opportunities-in-the-Global-Printed-Circuit-Board-Market.html.
[139] Joseph Ladou, "Printed Circuit Board Industry," *International Journal of Hygiene & Environmental Health*, (2006).
[140] William Landay and Anthony Tether, *Hearing on National Defense Authorization Act for Fiscal Year 2009*, Washington, DC, March 13, 2008.
[141] David Bergman, *NSWC Crane Microelectronics Integrity Meeting*, Association Connecting Electronics Industries.
[142] DoD Executive Agent, DoDD 5101.1 (2003).
[143] FY 2017 NDAA, Pub. L. No. 114–328, 130 Stat. 2054 (2016).

Congress also redesignated the High Energy Laser Joint Technology Office (HEL-JTO) as the Joint Directed Energy Transition Office (JDETO) in the FY 2017 NDAA.[144] The provision stipulates, "The High Energy Laser Joint Technology Office of the Department of Defense is hereby re-designated as the 'Joint Directed Energy Transition Office'…and shall report to the official designated under subsection (a)(1)."[145] The FY 2018 NDAA stipulates that the USD(R&E) will be designated in this role.[146]

Through the FY 2000 NDAA, Congress called on the DoD to assemble a master plan for laser weapons development.[147] The resulting High Energy Laser Executive Review Panel issued a report in March 2000 titled, the D*epartment of Defense Laser Master Plan*. The review panel's plan recommended DoD "implement a new management structure for HEL technologies."[148] Congress accepted the HEL Panel's recommendations in the FY 2001 NDAA, and DoD established HEL-JTO in June 2000 to implement the master plan.[149]

Findings

There was a marked emphasis on laser technology in the FY 2000 NDAA. In addition to mandating DoD devise a master plan for laser technology, it also called for a space-based laser program and discussed "criteria for progression of airborne laser program[s]."[150] The emphasis on directed energy weapons in the FY 2000 NDAA may have stemmed from preceding laser weapons research and development efforts, including the Strategic Defense Initiative of the 1980s.[151]

The recommendation to redesignate the HEL-JTO as the JDETO originally appeared in the Directed Energy Weapon Systems Acquisition Act of 2016.[152] The body of the Act appears in the FY 2017 NDAA and in 10 U.S.C. § 2431 note.[153] Part (a) of the note mandates the Secretary of Defense select a senior official to lead JDETO.[154]

Inadequate directed energy weapons acquisitions precipitated HEL-JTO's redesignation and appointment of a senior official. According to a Senate committee report for the FY 2016 NDAA, members of Congress expressed concern over the fact that although DoD has invested more than $6 billion in directed energy technology since 1960, DoD's "directed energy initiatives [have not been] resourced at levels necessary to transition them to full-scale acquisition programs."[155] The conference report for the FY 2017 NDAA further explained that the purpose of HEL-JTO's redesignation and the

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[144] Ibid.
[145] Ibid.
[146] House of Representatives, FY 2018 NDAA, *Conference Report to Accompany H.R. 2810*, accessed January 6, 2018, http://docs.house.gov/billsthisweek/20171113/HRPT-115-HR2810.pdf.
[147] FY 2000 NDAA, Pub. L. No. 106–65, 113 Stat. 554 (1999).
[148] High Energy Laser Executive Review Panel, *Department of Defense Laser Master Plan,* accessed June 29, 2017, http://www.wslfweb.org/docs/MasterLaserPlan.pdf.
[149] GPO, *Department of Defense Initiatives on High Energy Lasers Have Been Responsive to Congressional Direction*, accessed June 29, 2017, https://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-05-545R/html/GAOREPORTS-GAO-05-545R.htm.
[150] FY 2000 NDAA, Pub. L. No. 106–65, 113 Stat. 540 (1999).
[151] Don D. Seeley and John M. Slater, "High Energy Laser Joint Technology Office: A Mission Overview" (paper, Optical Science and Technology, the SPIE 49th Annual Meeting, Denver, CO, October 18, 2004).
[152] Directed Energy Weapon Systems Acquisition Act of 2016, S.R. 2778, 114th Cong. (2016).
[153] FY 2017 NDAA, Pub. L. No. 114–328, 130 Stat. 2054 (2016).
[154] Weapons Development and Procurement Schedules, 10 U.S.C. §2431, notes (a) and (b).
[155] SACS, *National Defense Authorization Act for Fiscal Year 2017*, S. Rep. 114-255 (2016) (Committee Rep.).

statutory requirement for a senior official to lead the JDETO is to give the Secretary of Defense "rapid acquisition authority" toward "speed[ing] the development and deployment of operational directed energy capabilities."[156]

Conclusions

It is unlikely that removing the statutory requirement for JDETO would curtail DoD's renewed directed energy efforts, yet Congress only recently reestablished JDETO for FY 2017. Because reestablishment of JDETO was so recent, and in an effort to provide future flexibility should the nature of the requirement for this designated official shift, Congress should amend the clause to sunset in 5 years (2023). Such action should both fulfill congressional direction to focus on research and development and provide flexibility in the future to appropriately align DoD's research focus as it evolves. Section 215 of the FY 2018 NDAA adds a new prototyping and demonstration program to Section 219 as a new subsection (c). The Section 809 Panel had not evaluated that new program, and the recommendation for a sunset provision for Section 219 does not encompass the new subsection (c). Congress, in reviewing the recommendations to sunset the other portions of Section 219, should include a sunset provision for the new subsection (c).

Implementation

Legislative Branch

- Repeal the statutory requirement for Department of Defense Test Resource Management Center, 10 U.S.C. § 196.
- Repeal the statutory requirement for Office of Corrosion Policy and Oversight, 10 U.S.C. § 2228.
- Repeal the statutory requirement for Director for Performance Assessment and Root Cause Analysis (PARCA), 10 U.S.C. § 2438.
- Repeal the statutory requirement for Office of Technology Transition, 10 U.S.C. § 2515.
- Repeal the statutory requirement for Office for Foreign Defense Critical Technology Monitoring and Assessment, 10 U.S.C. § 2517.
- Repeal the statutory requirement at 10 U.S.C. § 204 for a Small Business Ombudsman within each defense audit agency.
- Repeal the statutory requirement for Secretary of Defense to designate a competition advocate for the Defense Logistics Agency, 10 U.S.C. § 2318.
- 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).
- 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).
- 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).

[156] House of Representatives, FY 2018 NDAA, *Conference Report to Accompany H.R. 2810*, accessed January 6, 2018, http://docs.house.gov/billsthisweek/20171113/HRPT-115-HR2810.pdf.

- 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).
- 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).
- 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).
- 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.

Executive Branch

- No Executive Branch changes are required.

Note: Recommended draft legislative text and sections 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
Statutory Offices and Designated Officials

Implementation Details

Recommendation 22

[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 below.]

SEC. ___. REPEAL OF STATUTORY REQUIREMENT FOR CERTAIN POSITIONS OR OFFICES IN THE DEPARTMENT OF DEFENSE ESTABLISHED OR REQUIRED BY LAW.

(a) REPEAL OF STATUTORY REQUIREMENT FOR DOD TEST RESOURCE MANAGEMENT CENTER.—

(1) REPEAL.—Section 196 of title 10, United States Code, as amended by section 222 of the National Defense Authorization Act for Fiscal Year 2018, is repealed.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter I of chapter 8 of such title is amended by striking the item relating to section 196.

(b) REPEAL OF STATUTORY REQUIREMENT FOR DIRECTOR OF CORROSION POLICY AND OVERSIGHT.—

(1) REPEAL.—

(A) IN GENERAL.—Section 2228 of title 10, United States Code, is repealed.

(B) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 131 of such title is amended by striking the item relating to section 2228.

(2) OFFICE OF THE SECRETARY OF DEFENSE.—Paragraph (9) of section 131(b) of such title, as redesignated by section 910(c)(1)(A) of the National Defense Authorization Act for Fiscal Year 2018, is amended by striking subparagraph (H).

(c) REPEAL OF STATUTORY REQUIREMENT FOR DIRECTOR OF THE OFFICE OF PERFORMANCE ASSESSMENT AND ROOT CAUSE ANALYSIS.—

(1) REPEAL.—

(A) IN GENERAL.—Section 2438 of title 10, United States Code, is repealed.

(B) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 144 of such title is amended by striking the item relating to section 2438.

(2) OFFICE OF THE SECRETARY OF DEFENSE.—Section 131(b)(9) of such title is amended by striking subparagraph (I).

(d) REPEAL OF STATUTORY REQUIREMENT FOR OFFICE OF TECHNOLOGY TRANSITION.—

(1) REPEAL.—Section 2515 of title 10, United States Code, is repealed.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter III of chapter 148 of such title is amended by striking the item relating to section 2515.

(e) REPEAL OF STATUTORY REQUIREMENT FOR OFFICE FOR FOREIGN DEFENSE CRITICAL TECHNOLOGY MONITORING AND ASSESSMENT.—

(1) REPEAL.—Section 2517 of title 10, United States Code, is repealed.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter III of chapter 148 of such title is amended by striking the item relating to section 2517.

(f) REPEAL OF STATUTORY REQUIREMENT FOR SMALL BUSINESS OMBUDSMAN FOR DCAA AND DCMA.—

(1) REPEAL.—Section 204 of title 10, United States Code, is repealed.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter II of chapter 8 of such title is amended by striking the item relating to section 204.

(g) REPEAL OF STATUTORY REQUIREMENT FOR DLA ADVOCATE FOR COMPETITION.—

(1) REPEAL.—Section 2318 of title 10, United States Code, is amended—

(A) by striking subsection (a); and

(B) by striking "(b)" before "Each advocate".

(2) TECHNICAL AMENDMENTS.—Such section is further amended—

(A) by striking "advocate for completion of" and inserting "advocate for competition designated pursuant to section 1705(a) of title 41 for; and

(B) by striking "a grade GS–16 or above under the General Schedule (or in a comparable or higher position under another schedule)" and inserting "in a position classified above GS-15 pursuant to section 5108 of title 5".

(h) REPEAL OF STATUTORY REQUIREMENT FOR JOINT HYPERSONICS TRANSITION OFFICE.—Section 218 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364; 10 U.S.C. 2358 note), as most recently amended by section 214(b) of the National Defense Authorization Act for Fiscal Year 2018, is repealed.

(i) SUNSET FOR STATUTORY DESIGNATION OF USD(R&E) AS SENIOR DOD OFFICIAL WITH PRINCIPAL RESPONSIBILITY FOR DIRECTED ENERGY WEAPONS.—Section 219 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 2431 note), as amended by section 215 of the National Defense Authorization Act for Fiscal Year 2018, is amended by adding at the end the following new subsection:

"(d) SUNSET.—The provisions of subsection (a) and of paragraphs (2) and (3) of subsection (b) shall cease to be in effect as of September 30, 2022.".

(j) REPEAL OF STATUTORY REQUIREMENT FOR DESIGNATION OF INDIVIDUAL TO SERVE AS PRIMARY LIAISON BETWEEN THE PROCUREMENT AND RESEARCH AND DEVELOPMENT ACTIVITIES OF THE UNITED STATES ARMED FORCES AND THOSE OF THE STATE OF ISRAEL.—Section 1006 of the National Defense Authorization Act, Fiscal Year 1989 (Public Law 100-456; 10 U.S.C. 133 note) is repealed.

(k) REPEAL OF STATUTORY REQUIREMENT FOR DESIGNATION OF SENIOR OFFICIAL TO COORDINATE AND MANAGE HUMAN SYSTEMS INTEGRATION ACTIVITIES RELATED TO ACQUISITION PROGRAMS.—Section 231 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 10 U.S.C. 1701 note) is amended—

(1) by striking "(a) IN GENERAL.—"; and

(2) by striking subsections (b), (c), and (d).

(l) REPEAL OF STATUTORY REQUIREMENT FOR DESIGNATION OF SENIOR OFFICIAL RESPONSIBLE FOR FOCUS ON URGENT OPERATIONAL NEEDS AND RAPID ACQUISITION.—Section 902 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 10 U.S.C. 2302 note) is repealed.

(m) REPEAL OF STATUTORY REQUIREMENT FOR DESIGNATION OF SENIOR OFFICIAL RESPONSIBLE FOR DUAL-USE PROJECTS UNDER DUAL-USE SCIENCE AND TECHNOLOGY PROGRAM.—Section 203 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85; 10 U.S.C. 2511 note) is amended by striking subsection (c).

(n) REPEAL OF STATUTORY REQUIREMENT FOR DESIGNATION OF SENIOR OFFICIAL AS EXECUTIVE AGENT FOR PRINTED CIRCUIT BOARD TECHNOLOGY.—Section 256 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417; 10 U.S.C. 2501 note) is repealed.

SECTIONS AFFECTED BY THE PROPOSAL TO REPEAL CERTAIN STATUTORY OFFICES AND POSITIONS

[Matter proposed to be deleted is shown in ~~stricken through~~ text; matter to be inserted is shown in *bold italic*. Letters in yellow text (viz, A.) correlate to the corresponding subsection designations in the accompanying legislative text (viz, (a)]

[Text shown as current law incorporates amendments from the FY2018 NDAA conference report, as passed the House on Nov. 15, 2017 (H. Rpt. 115-404)]

TITLE 10, UNITED STATES CODE

A. ~~§ 196. Department of Defense Test Resource Management Center~~

~~(a) ESTABLISHMENT AS DEPARTMENT OF DEFENSE FIELD ACTIVITY.—The Secretary of Defense shall establish within the Department of Defense under section 191 of this title a Department of Defense Test Resource Management Center (hereinafter in this section referred to as the "Center"). The Secretary shall designate the Center as a Department of Defense Field Activity.~~

~~(b) DIRECTOR AND DEPUTY DIRECTOR.—(1) At the head of the Center shall be a Director, selected by the Secretary from among individuals who have substantial experience in the field of test and evaluation.~~

~~(2) There shall be a Deputy Director of the Center, selected by the Secretary from among individuals who have substantial experience in the field of test and evaluation. The Deputy Director shall act for, and exercise the powers of, the Director when the Director is disabled or the position of Director is vacant.~~

~~(c) DUTIES OF DIRECTOR.—(1) The Director shall have the following duties:~~

~~(A) To review and provide oversight of proposed Department of Defense budgets and expenditures for—~~

~~(i) the test and evaluation facilities and resources of the Major Range and Test Facility Base of the Department of Defense; and~~

~~(ii) all other test and evaluation facilities and resources within and outside of the Department of Defense, other than budgets and expenditures for activities described in section 139(j) of this title.~~

~~(B) To review proposed significant changes to the test and evaluation facilities and resources of the Major Range and Test Facility Base, including with respect to the expansion, divestment, consolidation, or curtailment of activities, before they are implemented by the Secretaries of the military departments or the heads of the Defense Agencies with test and evaluation responsibilities and advise the Secretary of Defense and the Under Secretary of Acquisition, Technology, and Logistics of the impact of such changes on the adequacy of such test and evaluation facilities and resources to meet the test and evaluation requirements of the Department.~~

~~(C) To complete and maintain the strategic plan required by subsection (d).~~

~~(D) To review proposed budgets under subsection (e) and submit reports and certifications required by such subsection.~~

~~(E) To administer the Central Test and Evaluation Investment Program and the program of the Department of Defense for test and evaluation science and technology.~~

~~(2) The Director shall have access to such records and data of the Department of Defense (including the appropriate records and data of each military department and Defense Agency) that are necessary in order to carry out the duties of the Director under this section.~~

~~(d) STRATEGIC PLAN FOR DEPARTMENT OF DEFENSE TEST AND EVALUATION RESOURCES.—(1) Not less often than once every two fiscal years, the Director, in coordination with the Director of Operational Test and Evaluation, the Secretaries of the military departments, and the heads of Defense Agencies with test and evaluation responsibilities, shall complete a strategic plan reflecting the needs of the Department of Defense with respect to test and evaluation facilities and resources, including modeling and simulation capabilities. Each such strategic plan shall cover the period of ten fiscal years beginning with the fiscal year in which the plan is submitted under paragraph (3). The strategic plan shall be based on a comprehensive review of the test and evaluation requirements of the Department and the adequacy of the test and evaluation facilities and resources of the Department to meet those requirements.~~

~~(2) The strategic plan shall include the following:~~

~~(A) An assessment of the test and evaluation requirements of the Department for the period covered by the plan.~~

~~(B) An identification of performance measures associated with the successful achievement of test and evaluation objectives for the period covered by the plan.~~

~~(C) An assessment of the test and evaluation facilities and resources that will be needed to meet such requirements and satisfy such performance measures.~~

~~(D) An assessment of the current state of the test and evaluation facilities and resources of the Department.~~

~~(E) An assessment of plans and business case analyses supporting any significant modification of the test and evaluation facilities and resources of the Department projected, proposed, or recommended by the Secretary of a military department or the head of a Defense Agency for such period, including with respect to the expansion, divestment, consolidation, or curtailment of activities.~~

~~(F) An itemization of acquisitions, upgrades, and improvements necessary to ensure that the test and evaluation facilities and resources of the Department are adequate to meet such requirements and satisfy such performance measures.~~

~~(G) An assessment of the budgetary resources necessary to implement such acquisitions, upgrades, and improvements.~~

~~(3) Upon completing a strategic plan under paragraph (1), the Director shall submit to the Secretary of Defense a report on that plan. The report shall include the plan and a description of the review on which the plan is based.~~

~~(4) Not later than 60 days after the date on which the report is submitted under paragraph (3), the Secretary of Defense shall transmit to the Committee on Armed Services and Committee on Appropriations of the Senate and the Committee on Armed Services and Committee on Appropriations of the House of Representatives the report, together with any comments with respect to the report that the Secretary considers appropriate.~~

~~(e) CERTIFICATION OF BUDGETS.—(1) The Secretary of Defense, acting through the Under Secretary of Defense (Comptroller), shall require that the Secretary of each military department and the head of each Defense Agency with test and evaluation responsibilities transmit such Secretary's or Defense Agency head's proposed budget for test and evaluation activities,~~

~~including modeling and simulation capabilities, for a fiscal year and for the period covered by the future-years defense program submitted to Congress under section 221 of this title for that fiscal year to the Director of the Center for review under paragraph (2) before submitting such proposed budget to the Under Secretary of Defense (Comptroller).~~

~~(2)(A) The Director of the Center shall review each proposed budget transmitted under paragraph (1) and shall, not later than January 31 of the year preceding the fiscal year for which such budgets are proposed, submit to the Secretary of Defense a report containing the comments of the Director with respect to all such proposed budgets, together with the certification of the Director as to whether such proposed budgets are adequate.~~

~~(B) The Director shall also submit, together with such report and such certification, an additional certification as to whether such proposed budgets provide balanced support for such strategic plan.~~

~~(3) The Secretary of Defense shall, not later than March 31 of the year preceding the fiscal year for which such budgets are proposed, submit to Congress a report on those proposed budgets which the Director has not certified under paragraph (2)(A) to be adequate. The report shall include the following matters:~~

~~(A) A discussion of the actions that the Secretary proposes to take, together with any recommended legislation that the Secretary considers appropriate, to address the inadequacy of the proposed budgets.~~

~~(B) Any additional comments that the Secretary considers appropriate regarding the inadequacy of the proposed budgets.~~

~~(f) APPROVAL OF CERTAIN MODIFICATIONS.—(1) The Secretary of a military department or the head of a Defense Agency with test and evaluation responsibilities may not implement a projected, proposed, or recommended significant modification of the test and evaluation facilities and resources of the Department, including with respect to the expansion, divestment, consolidation, or curtailment of activities, until—~~

~~(A) the Secretary or the head, as the case may be, submits to the Director a business case analysis for such modification; and~~

~~(B) the Director reviews such analysis and approves such modification.~~

~~(g) SUPERVISION OF DIRECTOR BY UNDER SECRETARY.—The Director of the Center shall be subject to the supervision of the Under Secretary of Defense for Acquisition, Technology, and Logistics. The Director shall report directly to the Under Secretary, without the interposition of any other supervising official.~~

~~(h) ADMINISTRATIVE SUPPORT OF CENTER.—The Secretary of Defense shall provide the Director with administrative support adequate for carrying out the Director's responsibilities under this section. The Secretary shall provide the support out of the headquarters activities of the Department or any other activities that the Secretary considers appropriate.~~

~~(i) DEFINITION.—In this section, the term "Major Range and Test Facility Base" means the test and evaluation facilities and resources that are designated by the Secretary of Defense as facilities and resources comprising the Major Range and Test Facility Base.~~

B. ~~§ 2228. Office of Corrosion Policy and Oversight~~

~~(a) OFFICE AND DIRECTOR.—(1) There is an Office of Corrosion Policy and Oversight within the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.~~

~~(2) The Office shall be headed by a Director of Corrosion Policy and Oversight, who shall be assigned to such position by the Under Secretary from among civilian employees of the Department of Defense with the qualifications described in paragraph (3). The Director is responsible in the Department of Defense to the Secretary of Defense (after the Under Secretary of Defense for Acquisition, Technology, and Logistics) for the prevention and mitigation of corrosion of the military equipment and infrastructure of the Department of Defense. The Director shall report directly to the Under Secretary.~~

~~(3) In order to qualify to be assigned to the position of Director, an individual shall—~~

~~(A) have management expertise in, and professional experience with, corrosion project and policy implementation, including an understanding of the effects of corrosion policies on infrastructure; research, development, test, and evaluation; and maintenance; and~~

~~(B) have an understanding of Department of Defense budget formulation and execution, policy formulation, and planning and program requirements.~~

~~(4) The Secretary of Defense shall designate the position of Director as a critical acquisition position under section 1733(b)(1)(C) of this title.~~

~~(b) DUTIES.—(1) The Director of Corrosion Policy and Oversight (in this section referred to as the "Director") shall oversee and coordinate efforts throughout the Department of Defense to prevent and mitigate corrosion of the military equipment and infrastructure of the Department. The duties under this paragraph shall include the duties specified in paragraphs (2) through (5).~~

~~(2) The Director shall develop and recommend any policy guidance on the prevention and mitigation of corrosion to be issued by the Secretary of Defense.~~

~~(3) The Director shall review the programs and funding levels proposed by the Secretary of each military department during the annual internal Department of Defense budget review process as those programs and funding proposals relate to programs and funding for the prevention and mitigation of corrosion and shall submit to the Secretary of Defense recommendations regarding those programs and proposed funding levels.~~

~~(4) The Director shall provide oversight and coordination of the efforts within the Department of Defense to prevent or mitigate corrosion during—~~

~~(A) the design, acquisition, and maintenance of military equipment; and~~

~~(B) the design, construction, and maintenance of infrastructure.~~

~~(5) The Director shall monitor acquisition practices within the Department of Defense—~~

~~(A) to ensure that the use of corrosion prevention technologies and the application of corrosion prevention treatments are fully considered during research and development in the acquisition process; and~~

~~(B) to ensure that, to the extent determined appropriate for each acquisition program, such technologies and treatments are incorporated into that program, particularly during the engineering and design phases of the acquisition process.~~

~~(c) ADDITIONAL AUTHORITIES FOR DIRECTOR.—The Director is authorized to—~~

~~(1) develop, update, and coordinate corrosion training with the Defense Acquisition University;~~

~~(2) participate in the process within the Department of Defense for the development of relevant directives and instructions; and~~

~~(3) interact directly with the corrosion prevention industry, trade associations, other government corrosion prevention agencies, academic research and educational institutions, and scientific organizations engaged in corrosion prevention, including the National Academy of Sciences.~~

~~(d) LONG-TERM STRATEGY.—(1) The Secretary of Defense shall develop and implement a long-term strategy to reduce corrosion and the effects of corrosion on the military equipment and infrastructure of the Department of Defense.~~

~~(2) The strategy under paragraph (1) shall include the following:~~

~~(A) Expansion of the emphasis on corrosion prevention and mitigation within the Department of Defense to include coverage of infrastructure.~~

~~(B) Application uniformly throughout the Department of Defense of requirements and criteria for the testing and certification of new corrosion-prevention technologies for equipment and infrastructure with similar characteristics, similar missions, or similar operating environments.~~

~~(C) Implementation of programs, including supporting databases, to ensure that a focused and coordinated approach is taken throughout the Department of Defense to collect, review, validate, and distribute information on proven methods and products that are relevant to the prevention of corrosion of military equipment and infrastructure.~~

~~(D) Establishment of a coordinated research and development program for the prevention and mitigation of corrosion for new and existing military equipment and infrastructure that includes a plan to transition new corrosion prevention technologies into operational systems, including through the establishment of memoranda of agreement, joint funding agreements, public-private partnerships, university research and education centers, and other cooperative research agreements.~~

~~(3) The strategy shall include, for the matters specified in paragraph (2), the following:~~

~~(A) Policy guidance.~~

~~(B) Performance measures and milestones.~~

~~(C) An assessment of the necessary personnel and funding necessary to accomplish the long-term strategy.~~

~~(e) REPORT.—(1) For each budget for a fiscal year, beginning with the budget for fiscal year 2009 and ending with the budget for fiscal year 2022, the Secretary of Defense shall submit, with the defense budget materials, a report on the following:~~

~~(A) Funding requirements for the long-term strategy developed under subsection (d).~~

~~(B) The estimated composite return on investment achieved by implementing the strategy, and documented in the assessments by the Department of Defense of completed corrosion projects and activities.~~

~~(C) The funds requested in the budget compared to the funding requirements.~~

~~(D) If the full amount of funding requirements is not requested in the budget, the reasons for not including the full amount and a description of the impact on readiness, logistics, and safety of not fully funding required corrosion prevention and mitigation activities.~~

~~(E) For the fiscal year preceding the fiscal year covered by the report, the amount of funds requested in the budget for each project or activity described in subsection (d) compared to the funding requirements for the project or activity.~~

~~(F) For the fiscal year preceding the fiscal year covered by the report, a description of the specific amount of funds used for military corrosion projects, the Technical Corrosion Collaboration program, and other corrosion-related activities.~~

~~(2)(A) Each report under this section shall include, in an annex to the report, a summary of the most recent report required by subparagraph (B).~~

~~(B) Not later than December 31 of each year, through December 31, 2020, the corrosion control and prevention executive of a military department shall submit to the Director of Corrosion Policy and Oversight a report containing recommendations pertaining to the corrosion control and prevention program of the military department. Such report shall include recommendations for the funding levels necessary for the executive to carry out the duties of the executive under this section. The report required under this subparagraph shall—~~

~~(i) provide a summary of key accomplishments, goals, and objectives of the corrosion control and prevention program of the military department; and~~

~~(ii) include the performance measures used to ensure that the corrosion control and prevention program achieved the goals and objectives described in clause (i).~~

~~(f) DEFINITIONS.—In this section:~~

~~(1) The term "corrosion" means the deterioration of a material or its properties due to a reaction of that material with its chemical environment.~~

~~(2) The term "military equipment" includes all weapon systems, weapon platforms, vehicles, and munitions of the Department of Defense, and the components of such items.~~

~~(3) The term "infrastructure" includes all buildings, structures, airfields, port facilities, surface and subterranean utility systems, heating and cooling systems, fuel tanks, pavements, and bridges.~~

~~(4) The term "budget", with respect to a fiscal year, means the budget for that fiscal year that is submitted to Congress by the President under section 1105(a) of title 31.~~

~~(5) The term "defense budget materials", with respect to a fiscal year, means the materials submitted to Congress by the Secretary of Defense in support of the budget for that fiscal year.~~

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§ 131. Office of the Secretary of Defense
[Section shown as in effect as of Feb. 1, 2018]

(a) There is in the Department of Defense an Office of the Secretary of Defense. The function of the Office is to assist the Secretary of Defense in carrying out the Secretary's duties and responsibilities and to carry out such other duties as may be prescribed by law.

(b) The Office of the Secretary of Defense is composed of the following:

(1) The Deputy Secretary of Defense.

(2) The Chief Management Officer of the Department of Defense.

(3) The Under Secretaries of Defense, as follows:

(A) The Under Secretary of Defense for Research and Engineering.

(B) The Under Secretary of Defense for Acquisition and Sustainment.

(C) The Under Secretary of Defense for Policy.
(D) The Under Secretary of Defense (Comptroller).
(E) The Under Secretary of Defense for Personnel and Readiness.
(F) The Under Secretary of Defense for Intelligence.
(4) The Deputy Chief Management Officer of the Department of Defense.
(5) Other officers who are appointed by the President, by and with the advice and consent of the Senate, and who report directly to the Secretary and Deputy Secretary without intervening authority, as follows:
(A) The Director of Cost Assessment and Program Evaluation.
(B) The Director of Operational Test and Evaluation.
(C) The General Counsel of the Department of Defense.
(D) The Inspector General of the Department of Defense.
(6) The Chief Information Officer of the Department of Defense.
(7) The Deputy Under Secretaries of Defense.
(8) The Assistant Secretaries of Defense.
(9) Other officials provided for by law, as follows:
(A) The two Deputy Directors within the Office of the Director of Cost Assessment and Program Evaluation under section 139a(c) of this title.
(B) The Deputy Assistant Secretary of Defense for Developmental Test and Evaluation appointed pursuant to section 139b(a) of this title.
(C) The Deputy Assistant Secretary of Defense for Systems Engineering appointed pursuant to section 139b(b) of this title.
(D) The Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy appointed pursuant to section 139c of this title.
(E) The Director of Small Business Programs appointed pursuant to section 144 of this title.
(F) The official designated under section 1501(a) of this title to have responsibility for Department of Defense matters relating to missing persons as set forth in section 1501 of this title.
(G) The Director of Military Family Readiness Policy under section 1781 of this title.
~~**(H) The Director of the Office of Corrosion Policy and Oversight assigned pursuant to section 2228(a) of this title.**~~
~~**(I) The official designated under section 2438(a) of this title to have responsibility for conducting and overseeing performance assessments and root cause analyses for major defense acquisition programs.**~~
(10) Such other offices and officials as may be established by law or the Secretary of Defense may establish or designate in the Office.

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C. ~~§ 2438. Performance assessments and root cause analyses~~

~~(a) DESIGNATION OF SENIOR OFFICIAL RESPONSIBILITY FOR PERFORMANCE ASSESSMENTS AND ROOT CAUSE ANALYSES.—~~

~~(1) IN GENERAL.—The Secretary of Defense shall designate a senior official in the Office of the Secretary of Defense as the principal official of the Department of Defense responsible for conducting and overseeing performance assessments and root cause analyses for major defense acquisition programs.~~

~~(2) NO PROGRAM EXECUTION RESPONSIBILITY.—The Secretary shall ensure that the senior official designated under paragraph (1) is not responsible for program execution.~~

~~(3) STAFF AND RESOURCES.—The Secretary shall assign to the senior official designated under paragraph (1) appropriate staff and resources necessary to carry out the senior official's function under this section.~~

~~(b) RESPONSIBILITIES.—The senior official designated under subsection (a) shall be responsible for the following:~~

~~(1) Carrying out performance assessments of major defense acquisition programs in accordance with the requirements of subsection (c) periodically or when requested by the Secretary of Defense, the Under Secretary of Defense for Acquisition, Technology and Logistics, the Secretary of a military department, or the head of a Defense Agency.~~

~~(2) Conducting root cause analyses for major defense acquisition programs in accordance with the requirements of subsection (d) when required by section 2433a(a)(1) of this title, or when requested by the Secretary of Defense, the Under Secretary of Defense for Acquisition, Technology and Logistics, the Secretary of a military department, or the head of a Defense Agency.~~

~~(3) Issuing policies, procedures, and guidance governing the conduct of performance assessments and root cause analyses by the military departments and the Defense Agencies.~~

~~(4) Evaluating the utility of performance metrics used to measure the cost, schedule, and performance of major defense acquisition programs, and making such recommendations to the Secretary of Defense as the official considers appropriate to improve such metrics.~~

~~(5) Advising acquisition officials on performance issues regarding a major defense acquisition program that may arise—~~

~~(A) before certification under section 2433a of this title;~~

~~(B) before entry into full-rate production; or~~

~~(C) in the course of consideration of any decision to request authorization of a multiyear procurement contract for the program.~~

~~(c) PERFORMANCE ASSESSMENTS.—For purposes of this section, a performance assessment with respect to a major defense acquisition program is an evaluation of the following:~~

~~(1) The cost, schedule, and performance of the program, relative to current metrics, including performance requirements and baseline descriptions.~~

~~(2) The extent to which the level of program cost, schedule, and performance predicted relative to such metrics is likely to result in the timely delivery of a level of capability to the warfighter that is consistent with the level of resources to be expended and provides superior value to alternative approaches that may be available to meet the same military requirement.~~

~~(d) ROOT CAUSE ANALYSES.—For purposes of this section and section 2433a of this title, a root cause analysis with respect to a major defense acquisition program is an assessment of the underlying cause or causes of shortcomings in cost, schedule, or performance of the program, including the role, if any, of—~~

~~(1) unrealistic performance expectations;~~
~~(2) unrealistic baseline estimates for cost or schedule;~~
~~(3) immature technologies or excessive manufacturing or integration risk;~~
~~(4) unanticipated design, engineering, manufacturing, or technology integration issues arising during program performance;~~
~~(5) changes in procurement quantities;~~
~~(6) inadequate program funding or funding instability;~~
~~(7) poor performance by government or contractor personnel responsible for program management; or~~
~~(8) any other matters.~~

~~(e) SUPPORT OF APPLICABLE CAPABILITIES AND EXPERTISE.—The Secretary of Defense shall ensure that the senior official designated under subsection (a) has the support of other Department of Defense officials with relevant capabilities and expertise needed to carry out the requirements of this section~~.

D. ~~§ 2515. Office of Technology Transition~~

~~(a) ESTABLISHMENT.—The Secretary of Defense shall establish within the Office of the Secretary of Defense an Office of Technology Transition.~~

~~(b) PURPOSE.—The purpose of the office shall be to ensure, to the maximum extent practicable, that technology developed for national security purposes is integrated into the private sector of the United States in order to enhance national technology and industrial base, reinvestment, and conversion activities consistent with the objectives set forth in section 2501(a) of this title.~~

~~(c) DUTIES.—The head of the office shall ensure that the office—~~
~~(1) monitors all research and development activities that are carried out by or for the military departments and Defense Agencies;~~
~~(2) identifies all such research and development activities that use technologies, or result in technological advancements, having potential nondefense commercial applications;~~
~~(3) serves as a clearinghouse for, coordinates, and otherwise actively facilitates the transition of such technologies and technological advancements from the Department of Defense to the private sector;~~
~~(4) conducts its activities in consultation and coordination with the Department of Energy and the Department of Commerce; and~~
~~(5) provides private firms with assistance to resolve problems associated with security clearances, proprietary rights, and other legal considerations involved in such a transition of technology.~~

E. ~~§ 2517. Office for Foreign Defense Critical Technology Monitoring and Assessment~~

~~(a) IN GENERAL.—The Secretary of Defense shall establish within the Office of the Assistant Secretary of Defense for Research and Engineering an office known as the "Office for Foreign Defense Critical Technology Monitoring and Assessment" (hereinafter in this section referred to as the "Office").~~

~~(b) RELATIONSHIP TO DEPARTMENT OF COMMERCE.—The head of the Office shall consult closely with appropriate officials of the Department of Commerce in order—~~

~~(1) to minimize the duplication of any effort of the Department of Commerce by the Department of Defense regarding the monitoring of foreign activities related to defense critical technologies that have potential commercial uses; and~~

~~(2) to ensure that the Office is effectively utilized to disseminate information to users of such information within the Federal Government.~~

~~(c) RESPONSIBILITIES.—The Office shall have the following responsibilities:~~

~~(1) To maintain within the Department of Defense a central library for the compilation and appropriate dissemination of unclassified and classified information and assessments regarding significant foreign activities in research, development, and applications of defense critical technologies.~~

~~(2) To establish and maintain—~~

~~(A) a widely accessible unclassified data base of information and assessments regarding foreign science and technology activities that involve defense critical technologies, including, especially, activities in Europe and in Pacific Rim countries; and~~

~~(B) a classified data base of information and assessments regarding such activities.~~

~~(3) To perform liaison activities among the military departments, Defense Agencies, and other appropriate elements of the Department of Defense, with appropriate agencies and offices of the Department of Commerce and the Department of State, and with other departments and agencies of the Federal Government in order to ensure that significant activities in research, development, and applications of defense critical technologies are identified, monitored, and assessed by an appropriate department or agency of the Federal Government.~~

~~(4) To ensure the maximum practicable public availability of information and assessments contained in the unclassified data bases established pursuant to paragraph (2)—~~

~~(A) by limiting, to the maximum practicable extent, restrictive classification of such information and assessments; and~~

~~(B) by disseminating to the National Technical Information Service of the Department of Commerce information and assessments regarding defense critical technologies having potential commercial uses.~~

~~(5) To disseminate through the National Technical Information Service of the Department of Commerce unclassified information and assessments regarding defense critical technologies having potential commercial uses so that such information and assessments may be further disseminated within the Federal Government and to the private sector.~~

F. ~~§ 204. Small Business Ombudsman for defense audit agencies~~

~~(a) SMALL BUSINESS OMBUDSMAN.—The Secretary of Defense shall designate within each defense audit agency an official as the Small Business Ombudsman to have the duties described in subsection (b) and such other responsibilities as may be determined by the Secretary.~~

~~(b) DUTIES.—The Small Business Ombudsman of a defense audit agency shall—~~
~~(1) advise the Director of the defense audit agency on policy issues related to small business concerns;~~
~~(2) serve as the defense audit agency's primary point of contact and source of information for small business concerns;~~
~~(3) collect and monitor relevant data regarding the defense audit agency's conduct of audits of small business concerns, including—~~
~~(A) data regarding the timeliness of audit closeouts for small business concerns; and~~
~~(B) data regarding the responsiveness of the defense audit agency to issues or other matters raised by small business concerns; and~~
~~(4) make recommendations to the Director regarding policies, processes, and procedures related to the timeliness of audits of small business concerns and the responsiveness of the defense audit agency to issues or other matters raised by small business concerns.~~

~~(c) AUDIT INDEPENDENCE.—The Small Business Ombudsman of a defense audit agency shall be segregated from ongoing audits in the field and shall not engage in activities with regard to particular audits that could compromise the independence of the defense audit agency or undermine compliance with applicable audit standards.~~

~~(d) DEFENSE AUDIT AGENCY DEFINED.—In this section, the term "defense audit agency" means the Defense Contract Audit Agency and the Defense Contract Management Agency.~~

G. § 2318. Advocates for competition

~~(a)(1) In addition to the advocates for competition established or designated pursuant to section 1705(a) of title 41, the Secretary of Defense shall designate an officer or employee of the Defense Logistics Agency to serve as the advocate for competition of the agency.~~
~~(2) The advocate for competition of the Defense Logistics Agency shall carry out the responsibilities and functions provided for in subsection (b) and (c) of section 1705 of title 41.~~

~~(b)~~ Each advocate for competition ***designated pursuant to section 1705(a) of title 41*** ~~of~~ ***for*** an agency named in section 2303(a) of this title shall be a general or flag officer if a member of the armed forces or ~~a grade GS–16 or above under the General Schedule (or in a comparable or higher position under another schedule)~~ ***in a position classified above GS-15 pursuant to section 5108 of title 5***, if a civilian employee and shall be designated to serve for a minimum of two years.
[Drafter note: Below is a possible alternative restatement of current subsection (b) for clarity – intended to be nonsubstantive]

(a) REQUIRED PERSONNEL LEVEL.—Each advocate for competition described in subsection (c) shall be a member of the armed forces who is a general or flag officer or a civilian employee who is in a position classified above GS-15 pursuant to section 5108 of title 5.

(b) REQUIRED PERIOD OF DESIGNATION.—Each advocate for competition described in subsection (c) shall be designated to serve for a minimum of two years.

(c) COVERED ADVOCATES FOR COMPETITION.—Subsections (a) and (b) apply to an advocate for competition designated pursuant to section 1705(a) of title 41 for an agency named in section 2303(a) of this title.

PROVISIONS OF ANNUAL NATIONAL DEFENSE AUTHORIZATION ACTS

Section 218 of the FY 2007 NDAA (Public Law 109–364; 10 U.S.C. 2358 note)

H. ~~SEC. 218. HYPERSONICS DEVELOPMENT.~~

~~(a) ESTABLISHMENT OF JOINT HYPERSONICS TRANSITION OFFICE.—The Secretary of Defense shall establish within the Office of the Secretary of Defense a Joint Hypersonics Transition Office (in this section referred to as the 'Office'). The Office shall carry out the program required under subsection (b), and shall have such other responsibilities relating to hypersonics as the Secretary shall specify.~~

~~(b) PROGRAM ON HYPERSONICS.—The Office shall carry out a program for the development of hypersonics for defense purposes.~~

~~(c) RESPONSIBILITIES.—In carrying out the program required by subsection (b), the Office shall do the following:~~

~~(1) Expedite testing, evaluation, and acquisition of hypersonic weapon systems to meet the stated needs of the warfighter, including flight testing, ground-based testing, and underwater launch testing.~~

~~(2) Coordinate and integrate current and future research, development, test, and evaluation programs and system demonstration programs of the Department of Defense on hypersonics.~~

~~(3) Undertake appropriate actions to ensure—~~

~~(A) close and continuous integration of the programs on hypersonics of the military departments and the Defense Agencies with the programs on hypersonics across the Federal Government and with appropriate private sector and foreign organizations; and~~

~~(B) that both foundational research and developmental and operational testing resources are adequate and well funded, and that facilities are made available in a timely manner to support hypersonics research, demonstration programs, and system development.~~

~~(4) Approve prototyping demonstration programs on hypersonic systems to speed the maturation and deployment of the systems to the warfighter.~~

~~(5) Ensure that any demonstration program on hypersonic systems that is carried out in any year after its approval under paragraph (3) is carried out only if certified under subsection (e) as being consistent with the roadmap under subsection (d).~~

~~(6) Develop strategies and roadmaps for hypersonic technologies to transition to operational capabilities for the warfighter.~~

~~(7) Coordinate with relevant stakeholders and agencies to support United States technological advantage in developing hypersonics.~~

~~(d) ROADMAP.—~~

~~(1) ROADMAP REQUIRED.—The Office shall develop, and every two years revise, a roadmap for the hypersonics programs of the Department of Defense.~~

~~(2) COORDINATION.—The roadmap shall be developed and revised under paragraph (1) in coordination with the Joint Staff and in consultation with the National Aeronautics and Space Administration.~~

~~(3) ELEMENTS.—The roadmap shall include the following matters:~~

~~(A) Anticipated or potential mission requirements for hypersonics.~~

~~(B) Short-term, mid-term, and long-term goals for the Department of Defense on hypersonics, which shall be consistent with the missions and anticipated requirements of the Department over the applicable period.~~

~~(C) A schedule for meeting such goals, including—~~

~~(i) the activities and funding anticipated to be required for meeting such goals; and~~

~~(ii) the activities of the National Aeronautics and Space Administration to be leveraged by the Department to meet such goals.~~

~~(D) The test and evaluation facilities required to support the activities identified in subparagraph (C), along with the schedule and funding required to upgrade those facilities, as necessary.~~

~~(E) Acquisition transition plans for hypersonics.~~

~~(e) ANNUAL REVIEW AND CERTIFICATION OF FUNDING.—~~

~~(1) ANNUAL REVIEW.—The Office shall conduct on an annual basis a review of—~~

~~(A) the funding available for research, development, test, and evaluation and demonstration programs within the Department of Defense for hypersonics, in order to determine whether or not such funding is consistent with the roadmap developed under subsection (d); and~~

~~(B) the hypersonics demonstration programs of the Department, in order to determine whether or not such programs avoid duplication of effort and support the goals of the Department in a manner consistent with the roadmap developed under subsection (d).~~

~~(2) CERTIFICATION.—The Office shall, as a result of each review under paragraph (1), certify to the Secretary whether or not the funding and programs subject to such review are consistent with the roadmap developed under subsection (d).~~

~~(3) TERMINATION.—The requirements of this subsection shall terminate after the submittal to Congress of the budget for fiscal year 2016 pursuant to section 1105 of title 31, United States Code.~~

Section 219 of the FY 2017 NDAA (Public Law 114-328; 10 U.S.C. 2431 note)

I. SEC. 219. DESIGNATION OF DEPARTMENT OF DEFENSE SENIOR OFFICIAL WITH PRINCIPAL RESPONSIBILITY FOR DIRECTED ENERGY WEAPONS.

(a) DESIGNATION OF SENIOR OFFICIAL.—

(1) IN GENERAL.—The Under Secretary of Defense for Research and Engineering shall serve as the official with principal responsibility for the development and demonstration of directed energy weapons for the Department.

(2) DEVELOPMENT OF STRATEGIC PLAN.—

(A) IN GENERAL.—The senior official designated under paragraph (1) shall develop a detailed strategic plan to develop, mature, and transition directed energy technologies to acquisition programs of record.

(B) ROADMAP.—Such strategic plan shall include a strategic roadmap for the development and fielding of directed energy weapons and key enabling capabilities for the Department, identifying and coordinating efforts across military departments to achieve overall joint mission effectiveness.

(3) ACCELERATION OF DEVELOPMENT AND FIELDING OF DIRECTED ENERGY WEAPONS CAPABILITIES.—

(A) IN GENERAL.—To the degree practicable, the senior official designated under paragraph (1) shall use the flexibility of the policies of the Department in effect on the day before the date of the enactment of this Act [Dec. 23, 2016], or any successor policies, to accelerate the development and fielding of directed energy capabilities.

(B) ENGAGEMENT.—The Secretary shall use the flexibility of the policies of the Department in effect on the day before the date of the enactment of this Act, or any successor policies, to ensure engagement with defense and private industries, research universities, and unaffiliated, nonprofit research institutions.

(4) ADVICE FOR EXERCISES AND DEMONSTRATIONS.—The senior official designated under paragraph (1) shall, to the degree practicable, provide technical advice and support to entities in the Department of Defense and the military departments conducting exercises or demonstrations with the purpose of improving the capabilities of or operational viability of technical capabilities supporting directed energy weapons, including supporting military utility assessments of the relevant cost and benefits of directed energy weapon systems.

(5) SUPPORT FOR DEVELOPMENT OF REQUIREMENTS.—The senior official designated under paragraph (1) shall coordinate with the military departments, Defense Agencies, and the Joint Directed Energy Transition Office to define requirements for directed energy capabilities that address the highest priority warfighting capability gaps of the Department.

(6) AVAILABILITY OF INFORMATION.—The Secretary of Defense shall ensure that the senior official designated under paragraph (1) has access to such information on programs and activities of the military departments and other defense agencies as the Secretary considers appropriate to coordinate departmental directed energy efforts.

(b) JOINT DIRECTED ENERGY TRANSITION OFFICE.—

(1) REDESIGNATION.—The High Energy Laser Joint Technology Office of the Department of Defense is hereby redesignated as the ``Joint Directed Energy Transition Office'' (in this subsection referred to as the ``Office''), and shall report to the official designated under subsection (a)(1).

(2) ADDITIONAL FUNCTIONS.—In addition to the functions and duties of the Office in effect on the day before the date of the enactment of this Act, the Office shall assist the senior official designated under paragraph (1) of subsection (a) in carrying out paragraphs (2) through (5) of such subsection.

(3) FUNDING.—The Secretary may make available such funds to the Office for basic research, applied research, advanced technology development, prototyping, studies and analyses, and organizational support as the Secretary considers appropriate to support the efficient and effective development of directed energy systems and technologies and transition of those systems and technologies into acquisition programs or operational use.

(c) PROTOTYPING AND DEMONSTRATION PROGRAM.—

(1) ESTABLISHMENT.—The Secretary of Defense, acting through the Under Secretary, shall establish a program on the prototyping and demonstration of directed energy weapon systems to build and maintain the military superiority of the United States by—

(A) accelerating, when feasible, the fielding of directed energy weapon prototypes that would help counter technological advantages of potential adversaries of the United

States; and

(B) supporting the military departments, the combatant commanders, and other relevant defense agencies and entities in developing prototypes and demonstrating operational utility of high energy lasers and high powered microwave weapon systems.

(2) GUIDELINES.—(A) Not later than 180 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2018, the Under Secretary shall issue guidelines for the operation of the program established under paragraph (1), including the following:

(i) Criteria required for an application for funding by a military department, defense agency or entity, or a combatant command.

(ii) The priorities, based on validated requirements or capability gaps, for fielding prototype directed energy weapon system technologies developed by research funding of the Department or industry.

(iii) Criteria for evaluation of an application for funding or changes to policies or acquisition and business practices by such a department, agency, or command for purposes of improving the effectiveness and efficiency of the program.

(B) Funding for a military department, defense agency, or combatant command under the program established under paragraph (1) may only be available for advanced technology development, prototyping, and demonstrations in which the Department of Defense maintains management of the technical baseline and a primary emphasis on technology transition and evaluating military utility to enhance the likelihood that the particular directed energy weapon system will meet the Department end user's need.

(3) APPLICATIONS FOR FUNDING.—(A) Not less frequently than once each year, the Under Secretary shall solicit from the heads of the military departments, the defense agencies, and the combatant commands applications for funding under the program established under paragraph (1) to be used to enter into contracts, cooperative agreements, or other transaction agreements entered into pursuant to section 2371b of title 10, United States Code, with appropriate entities for the prototyping or commercialization of technologies.

(B) Nothing in this section shall be construed to require any official of the Department of Defense to provide funding under the program to any congressional earmark as defined pursuant to clause 9 of rule XXI of the Rules of the House of Representatives or any congressionally directed spending item as defined pursuant to paragraph 5 of rule XLIV of the Standing Rules of the Senate.

(4) FUNDING.—(A) Except as provided in subparagraph (B) and subject to the availability of appropriations for such purpose, of the funds authorized to be appropriated by the National Defense Authorization Act for Fiscal Year 2018 or otherwise made available for fiscal year 2018 for research, development, test, and evaluation, defense-wide, up to $100,000,000 may be available to the Under Secretary to allocate to the military departments, the defense agencies, and the combatant commands to carry out the program established under paragraph (1).

(B) Not more than half of the amounts made available under subparagraph (A) may be allocated as described in such paragraph until the Under Secretary—

(i) develops the strategic plan required by subsection (a)(2)(A); and

(ii) submits such strategic plan to the congressional defense committees.

(5) UNDER SECRETARY DEFINED.—In this subsection, the term "Under Secretary" means the Under Secretary of Defense for Research and Engineering in the Under Secretary's capacity as the official with principal responsibility for the development and demonstration of directed energy weapons pursuant to subsection (a)(1).

(d) SUNSET.—The provisions of subsection (a) and of paragraphs (2) and (3) of subsection (b) shall cease to be in effect as of September 30, 2022.

Section 1006 of the FY 1989 NDAA (Public Law 100-456; 10 U.S.C. 133 note)

J. ~~SEC. 1006. IMPROVEMENT IN DEFENSE RESEARCH AND PROCUREMENT LIAISON WITH ISRAEL~~

~~The Secretary of Defense, in consultation with the Under Secretary of Defense for Acquisition [now the Under Secretary of Defense for Acquisition, Technology, and Logistics], shall designate for duty in Israel an individual or individuals to serve as the primary liaison~~

~~between the procurement and research and development activities of the United States Armed Forces and those of the State of Israel.~~

Section 231 of the FY 2008 NDAA (Public Law 110-181; 10 U.S.C. 1701note)

K. SEC. 231. COORDINATION OF HUMAN SYSTEMS INTEGRATION ACTIVITIES RELATED TO ACQUISITION PROGRAMS.

~~(a) IN GENERAL.—~~The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall coordinate and manage human systems integration activities throughout the acquisition programs of the Department of Defense.

~~(b) ADMINISTRATION.—In carrying out subsection (a), the Secretary shall designate a senior official to be responsible for the effort.~~

~~(c) RESPONSIBILITIES.—In carrying out this section, the senior official designated in subsection (b) shall—~~

~~(1) coordinate the planning, management, and execution of such activities; and~~

~~(2) identify and recommend, as appropriate, resource requirements for human systems integration activities.~~

~~(d) DESIGNATION.—The designation required by subsection (b) shall be made not later than 60 days after the date of the enactment of this Act [Jan. 28, 2008].~~

Section 902 of the FY 2013 NDAA (Public Law 112-239; 10 U.S.C. 2302 note)

L. ~~SEC. 902. REQUIREMENT FOR FOCUS ON URGENT OPERATIONAL NEEDS AND RAPID ACQUISITION.~~

~~(a) DESIGNATION OF SENIOR OFFICIAL RESPONSIBLE FOR FOCUS ON URGENT OPERATIONAL NEEDS AND RAPID ACQUISITION.—~~

~~(1) IN GENERAL.—The Secretary of Defense, after consultation with the Secretaries of the military departments, shall designate a senior official in the Office of the Secretary of Defense as the principal official of the Department of Defense responsible for leading the Department's actions on urgent operational needs and rapid acquisition, in accordance with this section.~~

~~(2) STAFF AND RESOURCES.—The Secretary shall assign to the senior official designated under paragraph (1) appropriate staff and resources necessary to carry out the official's functions under this section.~~

~~(b) RESPONSIBILITIES.—The senior official designated under subsection (a) shall be responsible for the following:~~

~~(1) Acting as an advocate within the Department of Defense for issues related to the Department's ability to rapidly respond to urgent operational needs, including programs funded and carried out by the military departments.~~

~~(2) Improving visibility of urgent operational needs throughout the Department, including across the military departments, the Defense Agencies, and all other entities and processes in the Department that address urgent operational needs.~~

~~(3) Ensuring that tools and mechanisms are used to track, monitor, and manage the status of urgent operational needs within the Department, from validation through procurement and fielding, including a formal feedback mechanism for the Armed Forces to provide information on how well fielded solutions are meeting urgent operational needs.~~

~~(c) URGENT OPERATIONAL NEEDS DEFINED.—In this section, the term "urgent operational needs" means capabilities that are determined by the Secretary of Defense, pursuant to the review process required by section 804(b) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2302 note), to be suitable for rapid fielding in response to urgent operational needs.~~

Section 203 of the FY 1998 NDAA (Public Law 105-85; 10 U.S.C. 2511 note)

M. SEC. 203. DUAL-USE SCIENCE AND TECHNOLOGY PROGRAM.

(a) FUNDING 1998.—***

(b) GOALS.—(1) Subject to paragraph (3), it shall be the objective of the Secretary of each military department to obligate for dual-use projects in each fiscal year referred to in paragraph (2), out of the total amount authorized to be appropriated for such fiscal year for the applied research programs of the military department, the percent of such amount that is specified for that fiscal year in paragraph (2).

(2) The objectives for fiscal years under paragraph (1) are as follows:

(A) For fiscal year 1998, 5 percent.

(B) For fiscal year 1999, 7 percent.

(C) For fiscal year 2000, 10 percent.

(D) For fiscal year 2001, 15 percent.

(3) The Secretary of Defense may establish for a military department for a fiscal year an objective different from the objective set forth in paragraph (2) if the Secretary—

(A) determines that compelling national security considerations require the establishment of the different objective; and

(B) notifies Congress of the determination and the reasons for the determination.

~~(c) DESIGNATION OF OFFICIAL FOR DUAL-USE PROGRAMS.—(1) The Secretary of Defense shall designate a senior official in the Office of the Secretary of Defense to carry out responsibilities for dual-use projects under this subsection. The designated official shall report directly to the Under Secretary of Defense for Acquisition, Technology, and Logistics.~~

~~(2) The primary responsibilities of the designated official shall include developing policy and overseeing the establishment of, and adherence to, procedures for ensuring that dual-use projects are initiated and administered effectively and that applicable commercial technologies are integrated into current and future military systems.~~

~~(3) In carrying out the responsibilities, the designated official shall ensure that—~~

~~(A) dual-use projects are consistent with the joint warfighting science and technology plan referred to in section 270 of the National Defense Authorization Act for Fiscal Year 1997 (Public Law 104-201; 10 U.S.C. 2501 note); and~~

~~(B) the dual-use projects of the military departments and defense agencies of the Department of Defense are coordinated and avoid unnecessary duplication.~~

(d) FINANCIAL COMMITMENT OF NON-FEDERAL GOVERNMENT PARTICIPANTS.—The total amount of funds provided by a military department for a dual-use project entered into by the Secretary of that department shall not exceed 50 percent of the total cost of the project. In the case of a dual-use project initiated after the date of the enactment of this Act [Nov. 18, 1997], the Secretary may consider in-kind contributions by non-Federal participants only to the extent such contributions constitute 50 percent or less of the share of the project costs by such participants.

(e) USE OF COMPETITIVE PROCEDURES.—Funds obligated for a dual-use project may be counted toward meeting an objective under subsection (a) only if the funds are obligated for a contract, grant, cooperative agreement, or other transaction that was entered into through the use of competitive procedures.

(f) REPORT.—(1) Not later than March 1 of each of 1998, 1999, and 2000, the Secretary of Defense shall submit a report to the congressional defense committees [Committees on Armed Services and Appropriations of Senate and House of Representatives] on the progress made by the Department of Defense in meeting the objectives set forth in subsection (b) during the preceding fiscal year.

(2) The report for a fiscal year shall contain, at a minimum, the following:

(A) The aggregate value of all contracts, grants, cooperative agreements, or other transactions entered into during the fiscal year for which funding is counted toward meeting an objective under this section, expressed in relationship to the total amount appropriated for the applied research programs in the Department of Defense for that fiscal year.

(B) For each military department, the value of all contracts, grants, cooperative agreements, or other transactions entered into during the fiscal year for which funding is counted toward meeting an objective under this section, expressed in relationship to the total amount appropriated for the applied research program of the military department for that fiscal year.

(C) A summary of the cost-sharing arrangements in dual-use projects that were initiated during the fiscal year and are counted toward reaching an objective under this section.

(D) A description of the regulations, directives, or other procedures that have been issued by the Secretary of Defense or the Secretary of a military department to increase the percentage of the total value of the dual-use projects undertaken to meet or exceed an objective under this section.

(E) Any recommended legislation to facilitate achievement of objectives under this section.

(g) COMMERCIAL OPERATIONS AND SUPPORT SAVINGS INITIATIVE.—(1) The Secretary of Defense shall establish a Commercial Operations and Support Savings Initiative (in this subsection referred to as the 'Initiative') to develop commercial products and processes that the military departments can incorporate into operational military systems to reduce costs of operations and support.

(2) Of the amounts authorized to be appropriated by section 201, $50,000,000 is authorized for the Initiative.

(3) Projects and participants in the Initiative shall be selected through the use of competitive procedures.

(4) The budget submitted to Congress by the President for fiscal year 1999 and each fiscal year thereafter pursuant to section 1105(a) of title 31, United States Code, shall set forth separately the funding request for the Initiative.

(h) REPEAL OF SUPERSEDED AUTHORITY.—[Repealed section 203 of Pub. L. 104–201, 110 Stat. 2451]

(i) DEFINITIONS.—In this section:

(1) The term "applied research program" means a program of a military department which is funded under the 6.2 Research, Development, Test and Evaluation account of that department.

(2) The term "dual-use project" means a project under a program of a military department or a defense agency under which research or development of a dual-use technology is carried out and the costs of which are shared by the Department of Defense and non-Government entities.

Section 256 of the FY 2009 NDAA (Public Law 110-417; 10 U.S.C. 2501 note)

N. ~~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).~~

~~(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.~~

Section 8
Statutory Reporting Requirements

Balances statutory reporting requirements with costs and benefits of the individual reports.

RECOMMENDATIONS

Rec. 23: Establish a permanent, automatic 5-year sunset provision for DoD congressional reporting requirements.

Rec. 24: Repeal, preserve, or maintain various DoD congressional reporting requirements.

- **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).
- **24b:** Repeal the statutory requirement for the Ballistic Missile Defense Programs annual budget justification reports, 10 U.S.C. § 223a(a).

Recommendations continued on following page.

RECOMMENDATIONS

24c: Repeal the statutory requirement for the Programs for Combating Terrorism: Annual budget overview report, 10 U.S.C. § 229.

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.

24e: Repeal the statutory requirement for the Cyber Mission Forces annual budget overview report, 10 U.S.C. § 238(a).

24f: Repeal the statutory requirement for the Corrosion Control and Prevention annual budget and policy report, 10 U.S.C. § 2228(e).

24g: Repeal the statutory requirement for the Major Satellite Acquisition Programs annual integration report, 10 U.S.C. § 2275.

24h: Repeal the statutory requirement for the Commercial Space Activities annual Cooperation with DoD report, 10 U.S.C. § 2276(e).

24i: Repeal the statutory requirement for the Depot-Level Maintenance overview report, 10 U.S.C. § 2466(d).

24j: Repeal the statutory requirement for the Covered Naval Vessels Repair Work in Foreign Shipyards annual report, 10 U.S.C. § 7310(c).

24k: Repeal the statutory requirement for the Reserve Component Equipment annual procurement report, 10 U.S.C. § 10543(a).

24l: Repeal the statutory requirement for the Reserve Components annual procurement threshold report, 10 U.S.C. § 10543(c).

24m: Repeal the statutory requirement for the Missile Defense Agency annual overview report, FY 2002 NDAA, 232(h)(3).

24n: Repeal the statutory requirement for the Ford-Class Aircraft Carrier annual cost estimate report, FY 2007 NDAA, 122(d)(1).

24o: Repeal the statutory requirement for the Carriage by Vessel annual Repair Work in Foreign Shipyards report, FY 2007 NDAA, 1017(e).

24p: Repeal the statutory requirement for the Bandwidth Capacity annual overview report, FY 2009 NDAA, 1047(d)(2).

24q: Repeal the statutory requirement for the Afghanistan Infrastructure Fund annual overview report, FY 2011 NDAA, 1217(i).

Recommendations continued on following page.

RECOMMENDATIONS

24r: Repeal the statutory requirement for the MDAP Testing and Evaluation annual justification of progress report, FY 2013 NDAA, 904(h)(1) and (2).

24s: Repeal the statutory requirement for the Ticonderoga-Class Cruisers and Dock Landing Ships annual modernization report, FY 2015 NDAA, 1026(d).

24t: Repeal the statutory requirement for the Ballistic Missile Defense Systems annual preproduction assessment reports, FY 2015 NDAA, 1662(c)(2) and (d)(2).

24u: Preserve the statutory requirement for the Director of Operational Test and Evaluation annual overview report, 10 U.S.C. § 139(h).

24v: Preserve the statutory requirement for Naval Vessel Construction annual strategic plan report, 10 U.S.C. § 231.

24w: Preserve the statutory requirement for the Director of Operational Test and Evaluation annual program report, 10 U.S.C. § 2399(g).

24x: Terminate in 2021 the statutory requirement for the Ballistic Missile Defense Programs annual acquisition baselines report, 10 U.S.C. § 225(c).

24y: Terminate in 2021 the statutory requirement for Depot-Level Maintenance biennial capability requirements report, 10 U.S.C. § 2464(d).

24z: Terminate in 2021 the statutory requirement for the National Technology and Industrial Base annual policy overview report, 10 U.S.C. § 2504.

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).

24ab: Terminate in 2021 the statutory requirement for the Research and Development in Defense Laboratories annual funding report, FY 2009 NDAA, 219(c).

INTRODUCTION

Excess reporting requirements can impose costs on DoD that outweigh the specific benefits of each individual report. The FY 2016 NDAA instructed DoD to submit a list to Congress of all congressional reporting requirements imposed through NDAAs as of April 1, 2015. According to the statute, DoD's obligation to submit any such report would automatically terminate 2 years after the date of enactment. In the FY 2017 NDAA, Congress modified the process by dividing all of the reporting requirements into three groups: a large group that would still terminate at the original termination date on November 25, 2017; a second large group that would terminate several years later on December 31, 2021; and a small group that were permanently exempted from termination.

The Section 809 Panel identified 28 reporting requirements that are related to defense acquisition in the group of reports set to terminate in December 2021 and performed analysis to help Congress formulate its final decisions regarding each report. After analyzing the history and implementation of each report, the panel recommends the immediate repeal of 20 reporting requirements; the preservation of three reporting requirements; and the maintenance of the December 2021 termination date for five reporting requirements. The Section 809 Panel also endorses the intent behind recent use of sunset dates by Congress to assess DoD reporting requirements and recommends the creation of an automatic sunset provision for all new and existing DoD reporting requirements.

Panel Recommendation	Number of Reporting Requirements
Repeal	20
Preserve	3
Maintain December 2021 Status Quo	5
Total	**28**

RECOMMENDATIONS

Recommendation 23: Establish a permanent, automatic 5-year sunset provision for DoD congressional reporting requirements.

Problem

As a result of the recurring problem posed by excessive congressional reporting requirements directed at DoD, as well as Congress's struggle to restrain the growth of reporting requirements over time, the notion of an automatic sunset has periodically entered the debate. Advocates for greater discipline in the imposition of reporting requirements have argued that automatic sunsets can be an effective means to encourage Congress to regularly assess the value of a report.

Background

The Clinton Administration's 1993 *Streamlining Management Control* study recommended the adoption of an automatic sunset provision for all new reporting requirements that would "ensure that the burdens of congressionally mandated reports are controlled."[1] Acting along similar lines, Congress passed the Federal Reports Elimination and Sunset Act of 1995 (FRESA), which instituted a *catch-all sunset provision* that terminated the legal requirements for all existing periodic reports 4 years after the date of enactment.[2] According to the Congressional Research Service, "many periodic reporting requirements appear to have been eliminated" by FRESA.[3] Between 1999 and 2008, Congress repeatedly saved certain reporting requirements from the sunset, including the entire category of reports concerning federal budgetary matters.[4] Elimination of numerous reporting requirements due to the FRESA sunset—along with Congress's unwillingness to allow the sunset to take full effect—demonstrated both the potential of sunset provisions and their dependence on congressional support.

Findings

A sunset created by Congress will always be susceptible to the decisions of a later Congress. Inevitably, sunset provisions are only as strong as the congressional will to uphold them. Yet an automatic sunset for reporting requirements is still a useful tool for maintaining congressional discipline. A sunset forces Congress to make an active decision to explicitly reauthorize a reporting requirement, prevents the unwitting growth of reports, and imposes an evaluation of costs and benefits for determining the necessity of a report. Moreover, Congress has already shifted toward this position in recent years by including sunset provisions in new reporting requirements with increasing frequency. The panel endorses the direction of recent congressional policy and aims to build on Congress's actions. The panel's proposed sunset provision is an attempt to bolster Congress's efforts and ensure that a similar standard is applied broadly across all relevant DoD reporting requirements.

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[1] White House Office of the Vice President, *Streamlining Management Control – Part 2*, September 1993, accessed August 7, 2017, https://clintonwhitehouse6.archives.gov/1994/06/1994-06-30-npr-report-on-streamlining-management-control-part-a.html.
[2] Congressional Research Service, *Reexamination of Agency Reporting Requirements: Annual Process Under the GPRA Modernization Act of 2010 (GPRAMA)*, May 29, 2013, accessed August 4, 2017, https://fas.org/sgp/crs/misc/R42490.pdf.
[3] Ibid.
[4] Ibid.

Conclusions

In support of the goals above, the structure of a sunset is important. Rather than the one-time sunset of FRESA, a permanent, recurring sunset provides a more effective mechanism for restraint. Every congressional reporting requirement for DoD should be justified at regular intervals to ensure that it remains of adequate value to merit the cost in time and resources. An automatic 5-year sunset—commencing in January 2022 for existing DoD reporting requirements, encompassing all new reporting requirements, and repeating every 5 years for each report—would provide a long-term answer to the growth of reporting requirements. The sunset would establish a permanent mechanism to impede the continuation of unnecessary or obsolete congressional reports.

Implementation

Legislative Branch

- Establish a permanent, automatic 5-year sunset provision for congressional reporting requirements directed to DoD.
- Begin the 5-year period in January 2022 for existing reports, after the expiration of the current December 2021 termination deadline. Begin the 5-year period immediately for all new reporting requirements created after the date of the sunset provision's enactment. All new and existing DoD reporting requirements would subsequently terminate automatically at the end of their respective 5-year periods unless specifically reauthorized by Congress.
- Direct DoD to provide an annual list to Congress of all reporting requirements set to terminate during the upcoming year.
- Subject all reporting requirements recommended to be made *permanent* to the automatic sunset (see Recommendation 24).

Executive Branch

- No Executive Branch changes are required.

Note: Draft legislative text and sections affected display can be found in the Implementation Details subsection at the end of Section 8.

Implications for Other Agencies

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

Recommendation 24: Repeal, preserve, or maintain various DoD congressional reporting requirements.

Problem

For more than 40 years, Congress, DoD, oversight agencies, and external analysts have endorsed efforts to eliminate existing reporting requirements and restrain the growth of future requirements. Acquisition leaders have charged that reporting requirements distract offices from their primary missions. Researchers have argued complying with reporting requirements is costly. Oversight agencies indicate that reporting requirements frequently become duplicative. Congress itself has acknowledged that many reporting requirements become obsolete over time. Overall, the current system of defense acquisition reporting requirements lacks the needed coherence or consistency to achieve its policy aims.

Despite widespread support for reporting requirement reform, remedies have repeatedly failed. The difficulty of measuring the costs and benefits of specific reporting requirements inhibits reform. So does the nature of the identified reports, which may address commendable aims when considered in isolation, but which create broader problems when considered as a whole because of the collective burden they create.

Background

The difficulties for executive branch agencies that arise from congressional reporting requirements are unintended consequences of congressional oversight. Reporting requirements can provide crucial context for drafting legislation, inform congressional efforts to ensure agencies fulfill statutory directives, and assist Congress in monitoring internal functioning of the executive branch.[5] Reporting requirements can also burden resources of the targeted agency and become duplicative or obsolete over time,[6] creating tension between congressional oversight and the executive focus on core agency missions.

Balancing these necessary, but differing, aims has been the goal of a number of previous efforts to improve the reporting requirements framework. As early as 1978, GAO indicated the total number of recurring reports had increased from 377 to 759 between 1920 and 1970, yet acknowledged it was unable to provide Congress with "an accurate cost assessment for reports preparation" because agency cost data contained "wide variances in both dollars and staffing for very similar reports."[7] Unease regarding reporting requirements animated five distinct legislative efforts to modify and eliminate entire blocs of reports during the 1980s and 1990s, as well as a 1993 study from the Clinton Administration that castigated the reporting requirements system for imposing more than $100 million in annual costs in the service of reports that frequently "seem to have little intrinsic value."[8] Congress

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[5] Ibid.
[6] GAO, *Congressional Reports: OMB and Other Agency Reporting Requirements*, August 1992, accessed August 4, 2017, http://www.gao.gov/assets/90/89386.pdf. Congressional Research Service, *Reexamination of Agency Reporting Requirements: Annual Process Under the GPRA Modernization Act of 2010 (GPRAMA)*, May 29, 2013, accessed August 4, 2017, https://fas.org/sgp/crs/misc/R42490.pdf.
[7] GAO, *Statistics on Congressional Reporting Requirements*, July 25, 1978, accessed August 4, 2017, https://www.gao.gov/assets/130/123963.pdf.
[8] White House Office of the Vice President, *Streamlining Management Control – Part 2*, September 1993, accessed August 7, 2017, https://clintonwhitehouse6.archives.gov/1994/06/1994-06-30-npr-report-on-streamlining-management-control-part-a.html.

acted on four separate occasions in the 1990s and 2000s to alter the structural dynamics that had undermined previous reform initiatives.[9] Despite these efforts, the challenge posed by reporting requirements has persisted through the present day.

DoD has been a central actor in the broader reporting requirements dilemma. The previously mentioned 1993 study from the Clinton Administration amassed data on reporting requirements for selected agencies and noted that DoD was obligated to submit more reports to Congress than any other federal agency, other than the presidency itself.[10] In 2003, DoD proposed to eliminate or modify 183 DoD-specific congressional reporting requirements, but Congress largely rejected the proposal due to the department's inability to "demonstrate that the costs of these reports were higher than the perceived benefits." [11] As recently as 2013, an Office of Management and Budget (OMB) proposal to eliminate or modify hundreds of mandatory plans and reports across the executive branch featured more proposals regarding DoD requirements than any other government entity.[12]

The defense-specific aspect of the reporting requirements problem induced Congress to pursue a defense-specific solution. Section 1080 of the FY 2016 NDAA declared that DoD must submit a list to Congress of all congressional reporting requirements imposed on the department by any NDAA as of April 1, 2015.[13] According to the statute, DoD's obligation regarding each report included on the list would terminate 2 years after the enactment date.[14] Congress hoped to reduce the reporting burden on DoD in one sweeping action. In accordance with Section 1080, DoD submitted the list to Congress on March 10, 2016.[15] Subsequently, Congress modified the termination provision through Section 1061 of the FY 2017 NDAA, which delayed the termination date for a select group of the reports listed by DoD until December 31, 2021.[16] In doing so, Congress distinguished between reports that would be allowed to terminate according to the original timeline—concluding on November 25, 2017—and reports that would remain mandatory for another five years. On January 18, 2017, DoD submitted an updated list to Congress that encompassed all of the reports still designated for termination in November 2017.[17]

Congressional Research Service, *Reexamination of Agency Reporting Requirements: Annual Process Under the GPRA Modernization Act of 2010 (GPRAMA)*, May 29, 2013, accessed August 4, 2017, https://fas.org/sgp/crs/misc/R42490.pdf. Congress enacted legislation targeting groups of reporting requirements in 1980, 1982, 1986, 1995 and 1998.

[9] Congressional Research Service, *Reexamination of Agency Reporting Requirements: Annual Process Under the GPRA Modernization Act of 2010 (GPRAMA)*, May 29, 2013, accessed August 4, 2017, https://fas.org/sgp/crs/misc/R42490.pdf. The laws were the Government Management Reform Act of 1994, the Federal Reports Elimination and Sunset Act of 1995, the Reports Consolidation Act of 2000, and the GPRA Modernization Act of 2010.

[10] White House Office of the Vice President, *Streamlining Management Control – Part 2*, September 1993, accessed August 7, 2017, https://clintonwhitehouse6.archives.gov/1994/06/1994-06-30-npr-report-on-streamlining-management-control-part-a.html.

[11] RAND National Defense Research Institute, *Measuring the Statutory and Regulatory Constraints on DoD Acquisition*, 2006, accessed August 7, 2017, https://www.rand.org/content/dam/rand/pubs/technical_reports/2006/RAND_TR347.pdf.

[12] Congressional Research Service, *Reexamination of Agency Reporting Requirements: Annual Process Under the GPRA Modernization Act of 2010 (GPRAMA)*, May 29, 2013, accessed August 4, 2017, https://fas.org/sgp/crs/misc/R42490.pdf.

[13] FY 2016 NDAA, Pub. L. No. 114-92, 129 Stat. 1000 (2015).

[14] Ibid.

[15] Office of the Assistant Secretary of Defense for Legislative Affairs, Letter to Congress, *FY17 NDAA (P.L. 114-328), section 1061(k) DoD Report*, January 18, 2017.

[16] FY 2017 NDAA, Pub. L. No. 114-328 (2015). Section 1061 also removed several reporting requirements from the termination schedule entirely, thereby preserving them indefinitely.

[17] Office of the Assistant Secretary of Defense for Legislative Affairs, Letter to Congress, *FY17 NDAA (P.L. 114-328), section 1061(k) DoD Report*, January 18, 2017.

Those reports have now terminated. The reports extended for another 5 years by Section 1061 remain set to terminate in December 2021.

Congress's rationale for its latest effort to eliminate DoD reporting requirements is consistent with its longstanding views on the dangers of an excessive reporting burden. In the conference report for the FY 2016 NDAA, the HASC and SASC agreed that "excessive reporting" placed a burden on DoD and needed to be balanced against "the importance and value of reports from the Department of Defense as a key enabler of effective oversight."[18]

A broad consensus exists among defense stakeholders that the current level of reporting requirements hampers DoD's ability to effectively direct resources to core objectives. Despite the consensus, however, the problem has proven resistant to easy solutions. The fundamental reason for its persistence is the tension between the legitimate needs of congressional oversight and the desires of defense agencies to focus on their primary mission functions. Even taking these factors into account, credible attempts to improve the situation have been stymied by a more parochial issue: a lack of convincing case-by-case arguments for the elimination of reporting requirements. As discussed above, federal agencies have long struggled to calculate the costs of reporting requirements in a broadly applicable manner.

In the absence of such cost estimates, the next step must be to analyze the merits of individual reporting requirements to justify their elimination or modification. It is in this regard that many previous efforts have fallen short. The Clinton Administration's 1993 study concluded that "an essential factor in the elimination of reports has been the provision of convincing reasons."[19] The study cited a failed 1986 congressional effort to reduce reporting requirements, for which Congress "eliminated 71 percent of the reports whose elimination agencies had adequately justified" but only eliminated 10 percent of the reports "when agencies did not provide adequate justification."[20] Due to the lack of adequate justification for most reporting requirements, only 23 reports were eliminated out of a total of 240 recommendations; a subsequent GAO report blamed "inadequate justification of reports proposed for elimination" as a factor in the broader failure of the effort.[21] In 2003, DoD's proposed elimination of reporting requirements was similarly undermined by its inability to convince Congress on the merits of the reports at issue.[22]

The success of reporting requirements reform efforts hinges on the quality of the analysis. The Section 809 Panel focused its analysis on reports that affect the defense acquisition system, using the ongoing congressional effort under Section 1080 of the FY 2016 NDAA and Section 1061 of the FY 2017 NDAA as a starting point. The panel determined which reports should be categorized as *defense*

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[18] FY 2016 NDAA, Pub. L. No. 114-92, Joint Explanatory Statement of the Committee of Conference, https://www.gpo.gov/fdsys/pkg/CPRT-114JPRT97637/pdf/CPRT-114JPRT97637.pdf.
[19] White House Office of the Vice President, *Streamlining Management Control – Part 2*, September 1993, accessed August 7, 2017, https://clintonwhitehouse6.archives.gov/1994/06/1994-06-30-npr-report-on-streamlining-management-control-part-a.html.
[20] Ibid.
[21] Ibid.
[22] RAND National Defense Research Institute, *Measuring the Statutory and Regulatory Constraints on DoD Acquisition*, 2006, accessed August 7, 2017, https://www.rand.org/content/dam/rand/pubs/technical_reports/2006/RAND_TR347.pdf.

acquisition reports and performed a case-by-case analysis of existing acquisition reporting requirements to improve the short-term reporting environment.

Case-by-Case Reporting Requirements

Twenty-nine reporting requirements related to defense acquisition (See Table 8-1 below) terminated on or before November 25, 2017, as a result of congressional actions in the FY 2016 and FY 2017 NDAAs. Because these reports were due to sunset before publication of this report, the Section 809 Panel did not consider them in its analysis, but it does support the congressional action to terminate them.

Table 8-1. Reporting Requirement Set to Sunset by November 25, 2017

U.S.C. Title or Statute	Summary	Frequency
10 U.S.C. § 235	Procurement of Contract Services: Specification of Amounts Requested in Budget	Annual
10 U.S.C. § 1705(f)	Department of Defense Acquisition Workforce Development Fund	Annual
10 U.S.C. § 1722b(c)	Career Development for Civilian and Military Personnel in the Acquisition Workforce	Biennial
10 U.S.C. § 2537(b)	Improved National Defense Control of Technology Diversions Overseas	Annual
10 U.S.C. § 2306b(l)(4)	Reporting Requirements Relating to Multiyear Contracts – Annual Report	Annual
10 U.S.C. § 2330a(c)	Inventories and Reviews of Contracts for Services	Annual
10 U.S.C. § 2410i(c), second sentence	Prohibition on Contracting with Entities that Comply with the Secondary Arab Boycott of Israel – Waiver Authority	Annual
10 U.S.C. § 2445b	Cost, Schedule, and Performance Information of Major Automated Information System Programs	Annual
10 U.S.C. § 2506(b)	DoD Technology and Industrial Base Policy Guidance	Annual
10 U.S.C. § 2861(d)	Authority to Carry out Military Construction Projects in Connection with Industrial Facility Investment Program	Annual
10 U.S.C. § 2866(b)(3)	Use of Financial Incentives and Water Cost Savings	Annual
10 U.S.C. §2912(d)	Availability and Use of Energy Cost Savings	Annual
Pub. L. No. 101-189; 103 Stat. 1394 211(e) (FY 1990-1991 NDAA)	Balanced Technology Initiative Program	Annual
Pub. L. No. 107-107 346(b) (115 Stat. 1062) (FY 2002 NDAA)	Development of Army Workload and Performance System and Wholesale Logistics Modernization Program	Annual
10 U.S.C. § 817(d) (2306 note) (FY 2003 NDAA)	Grants of Exceptions to Costs or Pricing Data Certification Requirements and Waivers of Cost Accounting Standards	Annual
Pub. L. No. 109-163 123(d)(1) (119 Stat. 3157 (FY 2006 NDAA)	Cost Limitation for Next-General Destroyer Program	Annual
Pub. L. No. 109-163 218(c)(3) (119 Stat. 3172) (FY 2006 NDAA)	Requirements for Development of Tactical Radio Communications Systems	Annual
Pub. L. No. 110-181 328(b)(1) (10 U.S.C. § 4544 note) (FY 2008 NDAA)	Extension of Authority for Army Industrial Facilities to Engage in Cooperative Activities with Non-Army Entities	Annual
Pub. L. No. 110-181 330(e) (122 Stat. 68) (FY 2008 NDAA)	Pilot Program for Availability of Working-Capital Funds for Certain Product Improvements	Annual
Pub. L. No. 110-181 845 (5 U.S.C. App. 5 note) (FY 2008 NDAA)	Disclosure of Government Contractor Audit Findings	Semi-Annual
Pub. L. No. 111-84 121(e) (123 Stat. 2212) (FY 2010 NDAA)	Littoral Combat Ship Procurement	Annual

U.S.C. Title or Statute	Summary	Frequency
Pub. L. No. 111-383 243(c) (10 U.S.C. § 2358 note) (FY 2011 NDAA)	Pilot Program to Include Technology Protection Features During Research and Development of Defense Systems	Annual
Pub. L. No. 111-383 866(d)(1) (10 U.S.C. § 2302 note) (FY 2011 NDAA)	Pilot Program on Acquisition of Military Purpose Non-Developmental Items	Annual
Pub. L. No. 112-239) 126(b) (126 Stat. 1657) (FY 2013 NDAA)	Designation of Mission Modules of the Littoral Combat Ship as a Major Defense Acquisition Program	Quarterly
Pub. L. No. 112-239) 144(c) (126 Stat. 1663) (FY 2013 NDAA)	Treatment of Certain Programs for the F-22A Raptor Aircraft as Major Defense Acquisition Program	Annual
Pub. L. No. 112-239 865 (126 Stat. 1861) (FY 2013 NDAA)	Reports on Use Indemnification Agreements	Annual
Pub. L. No. 112-239 1276(e) (10 U.S.C. § 2350c note) (FY 2013 NDAA)	DoD Participation on Multilateral Exchange of Air Transportation and Air Refueling Services (ATARES)	Annual
Pub. L. No. 113-66 1611(d) (127 Stat. 947) (FY 2014 NDAA)	Advancing Small Business Growth	Annual
Pub. L. No. 113-291 232(e) (10 U.S.C. § 2358 note) (FY 2015 NDAA)	Pilot Program on Assignment to Defense Advanced Research Projects Agency of Private Sector Personnel with Critical Research and Development Expertise	Annual

Also as a result of congressional actions in the FY 2016 and FY 2017 NDAAs, there are currently 28 reporting requirements related to defense acquisition that are set to terminate on December 31, 2021. The Section 809 Panel conducted assessments of each report to inform its recommendations, which are included below. Although the Section 809 Panel recommends eliminating the majority of the reporting requirements, it also recommends maintaining some on a short-term basis for further examination and preserving others in a manner consistent with Recommendation 23 of this report.

THE FOLLOWING STATUTORY REPORTING REQUIREMENTS SHOULD BE REPEALED.

Subrecommendation 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).

Background

Congress established the reporting requirements for defense test and evaluation facilities and resources in 10 U.S.C. § 196(d) and (e). The FY 2003 NDAA added 10 U.S.C. § 196, which created the Test Resource Management Center (TRMC) and established its requirements.[23] Section 196(d)(3) requires the director of the center to submit a report to the Secretary of Defense that includes a strategic plan for test and evaluation facilities and resources, as well as a description of the review on which the plan is based.[24] The director of the center must develop the strategic plan by coordinating with the Director of Operational Test and Evaluation (DOT&E), secretaries of the Military Services, and heads of Defense Agencies with test and evaluation responsibilities.[25] The strategic plan must cover 10 fiscal years, and it must be submitted at least once every 2 years. The review on which the plan is based must assess the adequacy of the test and evaluation facilities and resources to meet the Department's test and evaluation requirements.[26] Section 196(d)(4) requires that, within 60 days of receiving the report, the Secretary must transmit the report to Congress.[27] Additionally, Section 196(e)(2) requires the director of the center to submit a report to the Secretary on the proposed budgets for test and evaluation facilities and resources, along with certifications as to whether the proposed budgets are adequate and provide support for the strategic plan.[28] Section 196(e)(3) requires the Secretary to submit a report to Congress that addresses any proposed budgets that the director did not certify as adequate. The deadlines for the budget reports from DOT&E and the Secretary are, respectively, January 31 and March 31 of the preceding fiscal year.[29]

Findings

The reporting requirements at 10 U.S.C. § 196(d) and (e) were implemented to promote a long-term, strategic planning process for test and evaluation facilities and resources, and to provide Congress with better oversight of the process. The primary function of TRMC is to oversee funding and maintenance for the test ranges that constitute DoD's Major Range and Test Facility Base (MRTFB).[30] The strategic plan and budget reports analyze how well the budgeted resources meet DoD's stated objectives regarding MRTFB. The Military Services responded to the creation of the TRMC and corresponding budgetary mandates by increasing their range operating budgets, which climbed by more than 50 percent in FY 2006 and remained at heightened levels through at least FY 2011.[31] TRMC reporting requirements overlap substantially with DOT&E's annual report at 10 U.S.C. §139(h), which calls on DOT&E to detail "resources and facilities available for operational test and evaluation and levels of

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[23] FY 2003 NDAA, Pub. L. No. 107-314, 116 Stat. 2487 (2002).
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] GAO, *Weapons Acquisition Reform: Actions Needed to Address Systems Engineering and Developmental Testing Challenges*, September 2011, accessed July 13, 2017, http://www.gao.gov/assets/330/323377.pdf.
[31] Ibid.

funding made available for operational test and evaluation activities."[32] Because TRMC and DOT&E are required to coordinate their findings in these areas, the report at 10 U.S.C. § 139(h) is sufficient to disclose the necessary information to Congress without any redundancy.

Conclusions

TRMC reporting requirements at 10 U.S.C. § 196(d) and (e) are redundant to a larger and more influential report at 10 U.S.C. § 139(h). TRMC is required to work with DOT&E on the relevant findings, and DOT&E discloses its own findings separately to Congress. This arrangement is unnecessary and duplicative. Congressional oversight of test and evaluation facilities and resources would be better served by ensuring both offices coordinate properly on the findings contained within DOT&E's annual report. Congress repeal this reporting requirement.

> The Test Resource Management Center dissented from the Section 809 Panel's recommendation. TRMC argued that although a 'slight overlap' existed between the DOT&E report at 10 U.S.C. § 139(h) and the TRMC reports at 10 U.S.C. § 196(d) and (e), the TRMC reports possessed a "broader focus" that was crucial to ensuring adequate resources for DoD's testing infrastructure.[33] After receiving this comment, the Section 809 Panel opted not to alter its recommendation, taking the position that the reports at 10 U.S.C. § 196(d) and (e) do not offer enough value on their own to justify their continuation, in light of the existence of the DOT&E report.

Subrecommendation 24b: Repeal the statutory requirement for the Ballistic Missile Defense Programs annual budget justification reports, 10 U.S.C. § 223a(a).

Background

10 U.S.C. § 223a(a) establishes a reporting requirement for DoD's early-stage ballistic missile procurement process. The reporting requirement was initially imposed in the FY 2004 NDAA, which created 10 U.S.C, § 223a.[34] The original statutory language of Section 223a included paragraph (a), directing the Secretary to report to Congress regarding three distinct procurement elements of DoD's ballistic missile defense system programs: (a) the "production rate capabilities" of all intended production facilities in a ballistic missile defense program; (b) the "potential date of availability" for the initial fielding of each element in a ballistic missile defense program; and (c) the "estimated date on which the administration of the acquisition of that element [of a ballistic missile defense program] is to be transferred" from the Missile Defense Agency (MDA) to a military department.[35] The requirements applied to "each ballistic missile defense system element" under the authority of MDA, and they were specifically targeted at the early stages of a ballistic missile program, when the agency was still "engaged in planning for production and initial fielding."[36] The statute required the Sec Def to submit the information to Congress on an annual basis, as a part of the DoD's budget justification materials that accompany DoD's proposed annual budget.[37] There have been no subsequent amendments to the

[32] Director of Operational Test and Evaluation, 10 U.S.C. § 139.
[33] Test Resource Management Center, email to Section 809 Panel staff, November 13, 2017.
[34] FY 2004 NDAA, Pub. L. No. 108-136, 117 Stat. 1420 (2003).
[35] Ibid.
[36] Ibid.
[37] Ibid.

report requirement, and 10 U.S.C. § 223a(a) remains unchanged from the original statute.[38] As such, the report is still required annually.

Findings

In January 2002, Secretary of Defense Donald Rumsfeld issued a memorandum that exempted DoD's missile defense programs from the reporting requirements for major defense acquisition programs (MDAPs).[39] In May 2002, DoD broadened the scope of classification regarding missile defense programs, rendering previously public information such as developmental test details newly classified.[40] The classification decision sparked criticism from members of Congress and congressional staffers, who charged that the Bush Administration was inhibiting the ability of the House and Senate Armed Service Committees to fulfill their proper roles overseeing the ballistic missile defense program.[41] In response, Congress passed 10 U.S.C. § 223a(a) in the FY 2004 NDAA, compelling DoD to provide budget justification materials to Congress regarding early-stage procurement targets and projections.[42] More than 13 years later, the broad case for congressional oversight still exists due to continuing flaws in early-stage ballistic missile planning; a May 2015 GAO report concluded that several ballistic missile defense programs were "pursuing high-risk approaches" that failed to adhere to best practices and risked "cost growth and schedule delays" in acquisition outcomes. The specific report at 10 U.S.C. § 223a(a)—created due to discrete political circumstances—is not unique in pursuing that goal, and overlaps with several other reports promoting the same end. The redundant nature of the reports suggests that streamlining can occur without a loss in oversight.

Conclusions

Transparency in early-stage ballistic missile procurement is an important element of proper oversight, yet the information contained within the reporting requirement at 10 U.S.C. § 223a(a) overlaps with other ballistic missile reporting requirements, notably the report in 10 U.S.C. § 225(c) and sections 232 and 1662 of the FY 2002 NDAA and FY 2015 NDAA, respectively. All of these reports focus on early-stage developments within ballistic missile programs. Moreover, the report at 10 U.S.C. § 223a(a) justifies budgetary requests, which already contain information relating to relevant programs. The report is redundant and does not offer enough value on its own to justify its continuation.

> The Missile Defense Agency concurred with the Section 809 Panel's recommendation.[43]

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[38] Ballistic Missile Defense Programs: Procurement, 10 U.S.C. § 223a.
[39] Congressional Research Service, *Missile Defense: The Current Debate*, July 19, 2005, accessed June 1, 2017, https://fas.org/sgp/crs/weapons/RL31111.pdf.
[40] Ibid.
[41] David Ruppe, "Bush Administration Thwarting Scrutiny of Missile Defense, Hill Critics Say," *Global Security Newswire*, January 7, 2004, http://www.nti.org/gsn/article/bush-administration-thwarting-scrutiny-of-missile-defense-hill-critics-say/.
[42] Ibid.
[43] Missile Defense Agency, phone call with Section 809 Panel staff, November 29, 2017.

Subrecommendation 24c: Repeal the statutory requirement for the Programs for Combating Terrorism: Annual budget overview report, 10 U.S.C. § 229.

Background

Congress established the reporting requirement at 10 U.S.C. § 229 to more accurately assess the total cost of combating terrorism, which was defined by DoD in 1994 as encompassing "actions, including AT [antiterrorism] and CT [counterterrorism], taken to oppose terrorism through the entire threat spectrum."[44] 10 U.S.C. § 229 establishes a requirement for the Secretary to submit a consolidated budget justification display that includes "all programs and activities of the Department of Defense combating terrorism program." The report is intended to support the President's annual budget for DoD and must be submitted in classified and unclassified form. The FY 2000 NDAA added 10 U.S.C. § 229, and the reporting requirements largely existed in their current form in the original provision.[45] Congress mandated that the report include the amount requested for each program element, project, and initiative to support the combating terrorism program, as well as a rationale for each funding level request.[46] The report must also provide a summary of estimated expenditures for the current year, the budget year, and through the completion of the current 5-year defense plan for the combating terrorism program.[47] The only substantive amendment to section 229 occurred in the FY 2016 NDAA, when previously required semiannual reports on the combating terrorism program were eliminated.[48] In all other respects, the reporting requirement as it currently stands in section 229 has existed since the FY 2000 NDAA.[49]

Findings

In 1997, GAO reported that federal funding for combating terrorism was "unknown and difficult to determine," and recommended a review of cost data reports on an annual basis.[50] Since the requirement was enacted, GAO has issued multiple reports regarding the continuing weakness of federal funding data for combating terrorism. In 2002, GAO reported there were several difficulties in collecting and analyzing the data due to the various types of missions involved (e.g., intelligence, law enforcement) and the fact that funds for combating terrorism were often embedded in appropriation accounts that include other activities.[51] In 2006, GAO specifically addressed DoD funding data for the War on Terror, determining the data to be unreliable.[52] GAO has recommended that the Secretary take steps to ensure the reported costs for combating terrorism are reliable and to establish a methodology to determine how funding is apportioned for the War on Terror, but it is unclear whether DoD has achieved any improvements. The report includes data based on a distinction among *antiterrorism*, *counterterrorism,* and *combatting terrorism* that was conceived before the terrorist attacks of September

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[44] DoD Combatting Terrorism Program Procedures, DoDI 2000.14 (1994).
[45] FY 2000 NDAA, Pub. L. No. 106-65, 113 Stat. 727 (1999).
[46] Ibid.
[47] Ibid.
[48] FY 2016 NDAA, Pub. L. No. 114-92, 129 Stat. 977 (2015).
[49] Programs for Combating Terrorism: Display of Budget Information, 10 U.S.C. §229.
[50] GAO, *Combating Terrorism: Spending on Government wide Programs Requires Better Management and Coordination*, December 1997, accessed July 25, 2017, http://www.gao.gov/assets/230/224961.pdf.
[51] GAO, *Combating Terrorism: Funding Data Reported to Congress Should Be Improved*, November 2002, accessed July 25, 2017, http://www.gao.gov/assets/80/79348.pdf.
[52] GAO, *Global War on Terrorism: DoD Needs to Improve the Reliability of Cost Data and Provide Additional Guidance to Control Costs*, September 2005, accessed July 25, 2017, http://www.gao.gov/new.items/d05882.pdf.

11, 2001, which could explain why DoD has struggled to generate the specific data called for by the report. The report may reflect an outdated, pre-9/11 perspective.

Conclusions

The combating terrorism reporting requirement at 10 U.S.C. § 229 appears to be an obsolete inheritance from a pre-9/11 approach to terrorism. Congress created the report to provide better insight into the total cost of DoD's combatting terrorism program, but the structure of that program has undermined the report's ability to facilitate improved congressional oversight of DoD's response to the terrorist threat. The report predates the War on Terror and the vast transformation in DoD policy that has occurred since 2001. The report's outdated approach has made it difficult for DoD to properly comply. In recognition of these facts, Congress acted in the FY 2016 NDAA to repeal related semiannual reports on the combatting terrorism program. That decision is merited, and further action to repeal the annual report as well should take place. For the reasons stated above, the Section 809 Panel recommends that Congress repeal this reporting requirement.

> The Section 809 Panel did not receive comments from DoD regarding this recommendation.

Subrecommendation 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.

Background

10 U.S.C. § 231a establishes a reporting requirement for long-term aircraft procurement in support of U.S. strategic planning. The reporting requirement was initially imposed in the FY 2009 NDAA, which created Title 10 U.S.C. § 10 231a.[53] The original statutory language of section 231a directed the Secretary to submit an annual report to Congress regarding the integration of long-term aircraft procurement for the Navy and the Air Force into the broader strategic outline of U.S. defense policy.[54] The statute required the report, titled *Annual Aircraft Procurement Plan*, to describe "a plan for the procurement of the aircraft specified in subsection (b) for the Department of the Navy and the Department of the Air Force" to a 30-year time horizon.[55] The report would contain a detailed procurement program, as well as projected funding levels and an assessment of whether the "combined aircraft forces" of the Navy and the Air Force satisfied America's national security requirements.[56] The report was also statutorily obligated to support the framework outlined by the official *National Security Strategy Report* or the *Quadrennial Defense Review*.[57] If DoD concluded that the budget for a given fiscal year failed to provide the necessary funding to maintain aircraft procurement in accordance with the report, the statute further required that the report must specify "the risks associated with the reduced force structure of aircraft that will result from funding aircraft procurement at such level."[58] Subsequent amendments have expanded the scope of the *Annual Aircraft Procurement Plan* by broadening its analysis to include

[53] FY 2009 NDAA, Pub. L. No. 110-417, 122 Stat. 4379 (2008).
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid.

Army aircraft and mandating detailed explanations and justifications for the cost estimates provided.[59] The original components of the plan remain in statutory effect.

Findings

Congress modeled the aircraft procurement reporting requirement at 10 U.S.C. § 231a upon the preexisting 30-year naval construction report at 10 U.S.C. § 231. The reports were formulated with nearly identical statutory language. The *Annual Aircraft Procurement Plan* was intended to inform Congress regarding the "cumulative long-term effects of annual appropriation decisions," expose any shortfalls between long-term aircraft objectives and short-term budgets, and compel DoD to articulate its guiding assumptions about the evolution of America's airpower capabilities.[60] Nearly from the very beginning, however, the 30-year aircraft procurement reports have struggled to achieve consistency due to the structural unpredictability of the aerospace industry. The first two reports, submitted by DoD alongside the FY 2011 and FY 2012 budget requests, provided only 10 years of programmatic detail due to "long-term uncertainties in requirements and technology."[61] A 2011 CBO analysis concluded that the reports would be more informative for Congress if DoD provided a greater level of detail concerning "the expected inventory of each type of aircraft over the span covered," as well as the underlying assumptions for each type of aircraft. DoD experienced difficulty in attempting to rationalize that information.[62] DoD neglected to submit a report altogether in the FY 2015 budget cycle, and recent reports have failed to clarify the impact of the sequestration caps established by the Budget Control Act of 2011 on the department's projected aircraft procurement.[63] DoD's ability to implement the reporting requirement has been undermined by aerospace structural factors, such as the likelihood of rapid technological shifts and the unpredictable evolution of the department's requirements. These inherent forces within the aerospace sector have proven difficult to adapt to an annual report.

Conclusions

The long-term aircraft procurement reporting requirement at 10 U.S.C. § 231a is modeled on a similar report for naval vessels at 10 U.S.C. § 231. The naval vessel report has proven to be an asset for both DoD and Congress; the aircraft procurement report has not experienced similar success. The differing structural realities of the naval vessel and aircraft procurement sectors have affected the utility of the respective reports, and the aircraft procurement report has been troubled from the start. Rapid shifts and enduring volatility in the aerospace sector render it ill-suited for consistent projections on such a long time horizon. DoD has struggled to comply with the reporting mandate, failing to achieve its objectives in multiple reports and failing to submit a report altogether in FY 2015. The goal of the report is admirable, but the nature of the underlying information appears to render it impracticable.

> The Section 809 Panel did not receive comments from DoD regarding this recommendation.

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[59] Budgeting for Life-Cycle Cost of Aircraft for the Navy, Army, and Air Force: Annual Plan and Certification, 10 U.S.C. § 231a.
[60] Congressional Budget Office, *The Value of 30-Year Defense Procurement Plans for Congressional Oversight and Decisionmaking*, June 1, 2011, accessed June 12, 2017, https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/06-01-dodtestimony.pdf.
[61] Ibid.
[62] Ibid.
[63] Mackenzie Eaglen, "Pentagon's Aviation Plan Headed for a Dead Stick Landing," *American Enterprise Institute*, May 31, 2015, accessed June 12, 2017, https://www.aei.org/publication/pentagon-aviation-report-dead-stick-landing/.

Subrecommendation 24e: Repeal the statutory requirement for the Cyber Mission Forces annual budget overview report, 10 U.S.C. § 238(a).

Background

10 U.S.C. § 238(a) establishes a reporting requirement for the Secretary to submit a budget justification display that includes "a major force program category for the five-year defense plan of the Department of Defense for the training, manning, and equipping of the cyber mission forces."[64] The reports are also obligated to detail the program elements for cyber mission forces.[65] The FY 2015 NDAA added 10 U.S.C. § 238 to better account for cyber mission forces.[66] The provision required the Secretary to submit the first budget justification report to Congress starting with the budget materials for FY 2017, and to submit reports thereafter for each fiscal year.[67] The reporting requirement at section 238(a) has not been amended since the FY 2015 NDAA.[68]

Findings

The DoD 2015 Cyber Strategy outlined five strategic goals for its cyber operations, including to "build and maintain ready forces and capabilities to conduct cyberspace operations."[69] The preparation process for the FY 2017 defense budget request included determining and outlining the costs for the Cyber Mission Force, which comprises 133 teams, to ensure that it would be fully operational by the end of FY 2018.[70] Because the reporting requirement was implemented for the first time in FY 2017, little analysis has been conducted of the report itself.

Conclusions

Congress created the cyber mission forces reporting requirement at 10 U.S.C. § 238(a) in the FY 2015 NDAA. The report is intended to promote congressional oversight of DoD's Cyber Mission Force, which is not scheduled to be fully operational until the end of FY 2018. Because the report has only been in effect for 1 fiscal year, it is difficult to evaluate its relative merits; however, it appears the goals of the Cyber Mission Force would be better served by withdrawing the report until DoD has had the necessary time to implement its cyber strategy. After DoD has initiated the program, Congress could determine whether the burden of a reporting requirement is justified. But it is unclear if the report is necessary at the present time, and therefore difficult to validate its costs.

> The Office of the USD(AT&L) dissented from the Section 809 Panel's recommendation. DoD argued that due to the challenging nature of the current budgetary environment, the report served a useful purpose by providing an opportunity to tell Congress "a clear and unambiguous story regarding how much we are spending to man, train and equip the CMF."[71] The panel opted not to alter its recommendation. A reporting requirement is

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[64] FY 2015 NDAA, Pub. L. No. 113-291, 128 Stat. 3638 (2014).
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Cyber Mission Forces: Program Elements, 10 U.S.C. § 238.
[69] DoD, *DoD Cyber Strategy*, April 2015, accessed July 25, 2017, https://www.defense.gov/Portals/1/features/2015/0415_cyber-strategy/Final_2015_DoD_CYBER_STRATEGY_for_web.pdf
[70] Under Secretary of Defense (Comptroller)/Chief Financial Officer, FY *2017 Defense Budget Overview*, January 2019, accessed July 25, 2017, http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2017/FY2017_Budget_Request_Overview_Book.pdf
[71] Office of the Under Secretary of Defense for AT&L, ASD(A), email to Section 809 Panel staff, November 8, 2017.

> an unwieldy instrument for congressional outreach, the report is not necessary to build congressional support for the CMF, and other avenues are available to encourage support for the CMF without the corresponding costs of the report.

Subrecommendation 24f: Repeal the statutory requirement for the Corrosion Control and Prevention annual budget and policy report, 10 U.S.C. § 2228(e).

Background

10 U.S.C. § 2228(e) establishes a reporting requirement for implementing DoD's long-term strategy to reduce corrosion in military equipment and infrastructure. The reporting requirement was initially imposed in the FY 2008 NDAA, which added a new paragraph (e) to the existing Section 2228 that governed DoD's Office of Corrosion Policy and Oversight.[72] Congress had previously empowered the office to "oversee and coordinate efforts throughout the Department of Defense to prevent and mitigate corrosion of the military equipment and infrastructure of the Department" through the development of anticorrosion policies and programs.[73] The office also possessed responsibility for monitoring DoD acquisition practices to ensure that corrosion prevention technologies were properly integrated into the acquisition process, and for developing a long-term strategy to mitigate the effect of corrosion across the department.[74] The FY 2008 NDAA required the Secretary to disclose the funding requirements and an estimated return on investment (ROI) for the implementation of the office's long-term anticorrosion strategy, as well as provide a comparison with the actual funds requested in DoD's annual budget and a justification for any shortfall between required and requested funds.[75] It also required the Comptroller General to submit a second report to Congress that assessed DoD's budget submission for anticorrosion policy, as well as the department's own anticorrosion report.[76] Congress subsequently altered the reporting requirement to encompass a greater level of detail and replaced the Comptroller General's role with a different requirement that the "corrosion control and prevention executive of a military department" submit annual reports to the Director of Corrosion Policy and Oversight that provided "recommendations pertaining to the corrosion control and prevention program of the military department."[77] The most recent change occurred in the FY 2017 NDAA, in which Congress amended the provision to establish an end date for the reporting requirement upon the submission of the FY 2022 budget.[78]

Findings

The reporting requirement at 10 U.S.C. § 2228(e) arose due to the severity of the corrosion problem confronting the Defense Department. Corrosion costs DoD tens of billions of dollars annually; in 2010, the department estimated that the annual cost of equipment and infrastructure corrosion was $22.9 billion.[79] The Office of Corrosion Policy and Oversight was created to develop policies that would reduce corrosion and coordinate the implementation of those policies throughout DoD. A 2013 GAO

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[72] FY 2008 NDAA, Pub. L. No. 110-181, 122 Stat. 79 (2008).
[73] Office of Corrosion Policy and Oversight, 10 U.S.C. § 2228.
[74] Ibid.
[75] FY 2008 NDAA, Pub. L. No. 110-181, 122 Stat. 79 (2008).
[76] Ibid.
[77] Office of Corrosion Policy and Oversight, 10 U.S.C. § 2228.
[78] FY 2017 NDAA, Pub. L. No. 114-328, 130 Stat. 2376 (2016).
[79] GAO, *Defense Management: The Department of Defense's Fiscal Year 2012 Corrosion Prevention and Control Budget Request*, April 13, 2011, accessed July 14, 2017, http://www.gao.gov/assets/100/97425.pdf.

report concluded that DoD's anticorrosion efforts were inadequate, both in terms of the quality of the annual reports and the department's ability to implement the recommendations of the reports.[80] For example, GAO stated that the military departments "did not always collect required information" regarding ROI for corrosion projects, and that they were "unable to determine whether projects had achieved their estimated ROI" as a result.[81] DoD's own internal estimates indicated that the annual cost of corrosion remained essentially unchanged 7 years after the office was created, totaling $23.4 billion annually through FY 2013.[82] The inadequate quality of the reports posed an obstacle to congressional oversight. Due to these shortcomings, it appears congressional support for the Office of Corrosion Policy and Oversight itself is declining. In its version of the FY 2018 NDAA, the House of Representatives voted to repeal 10 U.S.C. § 2228 and eliminate the USD(AT&L) office entirely, but require the Military Services to oversee their own anti-corrosion policy efforts.[83] The final version of the NDAA preserved the office but mandated a one-time report from the Secretary to evaluate "the continued need for the Office of Corrosion Policy and Oversight," as well as to recommend "whether to retain or terminate the Office."[84] The provision sends a clear signal regarding congressional unhappiness with DoD's current anticorrosion framework. Congress's decision to set a separate termination date for the reporting requirement in conjunction with the submission of the FY 2022 budget suggests that Congress views the current report at 10 U.S.C. § 2228(e) with similar skepticism.[85]

Conclusions

In its recent actions, Congress has already signaled that the corrosion control reporting requirement at 10 U.S.C. § 2228(e) is likely to be eliminated over the next several years. In the FY 2017 NDAA, Congress specifically voted to establish an end date for the report alongside the FY 2022 budget. In the FY 2018 NDAA, Congress expressed skepticism about the very existence of the Office of Corrosion Policy and Oversight. The report does not appear to have assisted in mitigating the problem of corrosion within DoD, as the costs of corrosion have remained largely unchanged since its creation.

> The Office of Corrosion Policy and Oversight dissented from the Section 809 Panel's recommendation. The office defended the report's value in providing Congress with "an accounting of corrosion prevention and mitigation," while highlighting DoD's "corrosion cost avoidance."[86] After receiving this comment, the panel opted not to alter its recommendation because the comment did not directly address the concerns raised by the panel's analysis.

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[80] GAO, *Defense Management: DOD Should Enhance Oversight of Equipment-Related Corrosion Projects*, September 2013, accessed July 14, 2017, http://www.gao.gov/assets/660/657498.pdf.
[81] Ibid.
[82] Joint Technology Exchange Group, *Topic: Corrosion Prevention and Repair*, March 30, 2015, accessed July 14, 2017, http://jteg.ncms.org/wp-content/gallery/20150330_Corrosion/JTEG%20Corrosion%20Forum%20%28Combined%29%20pdf.pdf.
[83] National Defense Authorization Act for Fiscal Year 2018, House of Representatives, H.R. 2810, Sections 902 and 903 (2017), https://www.congress.gov/congressional-report/115th-congress/house-report/404/1?overview=closed.
[84] FY 2018 NDAA, Pub. L. No. 115-91 (2017)
[85] FY 2017 NDAA, Pub. L. No. 114-328, 130 Stat. 2376 (2016).
[86] Office of Corrosion Policy and Oversight, email to Section 809 Panel staff, November 11, 2017.

Subrecommendation 24g: Repeal the statutory requirement for the Major Satellite Acquisition Programs annual integration report, 10 U.S.C. § 2275.

Background

10 U.S.C. § 2275 establishes a reporting requirement for the integration of acquisition and delivery schedules within major satellite acquisition programs (MSAP). The reporting requirement was initially imposed in the FY 2013 NDAA, which created a new section 2275 of Title 10.[87] The original statutory language of section 2275 directed the USD(AT&L) to submit reports to Congress disclosing the total funding for all MSAPs, as well as the extent to which the schedules for the acquisition and delivery of capabilities had been integrated for each program.[88] The statute compelled a unique report for each MSAP. In addition to certain cost and capability requirements, the reports were required to assess whether the MSAP was a *nonintegrated program* due to a failure to integrate "the schedules for the acquisition and the delivery of the capabilities of the segments for the program."[89] If such a nonintegrated designation was declared for any MSAP by the USD(AT&L), the statute called for a second phase of reporting requirements to enhance congressional oversight over the program. The USD(AT&L) was obligated to evaluate the impact of the program's nonintegration on its mission and describe the actions being enacted to achieve full integration.[90] The USD(AT&L) was also obligated to submit annual update reports to Congress on the integration status of each nonintegrated MSAP until the program had achieved integration, or until 5 years had passed, after which the reporting requirement for the program would terminate but an automatic GAO review of the program would be triggered.[91] There have been no subsequent amendments to the report requirement, and 10 U.S.C. § 2275 remains unchanged.[92]

Findings

The reporting requirement at 10 U.S.C. § 2275 stemmed from longstanding concerns regarding the impact of flawed integration strategies on the cost and schedule objectives of major satellite acquisition programs. In 2007, the Air Force's Space and Missile Systems Center reconstituted a program management assistance group that was charged with improving persistent system integration difficulties.[93] As a consequence, Congress sought to improve integration strategies for MSAPs by passing 10 U.S.C. § 2275 in the FY 2013 NDAA, which required DoD to craft broad outlines for the integration of acquisition and delivery schedules and strengthened congressional oversight over the process.[94] Congress acted in the belief that a more intensive effort to monitor major satellite acquisition schedules would prompt DoD to strengthen its own synchronization efforts.[95] The effort has had mixed results. A RAND study published in 2015 concluded that integration difficulties continue to be one of

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[87] FY 2013 NDAA, Pub. L. No. 112-239, 126 Stat. 1870 (2013).
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Reports on Integration of Acquisition and Capability Delivery Schedules for Segments of Major Satellite Acquisition Programs and Funding for Such Programs, 10 U.S.C. § 2275. The provision was modified by a technical amendment in December 2014, but no substantive alteration occurred.
[93] GAO, *Space Acquisitions: DOD Faces Challenges in Fully Realizing Benefits of Satellite Acquisition Improvements*, March 21, 2012, accessed June 1, 2017, http://www.gao.gov/assets/590/589487.pdf.
[94] GAO, *Space Acquisitions: DOD Is Overcoming Long-Standing Problems, but Faces Challenges to Ensuring Its Investments Are Optimized*, April 24, 2013, accessed June 1, 2017, https://www.gao.gov/assets/660/654137.pdf.
[95] Ibid.

the primary causes of cost growth and schedule delays in MSAP's.[96] A GAO report from 2015 noted that a combination of congressional and DoD efforts had led to notable improvements in MSAP performance in recent years.[97] The nature of DoD's major satellite programs is evolving in a manner that could reduce vulnerability to integration problems in the near future because most of them have advanced to their mature phases of acquisition, in which cost and schedule problems are diminished.[98] Concerns over MSAP program integration that prompted the reports at 10 U.S.C. § 2275 in the first place may not be representative of the main issues that will confront MSAPs in the years to come. For those MSAP programs that still remain in the early stages, improvements in DoD's oversight of MSAPs could make the problems addressed by the report less pressing in the years to come.

Conclusions

The MSAP reporting requirement at 10 U.S.C. § 2275 is outdated in its focus on program integration. Congress imposed the report to address flawed MSAP integration strategies that were driving up costs and causing schedule delays in the early stages, but the maturation of most MSAP programs to mature phases of acquisition has reduced the risk caused by those problems. Furthermore, the report has contributed to improvements in early-stage MSAP performance, which diminishes the need for the report among those MSAP programs that have not yet matured. In effect, the report at 10 U.S.C. § 2275 is outmoded because it is directed at a problem that no longer undermines MSAP performance to the extent that it did several years prior.

> The Office of the USD(AT&L) concurred with the Section 809 Panel's recommendation.[99]

Subrecommendation 24h: Repeal the statutory requirement for the Commercial Space Activities annual Cooperation with DoD report, 10 U.S.C. § 2276(e).

Background

10 U.S.C. § 2276(e) establishes a reporting requirement for DoD's cooperation with the commercial space industry. The reporting requirement was initially imposed in the FY 2013 NDAA, which created 10 U.S.C. § 2276.[100] The statutory language of section 2276 included paragraph (e), which directed the Secretary to submit an annual report to Congress regarding the funds, services and infrastructure that were impacted by any collaboration between DoD and private sector companies in the commercial space sector.[101] Section 2276, as a whole, authorized DoD to approve use of its space transportation infrastructure by private sector companies, in exchange for payments or services, to reduce the upkeep costs for that infrastructure and enhance public-private cooperation.[102] The reporting requirement encompassed any aspect of DoD space infrastructure that had been subject to private-sector use through the authority, as well as any funds that DoD had secured in exchange for providing use of the

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[96] RAND, National Defense Research Institute, *Acquisition of Space Systems: Past Problems and Future Challenges, Volume 7*, 2015, accessed June 1, 2017, http://www.acq.osd.mil/parca/docs/2015-rand-MG1171z7.pdf.
[97] GAO, *Space Acquisitions: Some Programs Have Overcome Past Problems, but Challenges and Uncertainty Remain for the Future*, April 29, 2015, accessed June 2, 2017, http://www.gao.gov/assets/670/669930.pdf.
[98] Ibid.
[99] Office of the Under Secretary of Defense for AT&L, ASD(A), email to Section 809 Panel staff, November 8, 2017.
[100] FY 2013 NDAA, Pub. L. No. 112-239, 126 Stat. 1872 (2013).
[101] Ibid.
[102] Ibid.

infrastructure.[103] The statute required the Secretary to submit the report to Congress by January 31 of each year.[104] There have been no subsequent amendments to the report requirement, and 10 U.S.C. § 2276(e) remains unchanged in its current form from the original statute.[105]

Findings

The reporting requirement at 10 U.S.C. § 2276(e) emanated from the novel approach of using space infrastructure that was sanctioned by Congress with the passage of the FY 2013 NDAA. Section 2276 permitted DoD to receive payments and services from commercial companies in exchange for granting them the right to use the department's space infrastructure for their own launch purposes.[106] At the time, NASA itself did not possess a similar authority.[107] Advocates for the initiative touted the potential for lower costs and greater efficiencies in maintaining DoD's space infrastructure, without any risk of compromising the department's asset ownership and with flexibility in modifying its assets for future purposes.[108] Advocates also believed that the initiative could benefit the commercial space industry and support the National Space Policy as a whole through a more effective use of national resources and enhanced public-private partnerships.[109] Given the innovative nature of the new authority, the reporting requirement at 10 U.S.C. § 2276(e) likely served as a means for Congress to assess its merits as it was implemented. For example, Congress specified in an accompanying statement to the FY 2013 NDAA that the authority was "intended for those commercial entities who already operate at Department of Defense sites or will be required to operate there due to the nature of the mission they are conducting," and the report would have served as a tool to ensure DoD was properly observing congressional intent.[110] In practice, the authority does not appear relevant due to the lack of interest expressed by the commercial space sector. For example, a U.S. Air Force presentation in May 2014 noted that "no private sector entity has expressed interest in leveraging this provision." There is no indication that demand has increased in subsequent years.[111]

Conclusions

The commercial space reporting requirement at 10 U.S.C. § 2276(e) lacks a compelling rationale due to DoD's minimal use of the underlying space infrastructure authority. Congress created the report to ensure transparency during the development of an innovative new process, through which DoD was authorized to allow private-sector companies to use the department's space transportation

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[103] Ibid.
[104] Ibid.
[105] Commercial Space Launch Cooperation, 10 U.S.C. § 2276.
[106] U.S. Air Force, *Title 10 USC, Sec 2276: Commercial Space Launch Cooperation*, May 2014, accessed June 5, 2017, https://www.faa.gov/about/office_org/headquarters_offices/ast/advisory_committee/meeting_news/media/2014/may/20_Title_10_USC_CSLC_May_2014.pdf.
[107] Dan Leone, "NASA Wants More Spaceport Infrastructure Opened to Private Sector," *Space News*, July 3, 2013, accessed January 5, 2018, http://spacenews.com/36111nasa-wants-more-spaceport-infrastructure-opened-to-private-sector/.
[108] U.S. Air Force, *Title 10 USC, Sec 2276: Commercial Space Launch Cooperation*, May 2014, accessed June 5, 2017, https://www.faa.gov/about/office_org/headquarters_offices/ast/advisory_committee/meeting_news/media/2014/may/20_Title_10_USC_CSLC_May_2014.pdf.
[109] Ibid.
[110] FY 2013 NDAA, Pub. L. No. 112-239, Joint Explanatory Statement of the Committee of Conference, https://www.ngaus.org/sites/default/files/NDAA%20Conference%20Report.pdf.
[111] U.S. Air Force, *Title 10 USC, Sec 2276: Commercial Space Launch Cooperation*, May 2014, accessed June 5, 2017, https://www.faa.gov/about/office_org/headquarters_offices/ast/advisory_committee/meeting_news/media/2014/may/20_Title_10_USC_CSLC_May_2014.pdf.

infrastructure in exchange for payments or services that could reduce upkeep costs for the infrastructure. The need for congressional oversight was rooted in the program's novelty. There is little evidence that DoD has used the authority to an extent that could justify an annual report on its operation. As long as the authority remains little-used, the report lacks sufficient justification to remain in existence. If DoD does begin to use the authority with greater frequency, Congress can scrutinize the authority's early performance and determine whether a new reporting requirement is necessary.

> The Section 809 Panel did not receive comments from DoD regarding this recommendation.

Subrecommendation 24i: Repeal the statutory requirement for the Depot-Level Maintenance overview report, 10 U.S.C. § 2466(d).

Background

10 U.S.C. § 2466(d) establishes a reporting requirement for the Secretary to submit to Congress the percentage of funds expended in the preceding fiscal year, projected for the current fiscal year, and projected for the subsequent fiscal year for performance of depot-level maintenance. The report is due within 90 days after the submission of the President's budget. The reporting requirement was initially imposed in the FY 1998 NDAA, which used a previously-mandated, one-time report as a model for the permanent report.[112] The initial version of the report only encompassed funds expended during the preceding fiscal year, but subsequent amendments broadened the report to current and ensuing fiscal years as well. The report encompasses each of the Armed Forces other than the Coast Guard, as well as each Defense Agency.[113]

Findings

GAO has reviewed and written extensively on the depot-level maintenance reports at 10 U.S.C. § 2466(d), highlighting the continuing errors, omissions, and weaknesses in the data reported. Starting from 1999, the data collected were so error-prone and inadequate that GAO "could not determine whether the military services were in compliance with the 50-percent ceiling," which imposed a 50 percent cap on the annual percentage of depot funds that could be spent on contracting.[114] In the same report, GAO stated that it did not believe that DoD's projections of future depot maintenance expenditures for FYs 2000–2004 were "reasonably accurate."[115] In 2003, GAO released another report that discussed the many deficiencies in the reported data, resulting in a recommendation to streamline multiple reports into a single report that covered only a 3-year period (prior year, current year, and budget year) and to extend the deadline for the report to April 1 of each year.[116] Despite the adoption of some recommendations, GAO was still unable to validate DoD's compliance with the 50-percent ceiling

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[112] FY 1998 NDAA, Pub. L. No. 105-85, 111 Stat. 1695 (1997)
[113] Limitations on the Performance of Depot-Level Maintenance of Materiel, 10 U.S.C. § 2466.
[114] GAO, *Depot Maintenance: Action Needed to Avoid Exceeding Ceiling on Contract Workloads*, August 2000, accessed June 29, 2017, http://www.gao.gov/assets/230/229470.pdf.
[115] Ibid.
[116] GAO, *Depot Maintenance: DoD's 50-50 Reporting Should Be Streamlined*, September 2003, accessed June 29, 2017, http://www.gao.gov/assets/230/229470.pdf.

or to determine its reported projections to be reasonably accurate due to persistently unreliable data.[117] In 2005, GAO also noted that the reports did not provide analyses of annual changes, long-term trends, or methodologies used to prepare projections, which limited the reports' usefulness for Congress to exercise its oversight role.[118] Seven years later, in the FY 2012 NDAA, Congress created a depot maintenance reporting requirement at 10 U.S.C. § 2464(d) that addressed some of these concerns by adopting a broader and longer-term perspective on depot policy and mandating more detailed justifications from DoD concerning projected shortfalls. The Section 809 Panel has recommended that this requirement at 10 U.S.C. § 2464(d) be maintained.

Conclusions

Depot maintenance funding is a crucial matter, yet the reporting requirement at 10 U.S.C. § 2466(d) is not the best mechanism to ensure the existence of proper transparency and oversight. Inaccurate data has undermined the report's value; the information submitted by DoD to Congress for many years was flawed to such a large extent that analysts were unable to use it in the service of even basic conclusions. The report's narrow focus on funding has limited its utility to address broader issues of depot maintenance, which may have contributed to the creation of a related report at 10 U.S.C. § 2464(d) that has proven to be considerably more effective as a source of data for congressional oversight since its creation in the FY 2012 NDAA. The broader mandate of 10 U.S.C. § 2464(d) and its greater success with data collection has created a redundancy of effort for the report at 10 U.S.C. § 2466(d). For the reasons stated above, the Section 809 Panel recommends that Congress repeal this reporting requirement.

> The Office of the Assistant Secretary of Defense for Logistics and Material Readiness (L&MR) dissented from the Section 809 Panel's recommendation. L&MR argued that the reports at 10 U.S.C. § 2464(d) and 10 U.S.C. § 2466(d) are "complementary," and that the former focuses on establishing the proper "organic capabilities" for depot maintenance while the latter focuses on ensuring sufficient resource commitment to sustain "core [depot] capabilities."[119] After receiving this comment, the panel opted not to alter its recommendation in the belief that the report at 10 U.S.C. § 2464(d) is a more effective vehicle for congressional oversight of depot maintenance policies than the report at 10 U.S.C. § 2466(d). The extent to which the two reports may be complementary does not outweigh the issues of data quality and redundancy that lessen the value of the report at 10 U.S.C. § 2466(d).

Subrecommendation 24j: Repeal the statutory requirement for the Covered Naval Vessels Repair Work in Foreign Shipyards annual report, 10 U.S.C. § 7310(c).

Background

10 U.S.C. § 7310(c) establishes a reporting requirement for DoD's use of foreign shipyards in the repair and maintenance of covered naval vessels. The reporting requirement was initially imposed in the

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[117] GAO, *Depot Maintenance: Actions Needed to Provide More Consistent Funding Allocation Data to Congress*, November 2006, accessed June 29, 2017, http://www.gao.gov/assets/260/254047.pdf.
[118] GAO, *Depot Maintenance: Persistent Deficiencies Limit Accuracy and Usefulness of DoD's Funding Allocation Data Reported to Congress*, November 2005, accessed June 29, 2017, http://www.gao.gov/assets/250/248595.pdf.
[119] Office of the Assistant Secretary of Defense for Logistics & Material Readiness, email to Section 809 Panel staff, November 8, 2017.

FY 2009 NDAA, which amended the existing 10 U.S.C. § 7310.[120] The underlying text of the section was already in place by enactment of the FY 2009 NDAA, namely stating that naval vessels based out of homeports in the United States were prohibited from being "overhauled, repaired, or maintained in a shipyard outside the United States or Guam, other than in the case of voyage repairs."[121] Furthermore, naval vessels based out of homeports overseas were prohibited from receiving repair work in those shipyards for a period of 15 months before any planned reassignment to a shipyard in the United States, and naval vessels based in U.S. homeports were required to receive repair work in those shipyards for a period of 15 months before any planned reassignment to a homeport overseas.[122] Upon its creation, the reporting requirement in paragraph (c) provided an overview of the number of naval vessels that fell within the section's authority. Congress mandated that the Secretary of the Navy submit the report annually, and that each report detail "all repairs and maintenance performed on any covered naval vessel that has undergone work for the repair of the vessel in any shipyard outside the United States or Guam."[123] Each report was to assess the previous fiscal year, rather than the fiscal year in which it was being submitted.[124] Congress determined a precise set of criteria that were required for incorporation into each report, including the percentage of the Navy's annual ship repair budget that was dedicated to the repair of covered vessels in foreign shipyards; the legal justification for the use of foreign shipyards; the name and class of any vessel, and the category of repair undertaken in any foreign shipyard; the location of any foreign shipyard used for repairs; details regarding the duration, cost, and schedule of any repairs in a foreign shipyard; and the nature of the contract for any repairs performed in a foreign shipyard.[125] The reporting requirement has not been amended since the FY 2009 NDAA.[126]

Findings

Along with a related report in section 1017(e) of the FY 2007 NDAA, the reporting requirement in 10 U.S.C. § 7310(c) constitutes another aspect of Congress's longstanding commitment to support the domestic shipbuilding industry. Section 7310 is one of several legislative initiatives undertaken by Congress to bolster domestic shipyards, including the Jones Act (which mandates domestic ownership of all domestic maritime shipping), 10 U.S.C. § 7309, and 14 U.S.C. § 665.[127] The reporting requirement, implemented at the end of 2008, further strengthened congressional ability to monitor DoD's use of foreign shipyards for repairs on naval vessels. There is little evidence, however, to support the notion that naval vessels seeking repairs in foreign shipyards represent a practical problem for naval operations, which raises the question as to whether domestic factors are outweighing military considerations in the operation of the reporting requirement. The issue of naval repairs in foreign shipyards appears to have more salience as a domestic matter than as a military concern.

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[120] FY 2009 NDAA, Pub. L. No. 110-417, 122 Stat. 4584 (2008).
[121] Overhaul, Repair, Etc. of Vessels in Foreign Shipyards: Restrictions, 10 U.S.C. § 7310.
[122] Ibid.
[123] FY 2009 NDAA, Pub. L. No. 110-417, 122 Stat. 4584 (2008).
[124] Ibid.
[125] Ibid.
[126] Overhaul, Repair, Etc. of Vessels in Foreign Shipyards: Restrictions, 10 U.S.C. § 7310.
[127] National Defense University, *Shipbuilding Industry 2011*, Spring 2011, accessed June 19, 2017, http://es.ndu.edu/Portals/75/Documents/industry-study/reports/2011/icaf-is-report-shipbuilding-2011.pdf.

Conclusions

The foreign shipyard repair and maintenance reporting requirement at 10 U.S.C. § 7310(c) lacks a compelling policy rationale. Federal support for the domestic shipbuilding sector is a longstanding national policy; however, the reporting requirement itself has only existed since 2009, marking it as a recent supplement to a policy framework that had existed for many decades prior. The report is not justified as a useful tool for naval repairs oversight, which is ostensibly the subject of the report. The report's inadequate justification and limited policy effect render it difficult to support on substantive grounds.

> The Section 809 Panel did not receive comments from DoD regarding this recommendation.

Subrecommendation 24k: Repeal the statutory requirement for the Reserve Component Equipment annual procurement report, 10 U.S.C. § 10543(a).

Background

10 U.S.C. § 10543(a) establishes a reporting requirement for the proposed expenditures and appropriations supporting the major procurement activities of the Reserve Components of the armed forces. The reporting requirement was initially imposed in the FY 1997 NDAA, which created 10 U.S.C. § 10543.[128] The provision required the Secretary to disclose to Congress "the estimated expenditures and the proposed appropriations" underlying equipment and military construction procurement for "each of the Reserve Components of the armed forces."[129] The report was due to be completed annually and submitted as a part of the annual future-years defense program report under 10 U.S.C. § 221.[130] Although Congress has subsequently broadened the scope of section 10543 as a whole, the reporting requirement in paragraph (a) has not been amended since the FY 1997 NDAA.[131]

Findings

The reporting requirement at 10 U.S.C. § 10543(a) arose due to congressional concerns over inadequate equipment provisions for the National Guard and Reserve Components. As early as 1983, the Army recognized the need to enhance reserve readiness by establishing the Minimum Essential Equipment for Training program, which intended to "identify, by unit, specific types and quantities of equipment that were critical to training in Reserve Component units and to give those units priority."[132] The initiative failed due to poor management, however, and Congress increasingly took notice in the early 1990's due to fears that "shortages of essential equipment continue to hamper Army National Guard and Army Reserve efforts to conduct effective training."[133]

Amidst ongoing DoD struggles to properly equip the Reserve Components, Congress mandated the annual report on Reserve Component equipment and military construction in 1996 as part of its effort

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[128] FY 1997 NDAA, Pub. L. No. 104-201, 110 Stat. 2699 (1996).
[129] Ibid.
[130] Ibid.
[131] National Guard and Reserve Component Equipment Procurement and Military Construction Funding: Inclusion in Future-Years Defense Program, 10 U.S.C. § 10543.
[132] GAO, *Army Reserve Components: Minimum Essential Equipment for Training Has Not Been Effectively Managed*, May 1990, accessed June 20, 2017, http://www.gao.gov/assets/220/212554.pdf.
[133] Ibid.

to ensure that the reserves received adequate funding to maintain a proper degree of readiness.[134] The effect of the report in the intervening 2 decades is questionable. The policy dilemma remains acute: As recently as March 2017, the Army's deputy chief of staff for operations (G-3) acknowledged to Congress that reserve readiness remained problematic due to shortfalls in personnel, training and equipment.[135] Nevertheless, the report itself is made redundant by 10 U.S.C. § 10541 (National Guard and Reserve Component Equipment: Annual Report to Congress), which requires a comprehensive submission to Congress regarding numerous facets of equipment procurement for the National Guard and the Reserve Components.[136]

The information provided by the report at 10 U.S.C. § 10543(a) is already contained within the larger report at 10 U.S.C. § 10541, which was first created in 1990 and predates the later report by half a decade.[137] A 2007 analysis by the Federal Research Division of the Library of Congress cited the report at 10 U.S.C. § 10541 repeatedly as the primary source for Reserve Component funding data, without mentioning the separate report at 10 U.S.C. § 10543(a).[138] The relationship between the two reports indicates that the report at 10543(a) has not fulfilled its original purpose.

Conclusions

The Reserve Component equipment procurement reporting requirement at 10 U.S.C. § 10543(a) is made redundant by 10 U.S.C. § 10541, which represents the paramount source of congressional oversight for Reserve Component and National Guard readiness. This redundancy deprives the report at 10 U.S.C. § 10543(a) of much of its potential value. Reserve Component equipment readiness remains an important issue, but a duplicative report can distract from proper congressional oversight as much as it can inform. In light of its overlapping condition, the limited benefits of the report do not justify its continuation.

> The Office of the Under Secretary of Defense for Personnel and Readiness concurred with the Section 809 Panel's recommendation.[139]

Subrecommendation 24l: Repeal the statutory requirement for the Reserve Components annual procurement threshold report, 10 U.S.C. § 10543(c).

Background

The reporting requirement established by 10 U.S.C. § 10543(c) is closely related to the reporting requirement at 10 U.S.C. § 10543(a), discussed above. Paragraph (a) of section 10543 requires that DoD detail the estimated expenditures and proposed appropriations for Reserve Components in regards to equipment procurement and military construction, and paragraph (c) creates a conditional report for

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[134] RAND, *Equipping the Reserve Components of the Armed Services*, 1997, accessed June 20, 2017, https://www.rand.org/content/dam/rand/pubs/documented_briefings/2005/DB209.pdf.
[135] Charlsy Panzino, "3-Star: More Training Days for the Guard as the Army Struggles with Readiness," *Army Times*, March 8, 2017, accessed January 5, 2018, https://www.armytimes.com/articles/3-star-more-training-days-for-the-guard-as-the-army-struggles-with-readiness.
[136] National Guard and Reserve Component Equipment: Annual Report to Congress, 10 U.S.C. § 10541.
[137] FY 1991 NDAA, Pub. L. No. 101-510, 104 Stat. 1714 (1990).
[138] Federal Research Division, *Funding for Reserve Component Equipment: An Analysis of the Budget Process*, November 2007, accessed June 20, 2017, https://www.loc.gov/rr/frd/pdf-files/CNGR_Funding-Equipment.pdf.
[139] Office of the Under Secretary of Defense for Personnel and Readiness, email to Section 809 Panel staff, November 29, 2017.

DoD in the event that the department's funding request for equipment procurement and military construction falls short of a congressionally-mandated threshold. The reporting requirement in paragraph (c) was imposed in the FY 1998 NDAA as an amendment to the existing section 10543, which had been created the previous year.[140] The statute asserted that DoD must aggregate its annual funding requests for Reserve Component equipment procurement and military construction, and then determine whether the aggregate request equaled at least 90 percent of the "average authorized amount applicable for that fiscal year."[141] If the aggregate request failed to meet the 90 percent threshold, the Secretary was obligated to submit a report to Congress that specified "the additional items of equipment that would be procured, and the additional military construction projects that would be carried out" if the funding request was elevated to the 90 percent threshold.[142] In the FY 2012 NDAA, Congress amended the reporting requirement to allow more time for the Secretary to complete the report by extending the period from 15 days to 90 days after the submission of the presidential budget.[143] No other amendments to the provision have occurred since the FY 1998 NDAA.[144]

Findings

The reporting requirement at 10 U.S.C. § 10543(c) is linked to the Reserve Component equipment procurement report at 10 U.S.C. § 10543(a). The report at 10 U.S.C. § 10543(c) is conditional in nature—triggered by a failure to meet a funding threshold rather than a simple annual disclosure of data—yet it is still inherently derived from the information produced in paragraph (a) of section 10543. As a result, arguments regarding the efficacy of the annual report must also be considered in assessing the conditional report. The two reports should be considered in tandem, and the redundancy of the report in paragraph (a) affects the utility of the report in paragraph (c) as well.

Conclusions

The Reserve Component reporting requirement at 10 U.S.C. § 10543(c) should be repealed for reason similar to those justifying repeal of the report at 10 U.S.C. § 10543(a). The report arises on a provisional basis if DoD's annual funding requests for Reserve Component equipment procurement and military construction fall short of a designated threshold. That threshold is linked to information collected to satisfy the obligation of 10 U.S.C. § 10543(a); however, as detailed above, the data provided by 10 U.S.C. § 10543(a) is duplicative with the primary Reserve Component report at 10 U.S.C. § 10541. Even though the two reports emphasize different elements of the issue for Congress, their value is mutually undermined by redundancy with 10 U.S.C. § 10541. The report's utility is too limited to justify its continuation.

> The Office of the Under Secretary of Defense for Personnel and Readiness concurred with the Section 809 Panel's recommendation.[145]

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[140] FY 1998 NDAA, Pub. L. No. 105-85, 111 Stat. 1872 (1997).
[141] Ibid.
[142] Ibid.
[143] FY 2012 NDAA, Pub. L. No. 112-81, 125 Stat. 1587 (2011).
[144] National Guard and Reserve Component Equipment Procurement and Military Construction Funding: Inclusion in Future-Years Defense Program, 10 U.S.C. § 10543.
[145] Office of the Under Secretary of Defense for Personnel and Readiness, email to Section 809 Panel staff, November 29, 2017.

Subrecommendation 24m: Repeal the statutory requirement for the Missile Defense Agency annual overview report, FY 2002 NDAA, 232(h)(3).

Background

Section 232(h)(3) of the FY 2002 NDAA establishes an annual reporting requirement for the MDA test program. In its original form, section 232 – which is classified as a note under 10 U.S.C. § 2431 – required the DOT&E to "assess the adequacy and sufficiency of the Ballistic Missile Defense Organization test program" for the preceding fiscal year.[146] Congress also required the official to submit a report by February 15 of each year that summarized the results of the assessment.[147] The reporting requirement was amended in the FY 2009 NDAA in order to broaden the scope of the report by compelling the DOT&E to consider "the operational effectiveness, suitability, and survivability of the ballistic missile defense system, and its elements, that have been fielded or tested before the end of the fiscal year."[148] Thus, the annual report to Congress encompassed both a review of each year's Ballistic Missile Defense Organization test program (later amended to the MDA test program) and an analysis of any ballistic missile programs that were fielded or tested that year. The substantive components of the reporting requirement have not been amended since the FY 2009 NDAA.[149]

Findings

Section 232(h) originated during a period of reorganization and expansion in DoD's ballistic missile defense program. MDA emerged in its contemporary form in 2002, during a period in which the administration of President George W. Bush signaled a strong commitment to increased funding for missile defense programs.[150] The reporting requirement at section 232(h)(3) was likely intended to compel further transparency from MDA and enhance the ability of Congress to exercise an appropriate level of oversight. Fifteen years later, however, the MDA test program remains flawed. A GAO report from April 2016 determined that the test program was prone to "constant alterations," which rendered it difficult to "assess individual element and BMDS developmental progress and to trace the costs associated with each test."[151] GAO offered a similarly critical perspective in May 2017, asserting that MDA's test program lacked an adequate degree of "traceability and insight" and suggesting that MDA undertake to improve the test program's consistency, scheduling, cost estimates and funding disclosures.[152] MDA's test program is thus likely to remain a source of concern in the near future.

Conclusions

The reporting requirement imposed in section 232(h)(3) of the FY 2002 NDAA does not provide enough value to justify its perpetuation. The requirement overlaps with other missile defense reporting requirements, such as 10 U.S.C. § 223a(a) and 10 U.S.C. § 225(c), as well as section 1662 of the FY 2015 NDAA, in that each possesses a focus on early-stage developments within the ballistic missile program.

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[146] FY 2002 NDAA, Pub. L. No. 107-107, 115 Stat. 1039 (2001).
[147] Ibid.
[148] FY 2009 NDAA, Pub. L. No. 110-417, 122 Stat. 4390 (2008).
[149] Weapons Development and Procurement Schedules, 10 U.S.C. § 2431.
[150] GAO, *Defense Acquisitions: Missile Defense Agency's Flexibility Reduces Transparency of Program Cost*, April 30, 2007, accessed June 23, 2017, https://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-07-799T/html/GAOREPORTS-GAO-07-799T.htm.
[151] GAO, *Missile Defense: Ballistic Missile Defense System Testing Delays Affect Delivery of Capabilities*, April 28, 2016, accessed June 23, 2017, http://www.gao.gov/assets/680/676855.pdf.
[152] GAO, *Missile Defense: Some Progress Delivering Capabilities, but Challenges with Testing Transparency and Requirements Development Need to be Addressed*, May 2017, accessed June 23, 2017, http://www.gao.gov/assets/690/684963.pdf.

Further, the report has demonstrated little success at improving outcomes in the MDA testing program in the 15 years since it was created. The report's duplicative information and inability to support MDA in achieving its goals of timeliness, transparency, and traceability supports the case for the requirement's repeal.

> MDA concurred with the Section 809 Panel's recommendation.[153] DOT&E dissented from the recommendation. The office acknowledged that the report contained "some similarities in report content" with the other MDA reports, but argued that the report focused to a greater extent on the "adequacy of the MDA test program" than the other reports. The panel opted not to alter its recommendation in the belief that redundancy in report content between this report and the other MDA reports outweighs the report's value in terms of enhanced oversight.[154]

Subrecommendation 24n: Repeal the statutory requirement for the Ford-Class Aircraft Carrier annual cost estimate report, FY 2007 NDAA, 122(d)(1).

Background

Section 122(d)(1) of the FY 2007 NDAA establishes a reporting requirement for deviations from the Navy's cost estimates regarding its Ford-Class aircraft carrier program. Section 122 implemented a framework for Navy procurement on the Ford-Class program by mandating that the lead ship could not exceed $10.5 billion in procurement funds, and all follow-on ships could not exceed $8.1 billion in procurement funds.[155] The provision did authorize adjustments in the procurement budget for several specified reasons, such as inflation, outfitting, and post-delivery costs, the application of new technologies, nonrecurring design and engineering costs, and safety deficiencies.[156] The provision also imposed conditions on the technology justification, namely that cost adjustments for new technologies were only warranted if the technologies were projected to decrease life-cycle costs or respond to *emerging threats* that undermined American national security.[157] In paragraph (d)(1) of the provision, Congress directed the Secretary of the Navy to submit an annual report detailing "any change in the amount" of the procurement budget for a Ford-Class aircraft carrier under any of the official justifications.[158] The reporting requirement has not been amended since the FY 2007 NDAA.

Findings

Despite the best efforts of Congress, the Ford-Class aircraft carrier program has been plagued with cost overruns in the decade since the passage of the FY 2007 NDAA. In June 2017, GAO reported that the lead ship CVN-78 had experienced 23 percent cost growth to an estimated $12.9 billion, more than $2 billion in excess of the original congressional ceiling.[159] At the same time, CVN-78 was expected to possess reduced capability at delivery despite the enormous additional funding that had been directed

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[153] Missile Defense Agency, phone call with Section 809 Panel staff, November 29, 2017.
[154] DOT&E, email to Section 809 Panel staff, December 8, 2017.
[155] FY 2007 NDAA, Pub. L. No. 109-364, 120 Stat. 2105 (2006).
[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] GAO, *Ford-Class Aircraft Carrier: Follow-On Ships Need More Frequent and Accurate Cost Estimates to Avoid Pitfalls of Lead Ship*, June 2017, accessed June 27, 2017, https://www.gao.gov/assets/690/685241.pdf.

into its procurement.[160] Follow-on ships in the Ford-Class program have not proven immune from similar cost failings; the next ship, CVN-79, is now projected to cost $11.4 billion, more than $3 billion higher than the original congressional ceiling.[161] GAO remains doubtful that the underlying cost problems in the Ford-Class program have been properly remedied. In the same report, GAO argued that "the cost estimate for the second Ford-Class aircraft carrier, CVN 79, is not reliable and does not address lessons learned from the performance of the lead ship, CVN 78."[162] GAO's analysis demonstrates the intense oversight directed at the Ford-Class program independently of the reporting requirement at section 122(d)(1). In the past 10 years, GAO has conducted multiple assessments of the Ford-Class program's budgetary development at the behest of Congress, publishing reports in 2007, 2013, 2014, 2015, and 2017.[163] Furthermore, the CRS wrote a report on the history and status of the Ford-Class program in August 2017 and the SASC conducted a hearing on the Ford-Class program in October 2015.[164] The program's size and importance for the Navy's future has produced a level of intensive oversight that extends far beyond what the reporting requirement can provide. The report itself is thus a marginal factor and subsequently of little value in congressional oversight of the Ford-Class program.

Conclusions

In recent years, separate oversight mechanisms have overtaken the Ford-Class aircraft carrier reporting requirement that was imposed in section 122(d)(1) of the FY 2007 NDAA. The need for vigilant congressional oversight of the Ford-Class program has not diminished, but the report itself is now a peripheral component of oversight efforts led by congressional committees and offices such as GAO and CRS. As a result of the intense scrutiny that the Ford-Class program is likely to operate under for at least the near-term, the reporting requirement has become largely redundant to other oversight efforts.

> The Navy's Office of Legislative Affairs concurred with the Section 809 Panel's recommendation.[165]

Subrecommendation 24o: Repeal the statutory requirement for the Carriage by Vessel annual Repair Work in Foreign Shipyards report, FY 2007 NDAA, 1017(e).

Background

Section 1017(e) of the FY 2007 NDAA establishes a reporting requirement for covered vessels that undergo repair work at foreign shipyards. Section 1017 created a new provision that is classified as a note under 10 U.S.C. § 2631.[166] The statutory language of section 1017 identified the objective of the provision as the maintenance of the national defense industrial base.[167] To accomplish that aim, Congress directed the Secretary to create an "acquisition policy" with a new criterion for "obtaining

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[160] Ibid.
[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] Congressional Research Service, *Navy Ford (CVN-78) Class Aircraft Carrier Program: Background and Issues for Congress*, August 2017, accessed October 26, 2017, https://fas.org/sgp/crs/weapons/RS20643.pdf.
[165] Department of the Navy, Office of Legislative Affairs, email to Section 809 Panel staff, December 14, 2017.
[166] Supplies: Preference to United States Vessels, 10 U.S.C. § 2631.
[167] FY 2007 NDAA, Pub. L. No. 109-364, 120 Stat. 2379 (2006).

carriage by vessel of cargo."[168] The new criterion would require the consideration of "the extent to which an offeror of such carriage had overhaul, repair, and maintenance work for covered vessels of the offeror performed in shipyards located in the United States."[169] By this means, Congress directed DoD to evaluate whether any company seeking a contract to deliver supplies to the department by ship also utilized foreign shipyards for any repair or maintenance work on its fleet. The reporting requirement at paragraph (e) instructed DoD to provide an annual overview to Congress regarding any contractor to which the new acquisition policy applied, as well as the details of the contractor's repair work in foreign shipyards.[170] The reporting requirement has not been amended since the FY 2007 NDAA.[171]

Findings

Similar to a related report at 10 U.S.C. § 7310(c), the report required by Section 1017(e) arose out of Congress's longstanding support for the use of domestic shipyards in the defense acquisition system.[172] Section 1017 of the FY 2007 NDAA broadened this support into a new aspect of the defense acquisition system by requiring DoD to evaluate whether offerors used foreign or domestic shipyards for repair and maintenance work on their covered vessels. Analogous to 10 U.S.C. § 7310(c), the report's policy rationale is limited and appears to be primarily rooted in domestic, rather than military, concerns. Furthermore, the effect of the report on DoD's supply system since its implementation is unclear.

Conclusions

In a similar fashion to the reporting requirement at 10 U.S.C. § 7310(c), the carriage by vessel reporting requirement that was imposed in section 1017(e) of the FY 2007 NDAA lacks a compelling policy justification. The report is aimed at bolstering the domestic shipbuilding sector by increasing the scrutiny on contractors using foreign shipyards, but there is little evidence that the issue is substantively important to DoD's operations or that the report has even had a discernible impact. The inadequate policy justification for the report argues against its continuation.

> The Section 809 Panel did not receive comments from DoD regarding this recommendation.

Subrecommendation 24p: Repeal the statutory requirement for the Bandwidth Capacity annual overview report, FY 2009 NDAA, 1047(d)(2).

Background

Section 1047(d)(2) of the FY 2009 NDAA establishes a reporting requirement in regards to the bandwidth requirements for MDAPs. Section 1047 required the Secretary and the Director of National Intelligence (DNI) to conduct an expansive joint review of the near, mid- and long-range bandwidth requirements for the military and intelligence communities.[173] Congress mandated that the review encompass existing bandwidth capacities, projected bandwidth capacities, possible technological

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[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Supplies: Preference to United States Vessels, 10 U.S.C. § 2631.
[172] National Defense University, *Shipbuilding Industry 2016*, Spring 2016, accessed June 6, 2017, http://es.ndu.edu/Portals/75/Documents/industry-study/reports/2016/es-is-report-shipbuilding-2016.pdf.
[173] FY 2009 NDAA, Pub. L. No. 110-417, 122 Stat. 4602 (2008).

developments that could impact bandwidth capacities, and strategies to mitigate shortfalls and meet anticipated costs for bandwidth capacities for both communities.[174] Congress also established a 1-year deadline, after the date of enactment, for the Secretary and DNI to submit a report to Congress detailing the conclusions of the report.[175] Finally, Congress directed the two officials to establish a review process to guarantee that all MDAPs would enjoy the necessary bandwidth capacity in the future, as a part of the Milestone B or Key Decision Point B approval process.[176] One year later, with the initial deadline having passed, Congress amended Section 1047 to eliminate the language referring to the one-time report.[177] In its place, Congress established a new annual report to detail the conclusions that the Secretary and the DNI had reached concerning the bandwidth requirements needed to support MDAPs in the previous fiscal year.[178] The reporting requirement has not been amended again since the FY 2010 NDAA.[179]

Findings

The reporting requirement at Section 1047(d)(2) was intended to facilitate congressional oversight of DoD's bandwidth acquisition system. In the years preceding the FY 2009 NDAA, DoD received criticism for possessing a bandwidth acquisition structure that moved too slowly, lacked flexibility, and imposed unnecessary costs.[180] Despite the report, bandwidth acquisition remained troublesome for DoD in the aftermath of the FY 2009 NDAA. A GAO report in July 2015 concluded that DoD's bandwidth acquisition system was still "fragmented and inefficient," resulting in a constant struggle to ensure that bandwidth requirements were achieved.[181] GAO also criticized DoD for lacking the necessary data to craft long-term procurement decisions regarding bandwidth, and for failing to overcome a decentralized system of bandwidth procurement.[182] GAO's critical assessment highlighted the continuing difficulties confronting DoD's attempts to ensure long-term bandwidth support for major programs, which was the central subject of the reporting requirement. Additionally, DoD did act in September 2016 to improve the quality of bandwidth capacity planning through updated guidance (DoDI 8420.02), yet the reporting requirement did not play a direct role in that process and is not well-positioned to convey the impact of any changes to Congress.[183]

Conclusions

The reporting requirement's lack of success is rooted in its makeshift origin and ineffective configuration. The report was initially intended to be a 1-year report before it was made permanent in the FY 2010 NDAA. The contemporary permanent report is overly broad and poorly targeted to address the policy problem. The report imposes joint responsibility for bandwidth oversight onto the Secretary and the DNI; such responsibility is ill-suited for offices at that level, which are not ideal sources for the detailed oversight required by the report. As a result, the report fails to properly direct

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[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] FY 2010 NDAA, Pub. L. No. 111-84, 123 Stat. 2449 (2009).
[178] Ibid.
[179] Major Defense Acquisition Programs: Certification Required Before Milestone B Approval, 10 U.S.C. § 2366b.
[180] GAO, *Defense Satellite Communications: DOD Needs Additional Information to Improve Procurements*, July 2015, accessed June 27, 2017, https://www.gao.gov/assets/680/671484.pdf.
[181] Ibid.
[182] Ibid.
[183] DoD Satellite Communications (SATCOM), DoDI 8420.02 (2016).

its focus to generating the necessary data from DoD's existing decentralized bandwidth system. The report has outlived whatever initial usefulness it may have possessed, and its imperfect structure undermines its utility to Congress and reduces the likelihood that tangible improvements in bandwidth acquisition would arise from congressional oversight of its data.

> The office of the DoD Chief Information Officer concurred with the Section 809 Panel's recommendation.[184]

Subrecommendation 24q: Repeal the statutory requirement for the Afghanistan Infrastructure Fund annual overview report, FY 2011 NDAA, 1217(i).

Background

Section 1217(i) of the FY 2011 NDAA establishes a reporting requirement in regards to a joint program between DoD and the State Department to fund infrastructure projects in Afghanistan as a part of the broader U.S. counterinsurgency strategy. Section 1217 created a new authority that is classified as a note under 22 U.S.C. 7513.[185] The statutory language of Section 1217 granted far-reaching authority to a joint DoD–State Department "Afghanistan Infrastructure Fund" to develop infrastructure projects—described only as "water, power, and transportation projects; and other projects in support of the counterinsurgency strategy in Afghanistan"—using up to $400 million in funds for the first fiscal year of the program.[186] Congress directed the Secretary to provide notification at least 30 days before using any funds under the new program authority, explaining why the designated infrastructure project would be sustainable and justifying the project's counterinsurgency rationale.[187] The reporting requirement at paragraph (i) was intended to provide a general overview of the program by detailing the "allocation and use of funds" under the program, as well as a "description of each project" funded through the program authority.[188] The reporting requirement, which was directed to the Secretary "in coordination with the Secretary of State," was automatically triggered for each fiscal year "in which funds are obligated, expended, or transferred under the program."[189] Subsequent amendments extended the funding authority through FY 2014 and imposed limitations on the total amount of funding that could be utilized by DoD and State before submitting further justification to Congress.[190] The reporting requirement itself has not been amended since its creation in the FY 2011 NDAA.[191]

Findings

Section 1217 was intended to further strengthen America's counterinsurgency strategy in Afghanistan by funding "high-priority, large-scale infrastructure projects in support of the civil-military campaign in Afghanistan."[192] Within several years, the program authorized by Section 1217 appears to have exhausted its congressional support. The most recent amendment to Section 1217 occurred in the

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[184] DoD Chief Information Officer, email to Section 809 Panel staff, December 5, 2017.
[185] Authorization of Assistance, 22 U.S.C. § 7513.
[186] FY 2011 NDAA, Pub. L. No. 111-383, 124 Stat. 4393 (2011).
[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] Authorization of Assistance, 10 U.S.C. § 7513.
[191] Ibid.
[192] FY 2011 NDAA, Pub. L. No. 111-383, Joint Explanatory Statement of the Committees on Armed Services of the U.S. Senate and House of Representatives, http://www.wifcon.com/dodauth11/hr6523_explan.pdf.

FY 2014 NDAA, in which funding authority for the Afghanistan Infrastructure Fund was authorized through FY 2014 at a lower level of funding ($250 million, as compared to $350 million in FY 2013 and the original $400 million in FY 2011).[193] Congress opted not to provide any further funding authority to the Section 1217 program after FY 2014. Congress also approved two additional requirements that signaled its intention to end the program as a source of funding for new infrastructure projects after FY 2014: (a) a new requirement upon the Secretary to assess whether the Afghan National Security Forces were capable of providing security for infrastructure projects funded through the program in FY 2014[194] and (b) a mandate that the Secretary consult with the Secretary of State and the USAID Administrator to draft a plan "for the transition to the Government of Afghanistan, or a utility entity owned by the Government of Afghanistan, of the project management of projects funded with amounts authorized by this Act for the Afghanistan Infrastructure Fund."[195] Congress also articulated the contours of the plan, namely a description of all projects that would transition to Afghan control and an assessment of the ongoing costs to the Afghan government and the United States of managing the projects, as well as the capability of the Afghan government to manage the projects successfully.[196] Congress effectively required DoD to submit a plan for the termination of the direct American role in funding and maintaining infrastructure projects through the Afghanistan Infrastructure Fund. The statutory language articulated in the FY 2014 NDAA remains in effect, which indicates that the fund no longer possesses the authority to support new projects.

Conclusions

As the Afghanistan Infrastructure Fund nears its end, the reporting requirement for the program that was imposed in Section 1217(i) of the FY 2011 NDAA has lost its purpose. Congress created the report to facilitate its oversight of the program, but the fund has lacked the authority to finance new projects since the end of FY 2014. Congress's decision to halt funding authority and instruct DoD to prepare for the transition of infrastructure projects funded through the program to Afghan control signals that the program is effectively defunct. In light of this, the oversight afforded by the report is no longer necessary.

> The Section 809 Panel did not receive comments from DoD regarding this recommendation.

Subrecommendation 24r: Repeal the statutory requirement for the MDAP Testing and Evaluation annual justification of progress report, FY 2013 NDAA, 904(h)(1) and (2).

Background

Paragraphs (1) and (2) of Section 904(h) of the FY 2013 NDAA establish a reporting requirement to detail MDAPs that proceed to testing and evaluation despite internal DoD objections. The statutory language, which is classified as a note under 10 U.S.C. § 133, directed the USD(AT&L) to submit an annual report to Congress that describes every instance in which an MDAP moved forward in the testing and evaluation process over departmental objections. Congress specified that each report must consist of two components: a record of every MDAP that "proceeded to implement a test and

[193] FY 2014 NDAA, Pub. L. No. 113-66, 127 Stat. 907 (2013).
[194] Ibid.
[195] Ibid.
[196] Ibid.

evaluation master plan" despite the Deputy Assistant Secretary of Defense for Developmental Test and Evaluation's [DASD(DT&E)] finding of disapproval for the plan; and a record of every MDAP that "proceeded to initial operational testing and evaluation" despite the same official's determination that the program was not yet ready for operational testing.[197] For both categories, Congress mandated that the report explain the causes of the internal objections, the rationale behind DoD's decision to proceed with the program regardless, and the actions taken by DoD to address the internal concerns while moving forward with testing and evaluation.[198] Congress required the USD(AT&L) to submit the annual reports within 60 days of the end of each fiscal year.[199] Congress also specified that the reports were only due between fiscal years 2013 and 2018, establishing a 5-year timeline without any reference to subsequent reporting requirements after fiscal year 2018.[200] The reporting requirement in paragraphs (1) and (2) has not been amended since the FY 2013 NDAA.[201]

Findings

Section 904(h) of the FY 2013 NDAA was intended to address congressional discontent over the role of the DASD(DT&E) within DoD's testing and evaluation process. Congress established the position in the FY 2009 NDAA for the purpose of strengthening the role of testing and evaluation in developing major weapons systems.[202] Within 4 years, however, Congress concluded that DoD had failed to properly integrate the position into its internal structure. In a Joint Explanatory Statement that accompanied the FY 2013 NDAA, Congress criticized DoD for failing to provide the necessary resources, staff, and access to the position, as well as failing to ensure that the deputy assistant secretary was fully assimilated into the department's testing and evaluation process.[203] Congress also expressed concern that DoD had failed to give "adequate attention to shortcomings identified by DASD(DT&E) in developmental testing."[204] This final objection was addressed in paragraphs (1) and (2) of Section 904(h), which compelled DoD to submit a report to Congress disclosing any instance in which the testing and evaluation process for an MDAP moved forward over the objections of the DASD(DT&E).[205] The reporting requirement was designed to assist the DASD(DT&E) in fully integrating the oversight role that Congress had originally envisioned. It was also created with a 5-year sunset, indicating that Congress may have believed that a reporting requirement instituted for bureaucratic reasons did not necessarily need to become a permanent fixture of congressional oversight.

Conclusions

The reporting requirement imposed by Congress in section 904(h)(1) of the FY 2013 NDAA is nearing the end of its designated lifespan. Congress established that the report would sunset in FY 2018, suggesting that Congress always intended for the report to serve a specific, short-term purpose in assessing DoD's integration of the DASD(DT&E) into its broader testing and evaluation process. The

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[197] FY 2013 NDAA, Pub. L. No. 112-239, 126 Stat. 1868 (2013).
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] Under Secretary of Defense for Acquisition, Technology, and Logistics, 10 U.S.C. § 133.
[202] FY 2013 NDAA, Pub. L. No. 112-239, Joint Explanatory Statement of the Committee of Conference, https://www.ngaus.org/sites/default/files/NDAA%20Conference%20Report.pdf.
[203] Ibid.
[204] Ibid.
[205] Ibid.

original congressional timeframe is appropriate, and the report does not need to be extended beyond its current 5-year window. The report's sunset date offers a useful moment to evaluate the issue once again without reflexively extending the report's existence.

> The Section 809 Panel did not receive comments from DoD regarding this recommendation.

Subrecommendation 24s: Repeal the statutory requirement for the Ticonderoga-Class Cruisers and Dock Landing Ships annual modernization report, FY 2015 NDAA, 1026(d).

Background

Paragraph (d) of Section 1026 of the FY 2015 NDAA established a reporting requirement to bolster congressional oversight of the Navy's modernization of Ticonderoga-Class cruisers and dock landing ships. Section 1026 authorized the Navy to use funds from the Ship, Modernization, Operations, and Sustainment Fund (SMOSF) to modernize eleven Ticonderoga-Class cruisers and three Ticonderoga-class dock landing ships.[206] The provision also detailed a series of requirements and limitations that the Navy was required to obey over the course of the modernization.[207] To ensure that the modernization process adhered to congressional directives, Congress imposed a reporting requirement in paragraph (d) of Section 1026. The requirement directed the Secretary of the Navy to submit annual reports assessing the status of modernization efforts during each fiscal year that Ticonderoga-Class modernization was taking place.[208] Congress specified a number of obligatory components for each report, including an overview of "the status of modernization efforts, including availability schedules, equipment procurement schedules, and by-fiscal year funding requirements;" a description of vessel readiness and operational status while undergoing modernization; a material condition assessment for each vessel undergoing modernization; lists of rotatable pool equipment across the entire class, as well as lists of non-rotatable pool equipment that had been removed from each vessel and justifications for the removal; and per-vessel cost projection statements illustrating the estimated obligations for the remainder of the modernization, as compared to remaining funds in the SMOSF.[209] As a further consequence of the reports, Congress required the Secretary of the Navy to disclose any "material deviations" from projected per-vessel modernization costs within 30 days.[210] The reporting requirements in paragraph (d) have not been amended since the FY 2015 NDAA.

Findings

Section 1026 of the FY 2015 NDAA represented an effort on the part of Congress to thwart the Navy's potential decommissioning of a number of Ticonderoga-Class cruisers and dock landing ships. The dispute was rooted in the spending restrictions of the Budget Control Act of 2011, which prompted the Navy to announce that it would decommission seven Ticonderoga-class cruisers and two amphibious vessels to save $6 billion through FY 2017.[211] In the face of congressional opposition to the proposal, the

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[206] FY 2015 NDAA, Pub. L. No. 113-291, 128 Stat. 3490 (2014).
[207] Ibid.
[208] Ibid.
[209] Ibid.
[210] Ibid.
[211] GAO, *Military Capabilities: Navy Should Reevaluate Its Plan to Decommission the USS Port Royal*, April 2014, accessed July 24, 2017, http://www.gao.gov/assets/670/662376.pdf.

Navy changed course and offered a revised plan to temporarily inactivate 11 of its 22 Ticonderoga-Class cruisers in order to modernize the ships.[212] Congress remained skeptical, however, and feared that the Navy could use a *temporary* inactivation as a pretext for a permanent decommissioning.[213] Congress responded by imposing constraints on the Navy's modernization process for the Ticonderoga-class vessels through Section 1026, which ensured that modernization would proceed on a regular schedule without compromising the ability of the ships to rejoin the active fleet at any time.[214] Congress signaled its intent with clarity in the conference report accompanying the FY 2015 NDAA, declaring that "we also expect the Secretary [of the Navy] to ensure that these ships are maintained in the inventory until the end [sic] their expected service lives, excluding time spent in a phased modernization status."[215] The reporting requirement itself was designed to provide Congress with the necessary information to ensure that the Navy was properly implementing the modernization in line with congressional intent; however, circumstances have changed since 2015. The Trump Administration's stated goal to dramatically expand the size of the Navy has led naval officials to explore potential options for integrating the Ticonderoga-Class vessels back into the active fleet for a longer period of time.[216] The direction of the Ticonderoga-Class program has shifted away from a clash between Congress and the Navy over the future of the program, and appears likely to return to a consensus in favor of an extended role in the active fleet.

Conclusions

Congress imposed the Ticonderoga-Class modernization reporting requirement in Section 1026(d) of the FY 2015 NDAA in response to circumstances that have changed. The report represented part of a congressional effort to ensure that the Navy did not decommission a series of Ticonderoga-Class cruisers and dock landing ships under the pretext of temporary inactivation and modernization. At present, however, the Trump Administration is seeking expansion of the active fleet and as a result, the Navy appears less likely to pursue Ticonderoga-Class decommissioning. The report is outdated in light of this expansion.

> The Navy's Office of Legislative Affairs concurred with the Section 809 Panel's recommendation.[217]

Subrecommendation 24t: Repeal the statutory requirement for the Ballistic Missile Defense Systems annual preproduction assessment reports, FY 2015 NDAA, 1662(c)(2) and (d)(2).

Background

Paragraphs (c)(2) and (d)(2) of Section 1662 of the FY 2015 NDAA establish two reporting requirements to facilitate congressional oversight of DoD's missile defense systems prior to production and

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[212] Defense News, "US Navy's Cruiser Problem – Service Struggles Over Modernization, Replacements," July 7, 2014, accessed July 28, 2018, http://www.defensenews.com/pentagon/2014/07/07/us-navy-s-cruiser-problem-service-struggles-over-modernization-replacements/.
[213] Ibid.
[214] FY 2015 NDAA, Pub. L. No. 113-291, Joint Explanatory Statement of the Committee of Conference, https://www.armed-services.senate.gov/imo/media/doc/113-S1847-JES.pdf.
[215] Ibid.
[216] Breaking Defense, "More Maintenance $$ Gets Navy to 355 Ships Sooner: NAVSEA," June 1, 2017, accessed January 5, 2018, https://breakingdefense.com/2017/06/more-maintenance-gets-navy-to-355-ships-sooner-navsea/.
[217] Department of the Navy, Office of Legislative Affairs, email to Section 809 Panel staff, December 14, 2017.

deployment. The statutory language, which is classified as a note under 10 U.S.C. § 2431, sought to strengthen DoD's testing and assessment procedures for ballistic missile defense systems by requiring "sufficient and operationally realistic testing" for each system before a final decision to approve production and deployment.[218] To support that goal, the provision required that the Secretary receive two additional assessments before advancing the production and deployment of ballistic missile systems. Congress assigned the first assessment to the DOT&E, with a mandate to consider "the sufficiency, adequacy, and results of the testing of each covered system, including an assessment of whether the covered system will be sufficiently effective, suitable, and survivable when needed."[219] The second assessment was assigned to the Commander of the United States Strategic Command, with a mandate to perform "a military utility assessment of the operational utility of each covered system."[220] In both instances, Congress also created a reporting requirement for the DOT&E and the Commander of the U.S. Strategic Command to submit a summary of their assessments to Congress after submitting the assessments to the Secretary.[221] These reporting requirements in paragraphs (c)(2) and (d)(2) have not been amended since the FY 2015 NDAA.[222]

Findings

Congress hoped the required assessments in paragraphs (c) and (d) of Section 1662, as well as the fact that the Secretary was obligated to review them before advancing to the production phase, would impose further discipline on DoD's missile defense programs by facilitating a more judicious decision-making process from testing and evaluation to production and deployment.[223] The reason for the provision was congressional unease with the pace of DoD's progression from ballistic missile development and testing to production, which had sparked concerns in multiple programs. For example, a GAO report in February 2016 asserted that DoD's progress with its homeland missile defense program relied upon "a highly optimistic, aggressive schedule that overlaps development and testing with production activities, compromises reliability, extends risk to the warfighter, and risks the efficacy of flight testing."[224] The report followed a previous GAO analysis in April 2014, in which the agency concluded that DoD's ground-based midcourse defense system suffered from "major disruptions" due to a series of test failures that occurred "in conjunction with a highly concurrent development, production, and fielding strategy."[225] GAO also identified further risk in DoD's Redesigned Kill Vehicle program, which proposed to "[align] production decisions with flight testing."[226] GAO noted that it had issued recommendations to DoD revolving around "including sufficient schedule and resource margin in its test plan, and aligning production decisions with flight testing."[227] The agency also noted that DoD had largely concurred with the recommendations and

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[218] FY 2015 NDAA, Pub. L. No. 113-291, 128 Stat. 3657 (2014).
[219] Ibid.
[220] Ibid.
[221] Ibid.
[222] Weapons Development and Procurement Schedules, 10 U.S.C. § 2431.
[223] FY 2015 NDAA, Pub. L. No. 113-291, Joint Explanatory Statement of the Committee of Conference, https://www.armed-services.senate.gov/imo/media/doc/113-S1847-JES.pdf.
[224] GAO, *Missile Defense: Assessment of DoD's Reports on Status of Efforts and Options for Improving Homeland Missile Defense*, February 17, 2016, accessed June 22, 2017, http://www.gao.gov/assets/680/675263.pdf.
[225] Ibid.
[226] Ibid.
[227] Ibid.

pledged to implement them.[228] DoD had yet to implement several of these crucial recommendations by February 2016.[229] As recently as May 2017, GAO concluded again that "the [ballistic missile defense] program is still operating at a self-imposed fast pace, as production and fielding of assets occurs despite the inability to thoroughly validate them due to testing delays."[230] DoD's willingness to proceed with the production and deployment of ballistic missile systems before achieving testing goals continues to pose challenges for the department.

Conclusions

The ballistic missile preproduction reporting requirement that was imposed in Section 1662(c)(2) and (d)(2) of the FY 2015 NDAA is too limited and duplicative to truly address the problem. The provision merely requires the Secretary to review the reports from DOT&E and Strategic Command, with no imperative to adhere to their suggestions before advancing to production and deployment. The provision is also redundant with previously existing ballistic missile reporting requirements, particularly the reports at 10 U.S.C. § 223a(a) and 10 U.S.C. § 225(c), as well as Section 232 of the FY 2002 NDAA. All of the reports focus on early-stage developments within ballistic missile programs. GAO analysis offers little evidence to support the idea that DoD has improved its processes in the period since the report was imposed. The duplicative nature and limited effect of the report fail to justify its continuation.

> MDA concurred with the Section 809 Panel's recommendation,[231] but DOT&E dissented. DOT&E acknowledged that the Section 1662 (c)(2) report contained "some similarities in report content" with the other MDA reports, but argued that the report was uniquely "event-driven" in terms of acquisition milestones. The panel opted not to alter its recommendation in the belief that the redundancy in report content between this report and the other MDA reports outweighs the report's value in terms of enhanced oversight.[232]

[228] Ibid.
[229] Ibid.
[230] GAO, *Missile Defense: Some Progress Delivering Capabilities, But Challenges with Testing Transparency and Requirements Development Need to be Addressed*, May 2017, accessed June 22, 2017, http://www.gao.gov/assets/690/684963.pdf.
[231] Missile Defense Agency, phone call with 809 Panel Staff, November 29, 2017.
[232] DOT&E, email to Section 809 Panel staff, December 8, 2017.

THE PANEL RECOMMENDS THE FOLLOWING STATUTORY REPORTING REQUIREMENTS BE PRESERVED SUBJECT TO THE EVERY 5 YEARS SUNSET REVIEW DESCRIBED IN RECOMMENDATION 23.

Subrecommendation 24u: Preserve the statutory requirement for the Director of Operational Test and Evaluation annual overview report, 10 U.S.C. § 139(h).

Background

10 U.S.C. § 139(h) establishes a reporting requirement for DoD's operational test and evaluation (T&E) activities. The reporting requirement was initially imposed in the FY 1984 NDAA, which created a new section 136a of Title 10 that later became section 139.[233] The original statutory language of section 139 established DOT&E to serve as the "principal adviser to the Secretary of Defense on operational test and evaluation" within DoD.[234] The position was charged with overseeing all of DoD' operational T&E processes, as well as coordinating operational testing between agencies and evaluating the results of all operational tests.[235] Additionally, the statute directed DOT&E to submit an annual report to Congress that provided a comprehensive summary of DoD's operational T&E activities for each fiscal year.[236] In the subsequent 3 decades, the statutory basis for the position was subject to a large number of amendments, and the reporting requirement was expanded as well to encompass any waivers or deviations from testing and evaluation requirements that may have occurred in a given year.[237] According to the current provision, the annual reports are due no later than January 31 of each year.[238]

Findings

Congress created the DOT&E position during a period of budget growth for DoD's research budget. Funding for DoD's RDT&E program surged in the 1980s as a result of the Reagan Administration's military build-up, nearly doubling between FY 1980 and FY 1987.[239] The reporting requirement likely constituted an effort on the part of Congress to enhance oversight of DoD's T&E budget, in accordance with its larger funding commitment. In the subsequent 30 years, DoD's RDT&E budget declined during the 1990's, surged after the September 11, 2001 terrorist attacks, and then declined once more to a stable level at about $65 billion annually after FY 2013.[240] Amidst these cycles, DOT&E has evolved into a crucial component of DoD's T&E process. A 2015 GAO report concluded that less than 10 percent of all programs under the position's jurisdiction between FY 2010 and FY 2014 were the subject of "significant disputes" with the Military Services, and that the position possessed "valid and substantive operational test-related concerns for each program reviewed."[241] GAO also detailed that disputes between DOT&E and the Military Services were resolved to DOT&E's satisfaction, and that

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[233] Section 1211, Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, 97 Stat. 684 (1983).
[234] Ibid.
[235] Ibid.
[236] Ibid.
[237] Director of Operational Test and Evaluation, 10 U.S.C. § 139.
[238] Ibid.
[239] Congressional Research Service, *Defense Research: A Primer on the Department of Defense's Research, Development, Test and Evaluation (RDT&E) Program*, July 14, 1999, accessed June 8, 2017, https://www.hsdl.org/?view&did=451511.
[240] Congressional Research Service, *Department of Defense Research, Development, Test, and Evaluation (RDT&E): Appropriations Structure*, December 13, 2016, accessed June 8, 2017, https://fas.org/sgp/crs/natsec/R44711.pdf.
[241] Government Accountability Office, *DOD Operational Testing: Oversight Has Resulted in Few Significant Disputes and Limited Program Cost and Schedule Increases*, June 2015, accessed June 8, 2017, http://www.gao.gov/assets/680/670565.pdf.

those resolutions caused "limited cost and schedule impacts to the programs."[242] GAO opted not to make any recommendations regarding DOT&E's oversight performance, indicating that the agency was satisfied with the position's role and authority.[243]

Conclusions

The operational T&E reporting requirement at 10 U.S.C. § 139(h) is critical for the ability DOT&E to fulfill the office's mission. The position occupies an important role in DoD's coordination efforts throughout its test and evaluation budget, and the report itself is a central aspect of the office's functions. In recent years, DOT&E has made strides in terms of producing greater discipline and efficiency in program T&E activities. The issue remains a priority for DoD, and the existence of the report assists with both the office's internal success and the ability of Congress to exercise proper oversight.

> DOT&E concurred with the Section 809 Panel's recommendation.[244]

Subrecommendation 24v: Preserve the statutory requirement for Naval Vessel Construction annual strategic plan report, 10 U.S.C. § 231.

Background

10 U.S.C. § 231 establishes a reporting requirement for long-term naval vessel construction in support of U.S. strategic planning. The reporting requirement was initially imposed in the FY 2003 NDAA, which created 10 U.S.C. § 231.[245] The original statutory language of section 231 directed the Secretary to submit an annual report to Congress regarding the integration of long-range naval vessel construction into the broader strategic outline of U.S. defense policy.[246] The statute required the report, titled *Annual Naval Vessel Construction Plan*, to describe "a plan for the construction of combatant and support vessels for the Navy" to a 30-year time horizon.[247] The report would contain a detailed construction program, as well as the projected funding levels and procurement strategies necessary to achieve the program.[248] The report was also statutorily obligated to support the framework outlined by the official national security strategy report or the *Quadrennial Defense Review*.[249] If DoD concluded that the budget for a given fiscal year failed to provide the necessary funding to maintain naval vessel construction in accordance with the long-range construction report, the statute further required that the report must specify "the risks associated with the reduced force structure of naval vessels that will result from funding naval vessel construction at such level."[250] Subsequent amendments have added further elements to the Annual Naval Vessel Construction Plan, such as an estimated total cost of construction

[242] Ibid.
[243] Ibid.
[244] Director of Operational Test and Evaluation, email to Section 809 Panel staff, November 28, 2017.
[245] FY 2003 NDAA, Pub. L. No. 107-314, 116 Stat. 2639 (2002).
[246] Ibid.
[247] Ibid.
[248] Ibid.
[249] Ibid.
[250] Ibid.

for each vessel and a requirement for CBO evaluation of the plan.[251] The original components of the plan remain in statutory effect.

Findings

The reporting requirement at 10 U.S.C. § 231 originated at the start of the 21st Century. Its precursor was a one-time provision in the FY 2000 NDAA, which required DoD to submit a 30-year naval construction plan in 2000.[252] That plan was the first 30-year overview to be produced by DoD. Although similar plans were not submitted in 2001 or 2002, the process resumed with the permanent statutory requirement that was approved in the FY 2003 NDAA and codified at 10 U.S.C. § 231.[253] After altering the requirement in the FY 2011 NDAA to request quadrennial reports, Congress reversed course the following year and reaffirmed its desire for annual reports.[254] That congressional decision reflected a general recognition of the report's positive contribution to long-range naval planning.[255] For example, the most recent report highlighted the challenge in joining short-term budgetary realities to long-range strategic planning. The Congressional Research Service estimated that, according to the long-range naval construction plan submitted by the Secretary alongside DoD's proposed FY 2018 budget, the Navy would need to add more than 50 additional ships to the plan to achieve the broader fleet goal and maintain it through the 30-year period.[256] The cost of achieving this objective would range between $4.6 billion and $5.1 billion annually in additional shipbuilding funds over the course of the entire 30-year period.[257] The analysis was made possible by the report, to the benefit of both congressional leaders and DoD, which can now engage with Congress to reconcile the department's plans with congressional intent. Such a process demonstrates the value of the report, operating as intended.

Conclusions

The naval vessel construction reporting requirement at 10 U.S.C. § 231 has proven its value since its implementation in 2003. The report is well-designed to provide Congress with the information that it needs to make long-term budgetary judgments regarding naval construction programs. The report also bolsters DoD's strategic framework for naval planning. In slightly over a decade, the report has performed admirably and earned broad support from stakeholders. The report offers demonstrated benefits and should be preserved.

> The Navy's Office of Legislative Affairs concurred with the Section 809 Panel's recommendation.[258]

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[251] Budgeting for Construction of Naval Vessels: Annual Plan and Certification, 10 U.S.C. § 231.
[252] Congressional Research Service, *Navy Force Structure and Shipbuilding Plans: Background and Issues for Congress*, June 7, 2017, accessed June 9, 2017, https://fas.org/sgp/crs/weapons/RL32665.pdf.
[253] Ibid.
[254] Ibid.
[255] Mackenzie Eaglen, "Pentagon's Aviation Plan Headed for a Dead Stick Landing," *American Enterprise Institute*, May 31, 2015, accessed June 12, 2017, https://www.aei.org/publication/pentagon-aviation-report-dead-stick-landing/.
[256] Congressional Research Service, *Navy Force Structure and Shipbuilding Plans: Background and Issues for Congress*, June 7, 2017, accessed June 9, 2017, https://fas.org/sgp/crs/weapons/RL32665.pdf.
[257] Ibid.
[258] Department of the Navy, Office of Legislative Affairs, email to Section 809 Panel staff, December 14, 2017.

Subrecommendation 24w: Preserve the statutory requirement for the Director of Operational Test and Evaluation annual program report, 10 U.S.C. § 2399(g).

Background

10 U.S.C. § 2399(g) establishes a reporting requirement that is connected to a larger reporting requirement at 10 U.S.C. § 139(h). The reporting requirement at 10 U.S.C. § 139(h) directed DOT&E to submit an annual report to Congress that provided a comprehensive summary of DoD's operational test and evaluation activities for each fiscal year.[259] The reporting requirement at 10 U.S.C. § 2399(g) created an additional component of that annual report by requiring DOT&E to include greater detail about each program described within the report. The separate reporting requirement was initially imposed in the FY 1990–1991 NDAA, which created 10 U.S.C. § 2399.[260] As a part of the section, which governed the progression of new programs in the framework of operational T&E procedures, a new paragraph (g) was created that added a further obligation to the annual report of section 139(h).[261] DOT&E would subsequently be required to detail "the status of test and evaluation activities" for each program in the report, and to compare that status with the previously-approved program master plan.[262] The director was also required to note the existence of any waivers that had been granted in accordance with the test and evaluation procedures of the program.[263] There were no successive amendments to the report requirement, and 10 U.S.C. § 2399(g) remains unchanged in its current form from the original statute.

Findings

Due to the fact that 10 U.S.C. § 2399(g) establishes a reporting requirement within the annual report imposed by 10 U.S.C. § 139(h), any evaluation of Section 2399(g) should take place within the context of the report in Section 139(h). The success of that broader report establishes the credibility of 10 U.S.C. § 2399(g) and suggests that the two reports should be viewed together as a positive element in the T&E process.

Conclusions

The operational T&E reporting requirement at 10 U.S.C. § 2399(g) modifies the broader report at 10 U.S.C. § 139(h). By requiring additional information in the underlying report, Section 2399(g) serves less as its own reporting requirement than as an appendage to an existing report with a record of success. The reporting requirement at 10 U.S.C. § 2399(g) should be considered in tandem with the primary report in Section 139, and Congress should preserve this reporting requirement.

> DOT&E concurred with the Section 809 Panel's recommendation.[264]

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[259] Section 1211FY 1984 NDAA, Pub. L. No. 98-94, 97 Stat. 684 (1983).
[260] Section 802, FYs 1990-1991 NDAA, Pub. L. No. 101-189, 103 Stat. 1485 (1989).
[261] Ibid.
[262] Ibid.
[263] Ibid.
[264] Director of Operational Test and Evaluation, email to Section 809 Panel staff, November 28, 2017.

THE FOLLOWING STATUTORY REPORTING REQUIREMENTS SHOULD BE MAINTAINED UNDER THE CURRENT 2021 TERMINATION DATE.

Subrecommendation 24x: Terminate in 2021 the statutory requirement for the Ballistic Missile Defense Programs annual acquisition baselines report, 10 U.S.C. § 225(c).

Background

10 U.S.C. § 225(c) establishes a reporting requirement for DoD "acquisition baselines" regarding ballistic missile defense programs. The reporting requirement was initially imposed in the FY 2012 NDAA, which created a new 10 U.S.C. § 225.[265] The original statutory language of Section 225 included paragraph (c), which directed the MDA director to submit annual reports to Congress regarding "acquisition baselines" that had been created and defined by paragraphs (a) and (b) of the same section.[266] The acquisition baselines represented broad frameworks outlining the acquisition paths for program and major subprogram elements of ballistic missile defense systems. As established by the statute, the baselines detailed comprehensive schedules, technical descriptions of capabilities and requirements, cost estimates, and test baselines.[267] MDA was obligated to submit its annual report to Congress by February 15 of each year, with the first report presenting each acquisition baseline and all subsequent reports providing updates concerning any new acquisition baselines and any changes to existing acquisition baselines.[268] There have been no subsequent amendments to the report requirement, and 10 U.S.C. § 225(c) remains unchanged in its current form from the original statute.[269]

Findings

The reporting requirement at 10 U.S.C. § 225(c) arose due to congressional concern that MDA possessed excessive flexibility during the early stages of ballistic missile acquisition planning and production. As a part of the MDA's creation in its contemporary form in 2002, the agency received an unusually large degree of latitude in its acquisition policies to emphasize speed over traditional oversight and deliver missile defense programs on an expedited schedule.[270] The purpose of this increased latitude was to accelerate the pace of ballistic missile programs by deferring traditional acquisition oversight until the programs had advanced to such an extent that they were suitable for transition to a military service.[271] Congressional anxiety later emerged, however, regarding the lack of accountability in early-stage ballistic missile acquisition policies.[272] Congress acted to remedy the perceived lack of oversight by enacting 10 U.S.C. § 225(c) in the FY 2012 NDAA, which imposed a more stringent framework on the MDA's ballistic missile program acquisition policies and required their disclosure to Congress.[273] Since the advent of the report, acquisition oversight and transparency have improved for the MDA's ballistic missile programs and subprograms. In May 2017, GAO noted that a combination of congressional and agency actions had introduced greater accountability into the early-

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[265] FY 2012 NDAA, Pub. L. No. 112-81, 125 Stat. 1337 (2011).
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Acquisition Accountability Reports on the Ballistic Missile Defense System, 10 U.S.C. § 225.
[270] Government Accountability Office, *Missile Defense: Some Progress Delivering Capabilities, but Challenges with Testing Transparency and Requirements Development Need to Be Addressed*, May 2017, accessed June 1, 2017, https://www.gao.gov/assets/690/684963.pdf.
[271] Ibid.
[272] Ibid.
[273] Ibid.

stage acquisition process.[274] GAO also stated that the agency had failed to adopt all of its recommendations, and that its current approach to acquisition failed to strike the proper balance between "timeliness, affordability, reliability, and effectiveness."[275]

Conclusions

The ballistic missile acquisition baseline reporting requirement at 10 U.S.C. § 225(c) appears to help address an important congressional concern. The report has proven valuable in supporting congressional efforts to enhance the transparency of the MDA's early-stage ballistic missile acquisition policies. Those efforts have achieved some initial successes (although more remains to be done). The report also overlaps with several other reports, specifically 10 U.S.C. § 223a(a), Section 232 of the FY 2002 NDAA, and Section 1662 of the FY 2015 NDAA, all of which focus on different elements of the early-stage ballistic missile acquisition process. Unlike those reports, the acquisition baselines contained within 10 U.S.C. § 225(c) adopt a comprehensive perspective and are directed at MDA itself, rather than instructing other offices to evaluate specific aspects of MDA programs. The report covers a range of areas and provides MDA's perspective directly to Congress. 10 U.S.C. § 225(c) is better suited than its overlapping reports to serve as a core MDA report in enhancing congressional oversight. The report's success thus far and its comprehensive scope both serve to support its continuation to solidify recent improvements. The reporting requirement is justified at present and should be maintained through its scheduled termination date in 2021, when it can be further evaluated based upon MDA's ballistic missile acquisition performance at that time.

> MDA concurred with the Section 809 Panel's recommendation.[276]

Subrecommendation 24y: Terminate in 2021 the statutory requirement for Depot-Level Maintenance biennial capability requirements report, 10 U.S.C. § 2464(d).

Background

10 U.S.C. § 2464(d) establishes a reporting requirement for the Secretary to submit to Congress an assessment of depot-level maintenance and repair capability requirements for each armed service. The reports are prepared every 2 years, and each report evaluates depot-level capability requirements for the following fiscal year. The reporting requirement was initially imposed in the FY 2012 NDAA, which created a new paragraph (e) of Section 2464.[277] The new statutory text directed the Secretary to submit a biennial report to Congress identifying "the core depot-level maintenance and repair capability requirements and sustaining workloads" for each of the armed forces except for the Coast Guard.[278] Congress also directed the report to describe "the corresponding workloads necessary to sustain core depot-level maintenance and repair capability requirements," as well as "a detailed rationale for the shortfall and a plan either to correct, or mitigate, the effects of the shortfall" in any situation where "core depot-level maintenance and repair capability requirements exceed or are expected to exceed sustaining workloads."[279] The reporting requirement has not been amended since its

[274] Ibid.
[275] Ibid.
[276] Missile Defense Agency, phone call with Section 809 Panel staff, November 29, 2017.
[277] FY 2012 NDAA, Pub. L. No. 112-81, 125 Stat. 1368 (2011).
[278] Ibid.
[279] Ibid.

creation in the FY 2012 NDAA, although it was shifted to a new position as paragraph (d) of Section 2464 in the FY 2013 NDAA.[280]

Findings

The reporting requirement at 10 U.S.C. § 2464(d) arose because Congress was determined to preserve the effectiveness of military depots. Since 1984, Congress has mandated that DoD maintain a "core depot-level maintenance and repair capability" that cannot be contracted out to private contractors.[281] DoD is also required to ensure that military depots receive the necessary assignment of workload to ensure that capabilities are preserved during peacetime and prepared for unexpected mobilizations or emergencies.[282] The reporting requirement at 10 U.S.C. § 2464(d) was designed to provide Congress with the necessary information to exercise proper oversight of DoD's depot-maintenance policies. Unlike a related report at 10 U.S.C. § 2466(d), which focuses primarily on funding levels, the report at 10 U.S.C. § 2464(d) adopts a broader approach and evaluates capability requirements, workload shortfalls, and remedial policies. Since the report's inception, DoD has struggled to comply with the requirements established by Congress. Although the reports have partially complied by providing adequate data regarding depot-level maintenance requirements and the planned workload to meet the requirements, they have consistently failed to offer "required information on the rationale" for workload shortfalls that would prevent the department from meeting core depot requirements.[283] DoD has described its depot-level maintenance capability requirements properly, but it has neglected to explain the reasons underlying its inability to provide sufficient resources to meet those requirements. This element is a core aspect of the requirement, because it is fundamental to determining the effectiveness of DoD's depot maintenance policies. GAO discovered data errors in DoD's 2014 report that prompted a call for more "accurate and complete" reports in the future.[284] In its evaluation of DoD's 2016 biennial report, GAO identified the same problems: only partial compliance with the three core components of the report; inaccurate information for the Missile Defense Agency's depot-level maintenance capability requirements; and flawed guidance to reporting agencies that undermined their ability to provide the Secretary with accurate information for the report.[285] GAO recommended that Congress expand the scope of the information subject to the reporting requirement, and that DoD update DoDI 4151.20 to enhance the quality of the information being supplied by reporting agencies.[286]

Conclusions

Despite its flaws, the depot maintenance and repair capability reporting requirement at 10 U.S.C. § 2464(d) serves a useful purpose. Depot maintenance is a vital issue, and the report has strengthened congressional oversight over DoD's depot-level planning with the information that DoD has been able to successfully disclose. While the report has failed to achieve all of its aims—particularly in its attempt to require DoD to properly justify workload shortfalls regarding depot maintenance—the need for an improved DoD response to the report is more compelling than the argument for repeal. As long as the

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[280] FY 2013 NDAA, Pub. L. No. 112-239, 126 Stat. 1695 (2013), http://uscode.house.gov/statviewer.htm?volume=126&page=1694#.
[281] GAO, *Depot Maintenance: Improvements to DOD's Biennial Core Report Could Better Inform Oversight and Funding Decisions*, November 2016, accessed July 24, 2017, http://www.gao.gov/assets/690/681260.pdf.
[282] Ibid.
[283] Ibid.
[284] Ibid.
[285] Ibid.
[286] Ibid.

report can demonstrably deliver greater transparency for DoD depot maintenance policy, its continuation can be justified through its 2021 termination date. Additionally, the report at 10 U.S.C. § 2464(d) has proven to be more successful than its related and overlapping report at 10 U.S.C. § 2466(d), which focuses more narrowly on depot funding and experienced even more grave flaws in the integrity of its data.[287]

> The Office of the Assistant Secretary of Defense for Logistics & Material Readiness concurred with the Section 809 Panel's recommendation.[288]

Subrecommendation 24z: Terminate in 2021 the statutory requirement for the National Technology and Industrial Base annual policy overview report, 10 U.S.C. § 2504.

Background

10 U.S.C. § 2504 establishes a reporting requirement for DoD's strategy to maintain the nation's technology and industrial base. The reporting requirement was initially imposed in the FY 1997 NDAA, which created a new 10 U.S.C § 2504.[289] The original statutory language of Section 2504 directed the Secretary to submit an annual report to Congress describing DoD's departmental guidance, selected assessments, and programs in support of the national security strategy for the national technology and industrial base.[290] An amendment in the FY 2013 NDAA added a component that required DoD to prepare a description of the "mitigation strategies" and other policies that it planned to implement in order to eliminate vulnerabilities within the national technology and industrial base.[291] 10 U.S.C. § 2504 has not been subject to any further amendment since the FY 2013 NDAA.[292]

Findings

The reporting requirement at 10 U.S.C. § 2504 is rooted in the same unease over the health of America's defense industrial base that has concerned policymakers since the end of the Cold War.[293] Although DoD supported the post-Cold War consolidation of the defense industrial base for much of the 1990's, the rapid contraction and transformation of the sector eventually sparked anxiety among defense officials and members of Congress.[294] By 1997, both Congress and DoD signaled increasing alarm that the capabilities of the defense industrial base could be weakened by the ongoing evolution of the defense sector.[295] The reporting requirement at 10 U.S.C. § 2504 likely gained support in this context as Congress sought to assess DoD's ongoing strategy to safeguard the defense industrial base. The FY 2013 NDAA amendment, which compelled DoD to provide even more information in the report,

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[287] GAO, *Depot Maintenance: Persistent Deficiencies Limit Accuracy and Usefulness of DoD's Funding Allocation Data Reported to Congress*, November 2005, accessed June 29, 2017, http://www.gao.gov/assets/250/248595.pdf.
[288] Office of the Assistant Secretary of Defense for Logistics & Material Readiness, email to 809 Panel Staff, November 8, 2017.
[289] FY 1997 NDAA, Pub. L. No. 104-201, 110 Stat. 2614 (1996).
[290] Ibid.
[291] FY 2013 NDAA, Pub. L. No. 112-239, 126 Stat. 2063 (2013).
[292] Annual Report to Congress, 10 U.S.C. § 2504.
[293] For the remainder of this analysis, the terms "national technology and industrial base" and "defense industrial base" will be used interchangeably. Congressional Research Service, *Defense Primer: U.S. Defense Industrial Base*, December 14, 2016, accessed June 6, 2017, https://fas.org/sgp/crs/natsec/IF10548.pdf.
[294] Kenneth Flamm, "Post-Cold War Policy and the U.S. Defense Industrial Base," *The Bridge*, 35, no. 1 (2005), 5-12, accessed January 5, 2018, https://www.nae.edu/File.aspx?id=7297&v=d611c600.
[295] Ibid.

arrived in a similar context. The defense industrial base confronted the twin challenges of declining defense spending and the budgetary constraint of sequestration due to the Budget Control Act of 2011.[296] The amendment also required DoD to develop a national security strategy for the national technology and industrial base, reflecting congressional intent to adopt an even more assertive oversight posture in regards to the defense industrial base.[297] Several years later, the broader conditions surrounding the defense sector remain volatile. The Trump Administration has endorsed a sizeable increase in the defense budget and calls to end the sequestration caps on defense spending are growing among members of Congress.[298] The defense industrial base reporting requirement is designed to ensure that DoD possesses a strategy to navigate this uncertainty in the defense sector, and that Congress is capable of evaluating the strategy's reliability.

Conclusions

Congress created the reporting requirement at 10 U.S.C. § 2504 in order to address a critical policy dilemma that remains ongoing: the post-Cold War decline of America's traditional defense industrial base. The transformation of the defense industrial sector shows no signs of abating, and both Congress and DoD are correct to use the report as one tool for adjusting to the uncertainty of the sector. The report serves an important purpose and should maintain the December 2021 termination date for the reporting requirement.

> The Office of Manufacturing and Industrial Base Policy dissented from the Section 809 Panel's recommendation. MIBP agreed with the reasoning in regard to the report, but the office requested that the reporting requirement be made permanent, rather than maintained through December 2021.[299] After receiving this comment, the Section 809 Panel opted not to alter its recommendation in the belief that further review of the report's efficacy in 2021 will be a valuable means to assess its ongoing usefulness to the department.
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> In Section 6 of this report, the Section 809 Panel has articulated its own perspective on the reporting requirement's proper role regarding the defense industrial base and proposed amendments to the report at 10 U.S.C. § 2504.

Subrecommendation 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).

Background

Section 1034(d) of the FY 2008 NDAA establishes a reporting requirement regarding DoD's distribution of chemical agents to nonfederal entities for purposes of scientific testing. Section 1034 authorized the

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[296] Congressional Research Service, *Defense Primer: U.S. Defense Industrial Base*, December 14, 2016, accessed June 6, 2017, https://fas.org/sgp/crs/natsec/IF10548.pdf.
[297] FY 2013 NDAA, Pub. L. No. 112-239, Joint Explanatory Statement of the Committee of Conference, https://www.ngaus.org/sites/default/files/NDAA%20Conference%20Report.pdf.
[298] Joe Gould, "Hawkish Lawmakers Frustrated by Budget Caps Press for Repeal," *Defense News*, May 15, 2017, accessed January 5, 2018, http://www.defensenews.com/articles/hawkish-lawmakers-frustrated-by-budget-caps-press-for-repeal.
[299] Office of Manufacturing and Industrial Base Policy, email to Section 809 Panel staff, November 9, 2017.

Secretary to provide "small quantities of a toxic chemical or precursor" to states, municipalities or private organizations in order to promote the "development or testing, in the United States, of material that is designed to be used for protective purposes."[300] Congress instructed the Secretary to estimate the cost of the distribution and receive an advance payment from the entity before allowing the transaction to proceed.[301] In paragraph (d) of the provision, Congress created an annual reporting requirement for the Secretary to disclose each instance in which the chemical distribution authority was used during the previous calendar year.[302] Specifically, Congress required the report to include "a description of each use of the authority and [to] specify what material was made available and to whom it was made available."[303] The reporting requirement was amended and broadened in the FY 2017 NDAA to include "any biological select agent or toxin for the development or testing of any biodefense technology."[304] As a result, the Secretary was required to disclose identical information for any distribution of biological agents as had previously been required for chemical agents.[305] The amendment also declared that the reporting requirement would terminate on January 31, 2021.[306]

Findings

The reporting requirement at Section 1034(d) was not present in the first version of the provision. Although the House version of the FY 2008 NDAA contained the authority for the Secretary to provide "small quantities of toxic chemicals" to nonfederal entities, negotiations with the Senate yielded the reporting requirement as an addition to the House language.[307] Thus, from the very inception of the provision, Congress actively decided that a reporting requirement was necessary to ensure proper oversight of DoD's use of the authority. Biological agents were incorporated into the section 1034 authority at the end of 2016 due to longstanding congressional concerns that DoD was failing to "successfully develop medical countermeasures to respond to biological incidents," which produced a series of critical hearings and a congressionally mandated GAO report to review DoD's biological countermeasures.[308] However, the FY 2017 NDAA simultaneously broadened the reporting requirement in Paragraph (d) to include biological agents and created a sunset date for the requirement after four years. Although congressional intent regarding the reporting requirement is uncertain, it is plausible that Congress sought to delay a final decision on the report to evaluate DoD's use of its newfound authority for biological agents.

Conclusions

The chemical and biological agent reporting requirement that was imposed in Section 1034(d) of the FY 2008 NDAA enhances congressional oversight on an issue of the utmost importance. It is evident that DoD's distribution of chemical or biological agents to other entities for testing must be transparent to ensure that the system is not vulnerable to errors of judgment or ineptitude. Congress is correct to

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[300] FY 2008 NDAA, Pub. L. No. 110-181, 122 Stat. 308 (2008).
[301] Ibid.
[302] Ibid.
[303] Ibid.
[304] FY 2017 NDAA, Pub. L. No. 114-328, 130 Stat. 2393 (2016).
[305] Ibid.
[306] Ibid.
[307] FY 2008 NDAA, Pub. L. No. 110-181, Joint Explanatory Statement of the Committee on Conference, https://www.gsa.gov/portal/mediaId/184487/fileName/National_Defense_Authorization_Act_2008.action.
[308] GAO, *Biological Defense: DOD Has Strengthened Coordination on Medical Countermeasures but Can Improve Its Process for Threat Prioritization*, May 2014, accessed June 27, 2017, https://www.gao.gov/assets/670/663212.pdf.

assert its prerogatives and scrutinize DoD's use of such a sensitive authority. The objective of the reporting requirement is justified on substantive grounds. In the FY 2017 NDAA, Congress instituted its own, separate termination date in January 2021 for this reporting requirement. The Section 809 Panel supports the implied congressional intent to evaluate the reporting requirement through 2021 before making a final determination regarding its permanence.

> The Office of the Assistant Secretary of Defense for Nuclear, Chemical and Biological Defense Programs concurred with the Section 809 Panel's recommendation.[309]

Subrecommendation 24ab: Terminate in 2021 the statutory requirement for the Research and Development in Defense Laboratories annual funding report, FY 2009 NDAA, 219(c).

Background

Section 219(c) of the FY 2009 NDAA establishes a reporting requirement in regards to additional funding for research and development in defense laboratories. Section 219 permitted the Secretary to authorize the directors of defense laboratories to use "an amount of funds equal to not more than three percent of all funds available to the defense laboratory" in order to promote research and development in their laboratories.[310] Congress granted the new funding authority in support of three agendas: basic and applied research for military missions; the "transition of technologies" from the laboratory to operational use; and laboratory workforce development activities.[311] Congress also directed the Secretary to submit an annual report that would encompass six distinct elements: a description of the mechanisms that DoD established to distribute funding to defense laboratories, the total amount of funding distributed to each laboratory, a description of the investments made by each laboratory using funds authorized by the provision, an analysis of any improvements in laboratory performance as a result of the additional funding, an assessment of whether the research conducted with funds under the authority had contributed to the development of "needed military capabilities," and any proposals to modify DoD's distribution mechanisms to enhance the impact of funding under the authority.[312] In its original form, the entire provision was set to expire on October 1, 2013.[313] Subsequent amendments made the authority under the provision permanent, permitted the use of funding for "minor military construction of the laboratory infrastructure," altered the funding amount from a ceiling of 3 percent of laboratory funds to a range of 2 to 4 percent, and allowed laboratory directors to charge fees in certain circumstances in order to obtain funds.[314] The scope of the reporting requirement itself was simplified in the FY 2010 NDAA to include merely "a report on the use of the authority under subsection (a) during the preceding year."[315]

Findings

Since its approval, Section 219 has become an important mechanism for DoD funding of certain types of laboratory research. Section 219 is one of two programs available to DoD to fund defense laboratory-

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[309] OASD(NCB-CB), email to Section 809 Panel staff, November 8, 2017.
[310] FY 2009 NDAA, Pub. L. No. 110-417, 122 Stat. 4389 (2008).
[311] Ibid.
[312] Ibid.
[313] Ibid.
[314] Research and Development Projects, 10 U.S.C. § 2358
[315] FY 2010 NDAA, Pub. L. No. 111-84, 123 Stat. 2660 (2009).

initiated research, alongside the In-House Laboratory Independent Research program.[316] In September 2016, the Acting Director of the U.S. Army Research Laboratory (ARL) testified before Congress that the Section 219 authority provided the ARL with "an agile and fast capability to maximize our potential for the discovery, innovation and transition of leading-edge foundational research in support of strategic land-power dominance."[317] He asserted that the ARL "benefited greatly" from the authority, which supported the maintenance of "world-class laboratories" and offered the ability to "attract, train, and then retain the best and brightest engineers and scientists our country has to offer."[318] At the same hearing, the Acting Director of Research at the U.S. Naval Research Laboratory (NRL) echoed the ARL's sentiments, declaring that the NRL "fully supports" the use of Section 219 authority for minor construction.[319] In all likelihood, these positive assessments bolstered congressional support for the authority, contributing to Congress's decision to increase the ceiling on Section 219 funds from 3 percent to 4 percent of a defense laboratory's budget in the FY 2017 NDAA.[320] The provision appears to be functioning as intended, and recent congressional actions and DoD statements indicate that it remains popular among stakeholders.

Conclusions

The defense laboratories reporting requirement that was imposed in Section 219(c) of the FY 2009 NDAA concerns a funding authority that has rapidly gained popularity among stakeholders. The laboratories themselves have expressed support for the authority and Congress has imposed a minimum annual funding level, as well as a range for annual funding subject to the discretion of the services. Despite its popularity, the existence of an annual funding range does suggest the need for a degree of congressional oversight to ensure that funding decisions are aligned rationally with department priorities. For these reasons, the status quo should be maintained regarding the 2021 termination date. At that point, Congress can evaluate the operation of the funding authority and assess whether continued oversight is necessary, or whether the program is working well enough to be released from the need for a report.

> The Section 809 Panel did not receive comments from DoD regarding this recommendation.

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[316] GAO, *Federal Research: Information on DOE's Laboratory-Directed Research and Development Program*, April 2016, accessed June 27, 2017, http://www.gao.gov/assets/680/676432.pdf.
[317] Philip Perconti, *Testimony Before the Emerging Threats and Capabilities Subcommittee of the House Armed Services Committee*, September 28, 2016, accessed January 5, 2018, http://www.defenseinnovationmarketplace.mil/resources/HHRG-114-AS26-Wstate-PercontiP-20160928.pdf.
[318] Ibid.
[319] Edward R. Franchi, *Testimony Before the Emerging Threats and Capabilities Subcommittee of the House Armed Services Committee*, September 28, 2016, accessed January 5, 2018, http://www.defenseinnovationmarketplace.mil/resources/HHRG-114-AS26-Wstate-FranchiE-20160928.pdf.
[320] FY 2017 NDAA, Pub. L. No. 114-328, 130 Stat. 2047 (2016).

Implementation

Legislative Branch

- Immediately repeal the following 20 reporting requirements:
  - 10 U.S.C. §§ 196(d) and (e)
  - 10 U.S.C. § 223a(a)
  - 10 U.S.C. § 229
  - 10 U.S.C. § 231a
  - 10 U.S.C. § 238(a)
  - 10 U.S.C. § 2228(e)
  - 10 U.S.C. § 2275
  - 10 U.S.C. § 2276(e)
  - 10 U.S.C. § 2466(d)
  - 10 U.S.C. § 7310(c)
  - 10 U.S.C. § 10543(a)
  - 10 U.S.C. § 10543(c)
  - FY 2002 NDAA, 232(h)(3)
  - FY 2007 NDAA, 122(d)(1)
  - FY 2007 NDAA, 1017(e)
  - FY 2009 NDAA, 1047(d)
  - FY 2011 NDAA, 1217(i)
  - FY 2013 NDAA, 904(h)
  - FY 2015 NDAA, 1026(d)
  - FY 2015 NDAA, 1662(c)(2) and (d)(2)
- Preserve the following three reporting requirements (subject to the every 5 years sunset review described in Recommendation 23):
  - 10 U.S.C. § 139(h)
  - 10 U.S.C. § 231
  - 10 U.S.C. § 2399(g)
- Maintain the following five reporting requirements through the current December 2021 termination deadline:
  - 10 U.S.C. § 225(c)
  - 10 U.S.C. § 2464(d)
  - 10 U.S.C. § 2504
  - FY 2008 NDAA, 1034(d)
  - FY 2009 NDAA, 219(c)

Executive Branch

- No Executive Branch changes are required.

Note: Recommended draft legislative text and sections affected can be found in the Implementation Details subsection at the end of Section 8.

Implications for Other Agencies

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

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Section 8
Statutory Reporting Requirements

Implementation Details

Recommendations 23 and 24

LEGISLATIVE PROVISIONS — 809 PANEL RECOMMENDATIONS RELATING TO TERMINATION OF REPORTING REQUIREMENTS

[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 below.]

TITLE V—REPORTING REQUIREMENTS

Sec. 501. Automatic sunset for future statutory reporting requirements.
Sec. 502. Repeal of certain Department of Defense reporting requirements that otherwise terminate as of December 31, 2021.
Sec. 503. Delay in sunset provision for certain Department of Defense reporting requirements that otherwise terminate as of December 31, 2021.
Sec. 504. Sunset of certain reporting requirements currently applicable to Department of Defense.
Sec. 505. Annual notification to Congress of expiring reporting requirements.

SEC. 501. AUTOMATIC SUNSET FOR FUTURE STATUTORY REPORTING REQUIREMENTS.

(a) IN GENERAL.—Chapter 23 of title 10, United States Code, is amended by inserting after section 480 the following new section:

"§ 480a. Reports to Congress: termination of indefinite-duration reports after five years

"(a) IN GENERAL.—Any provision of law enacted after the date of the enactment of this section that includes an indefinite-duration report requirement shall cease to be effective, with respect to that requirement, five years after the date of the enactment of that provision of law unless that provision of law expressly states that this section is inapplicable to that requirement or that provision of law.

"(b) INDEFINITE-DURATION REPORT REQUIREMENT DEFINED.—In this section, the term 'indefinite-duration report requirement' means a requirement in any provision of law for the Secretary of Defense (or any other officer or employee of the Department of Defense) to submit to Congress (or any committee of Congress) a periodic report for which the law does not—

"(1) state a specific period of time as the period during which that report is required to be submitted or that provision of law is in effect; or

"(2) state a specific termination date for the requirement to submit the report or for that provision of law.

"(c) PERIODIC REPORT DEFINED.—In this section, the term 'periodic report' means a report required to be submitted on an annual, semiannual, or other regular periodic basis.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 480 the following new item:

"480a. Reports to Congress: termination of indefinite-duration reports after five years.".

SEC. 502. REPEAL OF CERTAIN DEPARTMENT OF DEFENSE REPORTING REQUIREMENTS THAT OTHERWISE TERMINATE AS OF DECEMBER 31, 2021.

(a) TITLE 10, UNITED STATES CODE.—Title 10, United States Code, is amended as follows:

(1) SECTION 196.—Section 196, relating to the Department of Defense Test Resource Management Center, is amended by striking subsections (d) and (e)(3).

(2) SECTION 223a.—Section 223a, relating to budget justification materials for ballistic missile defense programs, is amended by striking subsection (a).

(3) SECTION 229.—

(A) Section 229, relating to the display of budget information for programs for combating terrorism, is repealed.

(B) The table of sections at the beginning of chapter 9 is amended by striking the item relating to section 229.

(4) SECTION 231a.—

(A) Section 231a, relating to budgeting for life-cycle costs of aircraft for the Navy, Army, and Air Force, is repealed.

(B) The table of sections at the beginning of chapter 9 is amended by striking the item relating to section 231a.

(5) SECTION 238.—

(A) Section 238, relating to program elements for the cyber mission forces, is repealed.

(B) The table of sections at the beginning of chapter 9 is amended by striking the item relating to section 238.

(6) SECTION 2228.—Section 2228, relating to funding for the long-term strategy to reduce corrosion and the effects of corrosion on the military equipment and infrastructure of the Department of Defense, is amended by striking subsection (e).

(7) SECTION 2275.—

(A) Section 2275, relating to reports on integration of acquisition and capability delivery schedules for segments of major satellite acquisition programs and funding for such programs, is repealed.

(B) The table of sections at the beginning of chapter 135 is amended by striking the item relating to section 2275.

(8) Section 2276.—Section 2276, relating to commercial space launch cooperation, is amended by striking subsection (e).

(9) Section 2466.—Section 2466, relating to depot-level maintenance and repair workloads, is amended by striking subsection (d).

(10) Section 7310.—Section 7310, relating to report on repair of certain vessels in foreign shipyards, is amended by striking subsection (c).

(11) Section 10543.—Section 10543, relating to National Guard and reserve component equipment procurement and military construction funding, is amended by striking subsections (a) and (c).

(b) NDAA FOR FY 2002.— Section 232(h) of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107; 10 U.S.C. 2431 note), relating to an annual report on assessment of the adequacy and sufficiency of the Missile Defense Agency test program, is amended by striking paragraph (3).

(c) NDAA FOR FY 2007.—The John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) is amended as follows:

(1) Section 122 (120 Stat. 2104), as amended by section 121 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113–66; 127 Stat. 691), relating to the CVN-78 class aircraft carrier program, is amended by striking paragraph (1) of subsection (f).

(2) Section 1017 (120 Stat. 2379), relating to obtaining carriage by vessel, is amended by striking subsection (e).

(d) NDAA FOR FY 2009.—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), relating to reports on bandwidth requirements for major defense acquisition programs, is amended by striking paragraph (2).

(e) NDAA FOR FY 2011.—Section 1217 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383; 22 U.S.C. 7513 note), relating to

authority to establish a program to develop and carry out infrastructure projects in Afghanistan, is amended by striking subsection (i).

(f) NDAA FOR FY 2013.—Section 904(h) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 10 U.S.C. 133 note), relating to recommendations of the Deputy Assistant Secretary of Defense for Developmental Test and Evaluation, is amended by striking paragraphs (1) and (2).

(g) NDAA FOR FY 2015.—The Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291) is amended as follows:

(1) Section 1026(d) (128 Stat. 3490), relating to availability of funds for retirement of inactivation of Ticonderoga-class cruisers or dock landing ships, is amended by striking paragraph (1).

(2) Section 1662 (10 U.S.C. 2431 note), relating to testing and assessment of missile defense systems prior to production and deployment, is amended by striking subsections (c)(2) and (d)(2).

(h) CONFORMING AMENDMENTS.—

(1) SECTION 1061.—Section 1061 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 111 note) is amended—

(A) in subsection (c), by striking paragraphs (11), (12), (14), (16), (17), (36), (40), (41), (46), (59), and (63);

(B) in subsection (d), by striking paragraphs (3) and (16);

(C) in subsection (f), by striking paragraph (2);

(D) in subsection (g), by striking paragraph (3); and

(E) in subsection (i), by striking paragraphs (8), (13), (15), and (24).

(2) SECTION 1080.—Section 1080 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 10 U.S.C. 111 note) is repealed.

SEC. 503. DELAY IN SUNSET PROVISION FOR CERTAIN DEPARTMENT OF DEFENSE REPORTING REQUIREMENTS THAT OTHERWISE TERMINATE AS OF DECEMBER 31, 2021.

The reporting requirements under each of the following provisions of law (which otherwise cease to be in effect as of December 31, 2021, pursuant to section 1061 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 111 note)), shall remain in effect until December 31, 2023, and shall no longer be required to be submitted to Congress after that date:

(1) Sections 139(h) and 2399(g) of title 10, United States Code, relating to the annual report by the Director of Operational Test and Evaluation of the Department of Defense.

(2) Section 231, relating to an annual naval vessel construction plan.

SEC. 504. SUNSET OF CERTAIN REPORTING REQUIREMENTS CURRENTLY APPLICABLE TO DEPARTMENT OF DEFENSE.

(a) IN GENERAL.—This section provides for the termination of certain statutory reporting requirements that are applicable to the Department of Defense as of the date of the enactment of this Act.

(b) FISCAL YEAR 2018 SECTION 1051 REPORT LIST.—

(1) FIVE-YEAR SUNSET.—Any reporting requirement described in paragraph (2) shall cease to be in effect as of December 31, 2023.

(2) COVERED REPORTING REQUIREMENTS.—Paragraph (1) applies to each requirement to submit a report that is included on the list submitted by the Secretary of Defense to the Committees on Armed Services of the Senate and House of Representatives pursuant to section 1051(y) of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91).

(c) REPORTS CURRENTLY SPECIFIED FOR TERMINATION EFFECTIVE DECEMBER 31, 2021.—

(1) FURTHER FIVE-YEAR SUNSET.—Any reporting requirement described in paragraph (2) that is in effect on January 1, 2022, shall cease to be in effect as of December 31, 2026.

(2) COVERED REPORTING REQUIREMENTS.—Paragraph (1) applies to the reporting requirements specified in the following provisions of law:

(A) SECTION 1061.—Subsections (c) through (i) of section 1061 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 10 U.S.C. 111 note), as in effect on the day after the date of the enactment of this Act.

(B) SECTION 1051.—Subsection (x) of section 1051 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 113 note).

SEC. 505. ANNUAL NOTIFICATION TO CONGRESS OF EXPIRING REPORTING REQUIREMENTS.

(a) IN GENERAL.—Chapter 23 of title 10, United States Code, is amended by inserting after section 480a, as added by section 501(a), the following new section:

"§ 480b. Reports to Congress: annual notification of expiring provisions

"Not later than February 1 each year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a list setting forth each statutory reporting requirement applicable to the Department of Defense that by law will terminate during (or at the end of) the year during which the report is submitted.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 480a, as added by section 501(b), the following new item:

"480b. Reports to Congress: annual notification of expiring provisions.".

SECTIONS AFFECTED BY THE PROPOSAL

[The material below shows changes proposed to be made by the proposal 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*. (Where an amendment in the proposal would add a full new section to existing law, the text of that proposed new section is NOT set forth below since it is set out in full in the legislative text above.)]

[NOTE: Text shown as current law incorporates amendments made by the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91, enacted Dec. 12, 2017]

TITLE 10, UNITED STATES CODE

§196. Department of Defense Test Resource Management Center

(a) ESTABLISHMENT AS DEPARTMENT OF DEFENSE FIELD ACTIVITY.—The Secretary of Defense shall establish within the Department of Defense under section 191 of this title a Department of Defense Test Resource Management Center (hereinafter in this section referred to as the "Center"). The Secretary shall designate the Center as a Department of Defense Field Activity.

(b) DIRECTOR AND DEPUTY DIRECTOR.—(1) At the head of the Center shall be a Director, selected by the Secretary from among individuals who have substantial experience in the field of test and evaluation.

(2) There shall be a Deputy Director of the Center, selected by the Secretary from among individuals who have substantial experience in the field of test and evaluation. The Deputy Director shall act for, and exercise the powers of, the Director when the Director is disabled or the position of Director is vacant.

(c) DUTIES OF DIRECTOR.—***

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~~(d) STRATEGIC PLAN FOR DEPARTMENT OF DEFENSE TEST AND EVALUATION RESOURCES.—(1) Not less often than once every two fiscal years, the Director, in coordination with the Director of Operational Test and Evaluation, the Secretaries of the military departments, and the heads of Defense Agencies with test and evaluation responsibilities, shall complete a strategic plan reflecting the needs of the Department of Defense with respect to test and evaluation facilities and resources. Each such strategic plan shall cover the period of ten fiscal years beginning with the fiscal year in which the plan is submitted under paragraph (3). The strategic plan shall be based on a comprehensive review of the test and evaluation requirements of the Department and the adequacy of the test and evaluation facilities and resources of the Department to meet those requirements.~~

~~(2) The strategic plan shall include the following:~~

~~(A) An assessment of the test and evaluation requirements of the Department for the period covered by the plan.~~

~~(B) An identification of performance measures associated with the successful achievement of test and evaluation objectives for the period covered by the plan.~~

~~(C) An assessment of the test and evaluation facilities and resources that will be needed to meet such requirements and satisfy such performance measures.~~

~~(D) An assessment of the current state of the test and evaluation facilities and resources of the Department.~~

~~(E) An assessment of plans and business case analyses supporting any significant modification of the test and evaluation facilities and resources of the Department projected, proposed, or recommended by the Secretary of a military department or the head of a Defense Agency for such period, including with respect to the expansion, divestment, consolidation, or curtailment of activities.~~

~~(F) An itemization of acquisitions, upgrades, and improvements necessary to ensure that the test and evaluation facilities and resources of the Department are adequate to meet such requirements and satisfy such performance measures.~~

~~(G) An assessment of the budgetary resources necessary to implement such acquisitions, upgrades, and improvements.~~

~~(3) Upon completing a strategic plan under paragraph (1), the Director shall submit to the Secretary of Defense a report on that plan. The report shall include the plan and a description of the review on which the plan is based.~~

~~(4) Not later than 60 days after the date on which the report is submitted under paragraph (3), the Secretary of Defense shall transmit to the Committee on Armed Services and Committee on Appropriations of the Senate and the Committee on Armed Services and Committee on Appropriations of the House of Representatives the report, together with any comments with respect to the report that the Secretary considers appropriate.~~

(e) CERTIFICATION OF BUDGETS.—(1) The Secretary of Defense, acting through the Under Secretary of Defense (Comptroller), shall require that the Secretary of each military department and the head of each Defense Agency with test and evaluation responsibilities transmit such Secretary's or Defense Agency head's proposed budget for test and evaluation activities for a fiscal year and for the period covered by the future-years defense program submitted to Congress under section 221 of this title for that fiscal year to the Director of the Center for review under paragraph (2) before submitting such proposed budget to the Under Secretary of Defense (Comptroller).

(2)(A) The Director of the Center shall review each proposed budget transmitted under paragraph (1) and shall, not later than January 31 of the year preceding the fiscal year for which such budgets are proposed, submit to the Secretary of Defense a report containing the comments of the Director with respect to all such proposed budgets, together with the certification of the Director as to whether such proposed budgets are adequate.

(B) The Director shall also submit, together with such report and such certification, an additional certification as to whether such proposed budgets provide balanced support for such strategic plan.

~~(3) The Secretary of Defense shall, not later than March 31 of the year preceding the fiscal year for which such budgets are proposed, submit to Congress a report on those proposed budgets which the Director has not certified under paragraph (2)(A) to be adequate. The report shall include the following matters:~~

~~(A) A discussion of the actions that the Secretary proposes to take, together with any recommended legislation that the Secretary considers appropriate, to address the inadequacy of the proposed budgets.~~

~~(B) Any additional comments that the Secretary considers appropriate regarding the inadequacy of the proposed budgets.~~

(f) ***

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§223a. Ballistic missile defense programs: procurement

~~(a) BUDGET JUSTIFICATION MATERIALS.—In the budget justification materials submitted to Congress in support of the Department of Defense budget for any fiscal year (as submitted with the budget of the President under section 1105(a) of title 31), the Secretary of Defense shall specify, for each ballistic missile defense system element for which the Missile Defense Agency is engaged in planning for production and initial fielding, the following information:~~

~~(1) The production rate capabilities of the production facilities planned to be used for production of that element.~~

~~(2) The potential date of availability of that element for initial fielding.~~

~~(3) The estimated date on which the administration of the acquisition of that element is to be transferred from the Director of the Missile Defense Agency to the Secretary of a military department.~~

(b) ***

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~~§ 229. Programs for combating terrorism: display of budget information~~

~~(a) SUBMISSION WITH ANNUAL BUDGET JUSTIFICATION DOCUMENTS.—The Secretary of Defense shall submit to Congress, as a part of the documentation that supports the President's annual budget for the Department of Defense, a consolidated budget justification display, in classified and unclassified form, that includes all programs and activities of the Department of Defense combating terrorism program.~~

~~(b) REQUIREMENTS FOR BUDGET DISPLAY.—The budget display under subsection (a) shall include—~~

~~(1) the amount requested, by appropriation and functional area, for each of the program elements, projects, and initiatives that support the Department of Defense combating terrorism program, with supporting narrative descriptions and rationale for the funding levels requested; and~~

~~(2) a summary, to the program element and project level of detail, of estimated expenditures for the current year, funds requested for the budget year, and budget estimates through the completion of the current future-years defense plan for the Department of Defense combating terrorism program.~~

~~(c) EXPLANATION OF INCONSISTENCIES.—As part of the budget display under subsection (a) for any fiscal year, the Secretary shall identify and explain—~~

~~(1) any inconsistencies between (A) the information submitted under subsection (b) for that fiscal year, and (B) the information provided to the Director of the Office of Management and Budget in support of the annual report of the President to Congress on funding for executive branch counterterrorism and antiterrorism programs and activities for that fiscal year in accordance with section 1051(b) of the National Defense Authorization Act for Fiscal Year 1998 (31 U.S.C. 1113 note); and~~

~~(2) any inconsistencies between (A) the execution, during the previous fiscal year and the current fiscal year, of programs and activities of the Department of Defense combating terrorism program, and (B) the funding and specification for such programs and activities for those fiscal years in the manner provided by Congress (both in statutes and in relevant legislative history).~~

~~(d) DEPARTMENT OF DEFENSE COMBATING TERRORISM PROGRAM.—In this section, the term "Department of Defense combating terrorism program" means the programs, projects, and activities of the Department of Defense related to combating terrorism inside and outside the United States.~~

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~~§231a. Budgeting for life-cycle cost of aircraft for the Navy, Army, and Air Force: annual plan and certification~~

~~(a) ANNUAL AIRCRAFT PROCUREMENT PLAN AND CERTIFICATION.—Not later than 45 days after the date on which the President submits to Congress the budget for a fiscal year, the Secretary of Defense shall submit to the congressional defense committees—~~

~~(1) a plan for the procurement of the aircraft specified in subsection (b) for the Department of the Navy, the Department of the Army, and the Department of the Air Force developed in accordance with this section; and~~

~~(2) a certification by the Secretary that both the budget for such fiscal year and the future-years defense program submitted to Congress in relation to such budget under section 221 of this title provide for funding of the procurement of aircraft at a level that is sufficient for the procurement of the aircraft provided for in the plan under paragraph (1) on the schedule provided in the plan.~~

~~(b) COVERED AIRCRAFT.—The aircraft specified in this subsection are the aircraft as follows:~~

~~(1) Fighter aircraft.~~
~~(2) Attack aircraft.~~
~~(3) Bomber aircraft.~~
~~(4) Intertheater lift aircraft.~~
~~(5) Intratheater lift aircraft.~~
~~(6) Intelligence, surveillance, and reconnaissance aircraft.~~
~~(7) Tanker aircraft.~~
~~(8) Remotely piloted aircraft.~~
~~(9) Rotary-wing aircraft.~~
~~(10) Operational support and executive lift aircraft.~~
~~(11) Any other major support aircraft designated by the Secretary of Defense for purposes of this section.~~

~~(c) ANNUAL AIRCRAFT PROCUREMENT PLAN.—(1) The annual aircraft procurement plan developed for a fiscal year for purposes of subsection (a)(1) should be designed so that the aviation force provided for under the plan is capable of supporting the national military strategy of the United States as set forth in the most recent national security strategy report of the President under section 108 of the National Security Act of 1947 (50 U.S.C. 3043), except that, if at the time the plan is submitted with the defense budget materials for that fiscal year, a national security strategy report required under such section 108 has not been submitted to Congress as required by paragraph (2) or paragraph (3), if applicable, of subsection (a) of such section, then the plan should be designed so that the aviation force provided for under the plan is capable of supporting the aviation force structure recommended in the report of the most recent Quadrennial Defense Review.~~

~~(2) Each annual aircraft procurement plan shall include the following:~~

~~(A) A detailed program for the procurement of the aircraft specified in subsection (b) for each of the Department of the Navy, the Department of the Army, and the Department of the Air Force over the next 30 fiscal years.~~

~~(B) A description of the necessary aviation force structure to meet the requirements of the national military strategy of the United States or the most recent Quadrennial Defense Review, whichever is applicable under paragraph (1).~~

~~(C) The estimated levels of annual investment funding necessary to carry out each aircraft program, together with a discussion of the procurement strategies on which such estimated levels of annual investment funding are based, set forth in aggregate for the Department of Defense and in aggregate for each military department.~~

~~(D) The estimated level of annual funding necessary to operate, maintain, sustain, and support each aircraft program throughout the life-cycle of the program, set forth in aggregate for the Department of Defense and in aggregate for each military department.~~

~~(E) For each of the cost estimates required by subparagraphs (C) and (D)—~~

~~(i) a description of whether the cost estimate is derived from the cost estimate position of the military department or derived from the cost estimate position of the Cost Analysis and Program Evaluation office of the Secretary of Defense;~~

~~(ii) if the cost estimate position of the military department and the cost estimate position of the Cost Analysis and Program Evaluation office differ by more than .5 percent for any aircraft program, an annotated cost estimate difference and sufficient rationale to explain the difference; and~~

~~(iii) the confidence or certainty level associated with the cost estimate for each aircraft program.~~

~~(F) An assessment by the Secretary of Defense of the extent to which the combined aircraft forces of the Department of the Navy, the Department of the Army, and the Department of the Air Force meet the national security requirements of the United States.~~

~~(3) For any cost estimate required by paragraph (2)(C) or (D), for any aircraft program for which the Secretary is required to include in a report under section 2432 of this title, the source of the cost information used to prepare the annual aircraft plan, shall be sourced from the Selected Acquisition Report data that the Secretary plans to submit to the congressional defense committees in accordance with subsection (f) of that section for the year for which the annual aircraft plan is prepared.~~

~~(4) The annual aircraft procurement plan shall be submitted in unclassified form and shall contain a classified annex.~~

~~(d) ASSESSMENT WHEN AIRCRAFT PROCUREMENT BUDGET IS INSUFFICIENT TO MEET APPLICABLE REQUIREMENTS.—If the budget for a fiscal year provides for funding of the procurement of aircraft for either the Department of the Navy, the Department of the Army, or the Department of the Air Force at a level that is not sufficient to sustain the aviation force structure specified in the aircraft procurement plan for such Department for that fiscal year under subsection (a), the Secretary shall include with the defense budget materials for that fiscal year an assessment that describes and discusses the risks associated with the reduced force structure of aircraft that will result from funding aircraft procurement at such level. Such assessment shall be coordinated in advance with the commanders of the combatant commands.~~

~~(e) DEFINITIONS.—In this section:~~

~~(1) The term "budget", with respect to a fiscal year, means the budget for that fiscal year that is submitted to Congress by the President under section 1105(a) of title 31.~~

~~(2) The term "Quadrennial Defense Review" means the review of the defense programs and policies of the United States that is carried out every 4 years under section 118~~ [1] ~~of this title.~~

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~~§238. Cyber mission forces: program elements~~

~~(a) BUDGET JUSTIFICATION DISPLAY.—The Secretary of Defense shall submit to Congress, as a part of the defense budget materials for fiscal year 2017 and each fiscal year thereafter, a budget justification display that includes—~~

~~(1) a major force program category for the five-year defense plan of the Department of Defense for the training, manning, and equipping of the cyber mission forces; and~~

~~(2) program elements for the cyber mission forces.~~

~~(b) WAIVER.—The Secretary may waive the requirement under subsection (a) for fiscal year 2017 if the Secretary—~~

~~(1) determines the Secretary is unable to comply with such requirement for fiscal year 2017; and~~

~~(2) establishes a plan to implement the requirement for fiscal year 2018.~~

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§2228. Office of Corrosion Policy and Oversight

(a) ***

~~(c) REPORT.—(1) For each budget for a fiscal year, beginning with the budget for fiscal year 2009 and ending with the budget for fiscal year 2022, the Secretary of Defense shall submit, with the defense budget materials, a report on the following:~~

~~(A) Funding requirements for the long-term strategy developed under subsection (d).~~

~~(B) The estimated composite return on investment achieved by implementing the strategy, and documented in the assessments by the Department of Defense of completed corrosion projects and activities.~~

~~(C) For the fiscal year covered by the report and the preceding fiscal year, the funds requested in the budget compared to the funding requirements.~~

~~(D) If the full amount of funding requirements is not requested in the budget, the reasons for not including the full amount and a description of the impact on readiness, logistics, and safety of not fully funding required corrosion prevention and mitigation activities.~~

~~(E) For the fiscal year preceding the fiscal year covered by the report, the amount of funds requested in the budget for each project or activity described in subsection (d) compared to the funding requirements for the project or activity.~~

~~(F) For the fiscal year preceding the fiscal year covered by the report, a description of the specific amount of funds used for military corrosion projects, the Technical Corrosion Collaboration program, and other corrosion-related activities.~~

~~(2)(A) Each report under this section shall include, in an annex to the report, a summary of the most recent report required by subparagraph (B).~~

~~(B) Not later than December 31 of each year, through December 31, 2020, the corrosion control and prevention executive of a military department shall submit to the Director of Corrosion Policy and Oversight a report containing recommendations pertaining to the corrosion control and prevention program of the military department. Such report shall include recommendations for the funding levels necessary for the executive to carry out the duties of the executive under this section. The report required under this subparagraph shall—~~

~~(i) provide a summary of key accomplishments, goals, and objectives of the corrosion control and prevention program of the military department; and~~

~~(ii) include the performance measures used to ensure that the corrosion control and prevention program achieved the goals and objectives described in clause (i).~~

(f) ***

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~~§2275. Reports on integration of acquisition and capability delivery schedules for segments of major satellite acquisition programs and funding for such programs~~

~~(a) REPORTS REQUIRED.—The Under Secretary of Defense for Acquisition, Technology, and Logistics shall submit to the congressional defense committees a report on each major satellite acquisition program in accordance with subsection (d) that assesses—~~

~~(1) the integration of the schedules for the acquisition and the delivery of the capabilities of the segments for the program; and~~

~~(2) funding for the program.~~

~~(b) ELEMENTS.—Each report required by subsection (a) with respect to a major satellite acquisition program shall include the following:~~

~~(1) The amount of funding approved for the program and for each segment of the program that is necessary for full operational capability of the program.~~

~~(2) The dates by which the program and each segment of the program is anticipated to reach initial and full operational capability.~~

~~(3) A description of the intended primary capabilities and key performance parameters of the program.~~

~~(4) An assessment of the extent to which the schedules for the acquisition and the delivery of the capabilities of the segments for the program or any related program referred to in paragraph (1) are integrated.~~

~~(5) If the Under Secretary determines pursuant to the assessment under paragraph (4) that the program is a non-integrated program, an identification of—~~

~~(A) the impact on the mission of the program of having the delivery of the segment capabilities of the program more than one year apart;~~

~~(B) the measures the Under Secretary is taking or is planning to take to improve the integration of the acquisition and delivery schedules of the segment capabilities; and~~

~~(C) the risks and challenges that impede the ability of the Department of Defense to fully integrate those schedules.~~

~~(c) CONSIDERATION BY MILESTONE DECISION AUTHORITY.—The Milestone Decision Authority shall include the report required by subsection (a) with respect to a major satellite acquisition program as part of the documentation used to approve the acquisition of the program.~~

~~(d) SUBMITTAL OF REPORTS.—(1) In the case of a major satellite acquisition program initiated before January 2, 2013, the Under Secretary shall submit the report required by subsection (a) with respect to the program not later than one year after such date of enactment.~~[1]

~~(2) In the case of a major satellite acquisition program initiated on or after January 2, 2013, the Under Secretary shall submit the report required by subsection (a) with respect to the program at the time of the Milestone B approval of the program.~~

~~(e) NOTIFICATION TO CONGRESS OF NON-INTEGRATED ACQUISITION AND CAPABILITY DELIVERY SCHEDULES.—If, after submitting the report required by subsection (a) with respect to a major satellite acquisition program, the Under Secretary determines that the program is a non-integrated program, the Under Secretary shall, not later than 30 days after making that determination, submit to the congressional defense committees a report—~~

~~(1) notifying the committees of that determination; and~~

~~(2) identifying—~~

~~(A) the impact on the mission of the program of having the delivery of the segment capabilities of the program more than one year apart;~~

~~(B) the measures the Under Secretary is taking or is planning to take to improve the integration of the acquisition and delivery schedules of the segment capabilities; and~~

~~(C) the risks and challenges that impede the ability of the Department of Defense to fully integrate those schedules.~~

~~(f) ANNUAL UPDATES FOR NON-INTEGRATED PROGRAMS.—~~

~~(1) REQUIREMENT.—For each major satellite acquisition program that the Under Secretary has determined under subsection (b)(5) or subsection (e) is a non-integrated program, the Under Secretary shall annually submit to Congress, at the same time the budget of the President for a fiscal year is submitted under section 1105 of title 31, an update to the report required by subsection (a) for such program.~~

~~(2) TERMINATION OF REQUIREMENT.—The requirement to submit an annual report update for a program under paragraph (1) shall terminate on the date on which the Under Secretary submits to the congressional defense committees notice that the Under Secretary has determined that such program is no longer a non-integrated program, or on the date that is five years after the date on which the initial report update required under paragraph (1) is submitted, whichever is earlier.~~

~~(3) GAO REVIEW OF CERTAIN NON-INTEGRATED PROGRAMS.—If at the time of the termination of the requirement to annually update a report for a program under paragraph (1) the Under Secretary has not provided notice to the congressional defense committees that the Under Secretary has determined that the program is no longer a non-integrated program, the Comptroller General shall conduct a review of such program and submit the results of such review to the congressional defense committees.~~

~~(g) DEFINITIONS.—In this section:~~

~~(1) SEGMENTS.—The term "segments", with respect to a major satellite acquisition program, refers to any satellites acquired under the program and the ground equipment and user terminals necessary to fully exploit the capabilities provided by those satellites.~~

~~(2) MAJOR SATELLITE ACQUISITION PROGRAM.—The term "major satellite acquisition program" means a major defense acquisition program (as defined in section 2430 of this title) for the acquisition of a satellite.~~

~~(3) MILESTONE B APPROVAL.—The term "Milestone B approval" has the meaning given that term in section 2366(e)(7) of this title.~~

~~(4) NON-INTEGRATED PROGRAM.—The term "non-integrated program" means a program with respect to which the schedules for the acquisition and the delivery of the capabilities of the segments for the~~

~~program, or a related program that is necessary for the operational capability of the program, provide for the acquisition or the delivery of the capabilities of at least two of the three segments for the program or related program more than one year apart.~~

§2276. Commercial space launch cooperation

(a) AUTHORITY.—The Secretary of Defense may take such actions as the Secretary considers to be in the best interest of the Federal Government to-

(1) maximize the use of the capacity of the space transportation infrastructure of the Department of Defense by the private sector in the United States;

(2) maximize the effectiveness and efficiency of the space transportation infrastructure of the Department of Defense;

(3) reduce the cost of services provided by the Department of Defense related to space transportation infrastructure at launch support facilities and space recovery support facilities;

(4) encourage commercial space activities by enabling investment by covered entities in the space transportation infrastructure of the Department of Defense; and

(5) foster cooperation between the Department of Defense and covered entities.

(b) AUTHORITY FOR CONTRACTS AND OTHER AGREEMENTS RELATING TO SPACE TRANSPORTATION INFRASTRUCTURE.—The Secretary of Defense-

(1) may enter into an agreement with a covered entity to provide the covered entity with support and services related to the space transportation infrastructure of the Department of Defense; and

(2) upon the request of such covered entity, may include such support and services in the space launch and reentry range support requirements of the Department of Defense if-

(A) the Secretary determines that the inclusion of such support and services in such requirements-

(i) is in the best interest of the Federal Government;

(ii) does not interfere with the requirements of the Department of Defense; and

(iii) does not compete with the commercial space activities of other covered entities, unless that competition is in the national security interests of the United States; and

(B) any commercial requirement included in the agreement has full non-Federal funding before the execution of the agreement.

(c) CONTRIBUTIONS.—

(1) IN GENERAL.—The Secretary of Defense may enter into an agreement with a covered entity on a cooperative and voluntary basis to accept contributions of funds, services, and equipment to carry out this section.

(2) USE OF CONTRIBUTIONS.—Any funds, services, or equipment accepted by the Secretary under this subsection-

(A) may be used only for the objectives specified in this section in accordance with terms of use set forth in the agreement entered into under this subsection; and

(B) shall be managed by the Secretary in accordance with regulations of the Department of Defense.

(3) REQUIREMENTS WITH RESPECT TO AGREEMENTS.—An agreement entered into with a covered entity under this subsection-

(A) shall address the terms of use, ownership, and disposition of the funds, services, or equipment contributed pursuant to the agreement; and

(B) shall include a provision that the covered entity will not recover the costs of its contribution through any other agreement with the United States.

(d) DEFENSE COOPERATION SPACE LAUNCH ACCOUNT.—

(1) ESTABLISHMENT.—There is established in the Treasury of the United States a special account to be known as the "Defense Cooperation Space Launch Account".

(2) CREDITING OF FUNDS.—Funds received by the Secretary of Defense under subsection (c) shall be credited to the Defense Cooperation Space Launch Account.

(3) USE OF FUNDS.—Funds deposited in the Defense Cooperation Space Launch Account under paragraph (2) are authorized to be appropriated and shall be available for obligation only to the extent provided in advance in an appropriation Act for costs incurred by the Department of Defense in carrying out subsection (b). Funds in the Account shall remain available until expended.

~~(e) ANNUAL REPORT.—Not later than January 31 of each year, the Secretary of Defense shall submit to the congressional defense committees a report on the funds, services, and equipment accepted and used by the Secretary under this section during the preceding fiscal year.~~

(f) REGULATIONS.—The Secretary of Defense shall prescribe regulations to carry out this section.

(g) DEFINITIONS.—In this section:

(1) COVERED ENTITY.—The term "covered entity" means a non-Federal entity that-

(A) is organized under the laws of the United States or of any jurisdiction within the United States; and

(B) is engaged in commercial space activities.

(2) LAUNCH SUPPORT FACILITIES.—The term "launch support facilities" has the meaning given the term in section 50501(7) of title 51.

(3) SPACE RECOVERY SUPPORT FACILITIES.—The term "space recovery support facilities" has the meaning given the term in section 50501(11) of title 51.

(4) SPACE TRANSPORTATION INFRASTRUCTURE.—The term "space transportation infrastructure" has the meaning given that term in section 50501(12) of title 51.

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§2466. Limitations on the performance of depot-level maintenance of materiel

(a) PERCENTAGE LIMITATION.—Not more than 50 percent of the funds made available in a fiscal year to a military department or a Defense Agency for depot-level maintenance and repair workload may be used to contract for the performance by non-Federal Government personnel of such workload for the military department or the Defense Agency. Any such funds that are not used for such a contract shall be used for the performance of depot-level maintenance and repair workload by employees of the Department of Defense.

(b) WAIVER OF LIMITATION.—The Secretary of Defense may waive the limitation in subsection (a) for a fiscal year if-

(1) the Secretary determines that the waiver is necessary for reasons of national security; and

(2) the Secretary submits to Congress a notification of the waiver together with the reasons for the waiver.

(c) PROHIBITION ON DELEGATION OF WAIVER AUTHORITY.—The authority to grant a waiver under subsection (b) may not be delegated.

~~(d) ANNUAL REPORT.—(1) Not later than 90 days after the date on which the budget of the President for a fiscal year is submitted to Congress pursuant to section 1105 of title 31, the Secretary of Defense shall submit to Congress a report identifying, for each of the armed forces (other than the Coast Guard) and each Defense Agency, the percentage of the funds referred to in subsection (a) that was expended during the preceding fiscal year, and are projected to be expended during the current fiscal year and the ensuing fiscal year, for performance of depot-level maintenance and repair workloads by the public and private sectors.~~

~~(2) Each report required under paragraph (1) shall include as a separate item any expenditure covered by section 2474(f) of this title that was made during the fiscal year covered by the report and shall specify the amount and nature of each such expenditure.~~

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§7310. Overhaul, repair, etc. of vessels in foreign shipyards: restrictions

(a) VESSELS WITH HOMEPORT IN UNITED STATES OR GUAM.—A naval vessel (or any other vessel under the jurisdiction of the Secretary of the Navy) the homeport of which is in the United States or Guam may not be overhauled, repaired, or maintained in a shipyard outside the United States or Guam, other than in the case of voyage repairs.

(b) VESSEL CHANGING HOMEPORTS.—(1) In the case of a naval vessel the homeport of which is not in the United States (or a territory of the United States), the Secretary of the Navy may not during the 15-month period preceding the planned reassignment of the vessel to a homeport in the United States (or a territory of the United States) begin any work for the overhaul, repair, or maintenance of the vessel that is scheduled to be for a period of more than six months.

(2) In the case of a naval vessel the homeport of which is in the United States (or a territory of the United States), the Secretary of the Navy shall during the 15-month period preceding the planned reassignment of the vessel to a homeport not in the United States (or a territory of the United States) perform in the United States (or a territory of the United States) any work for the overhaul, repair, or maintenance of the vessel that is scheduled-

(A) to begin during the 15-month period; and

(B) to be for a period of more than six months.

~~(c) REPORT.—(1) The Secretary of the Navy shall submit to Congress each year, at the time that the President's budget is submitted to Congress that year under section 1105(a) of title 31, a report listing all repairs and maintenance performed on any covered naval vessel that has undergone work for the repair of the vessel in any shipyard outside the United States or Guam (in this section referred to as a "foreign shipyard") during the fiscal year preceding the fiscal year in which the report is submitted.~~

~~(2) The report shall include the percentage of the annual ship repair budget of the Navy that was spent on repair of covered naval vessels in foreign shipyards during the fiscal year covered by the report.~~

~~(3) Except as provided in paragraph (4), the report also shall include the following with respect to each covered naval vessel:~~

~~(A) The justification under law and operational justification for the repair in a foreign shipyard.~~

~~(B) The name and class of vessel repaired.~~

~~(C) The category of repair and whether the repair qualified as voyage repair as defined in Commander Military Sealift Command Instruction 4700.15C (September 13, 2007) or Joint Fleet Maintenance Manual (Commander Fleet Forces Command Instruction 4790.3 Revision A, Change 7), Volume III. Scheduled availabilities are to be considered as a composite and reported as a single entity without individual repair and maintenance items listed separately.~~

~~(D) The shipyard where the repair work was carried out.~~

~~(E) The number of days the vessel was in port for repair.~~

~~(F) The cost of the repair and the amount (if any) that the cost of the repair was less than or greater than the cost of the repair provided for in the contract.~~

~~(G) The schedule for repair, the amount of work accomplished (stated in terms of work days), whether the repair was accomplished on schedule, and, if not so accomplished, the reason for the schedule over run.~~

~~(H) The homeport or location of the vessel prior to its voyage for repair.~~

~~(I) Whether the repair was performed under a contract awarded through the use of competitive procedures or procedures other than competitive procedures.~~

~~(4) In the case of a covered vessel described in subparagraph (C) of paragraph (5), the report shall not be required to include the information described in subparagraphs (A), (E), (F), (G), and (I) of paragraph (3).~~

~~(5) In this subsection, the term "covered naval vessel" means any of the following:~~

~~(A) A naval vessel.~~

~~(B) Any other vessel under the jurisdiction of the Secretary of the Navy.~~

~~(C) A vessel not described in subparagraph (A) or (B) that is operated pursuant to a contract entered into by the Secretary of the Navy and the Maritime Administration or the United States Transportation Command in support of Department of Defense operations.~~

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§10543. National Guard and reserve component equipment procurement and military construction funding: inclusion in future-years defense program

~~(a) IN GENERAL.—The Secretary of Defense shall specify in each future-years defense program submitted to Congress under section 221 of this title the estimated expenditures and the proposed appropriations, for each fiscal year of the period covered by that program, for the procurement of equipment and for military construction for each of the reserve components of the armed forces.~~

(b) ASSOCIATED ANNEXES.—The associated annexes of the future-years defense program shall specify, at the same level of detail as is set forth in the annexes for the active components, the amount requested for--

(1) procurement of each item of equipment to be procured for each reserve component; and

(2) each military construction project to be carried out for each reserve component, together with the location of the project.

~~(c) REPORT.—(1) If the aggregate of the amounts specified in paragraphs (1) and (2) of subsection (b) for a fiscal year is less than the amount equal to 90 percent of the average authorized amount applicable for that fiscal year under paragraph (2), the Secretary of Defense shall submit to Congress a report specifying for each reserve component the additional items of equipment that would be procured, and the additional military construction projects that would be carried out, if that aggregate amount were an amount equal to such average authorized amount. The report shall be at the same level of detail as is required by subsection (b).~~

~~(2) In this subsection, the term "average authorized amount", with respect to a fiscal year, means the average of~~

~~(A) the aggregate of the amounts authorized to be appropriated for the preceding fiscal year for the procurement of items of equipment, and for military construction, for the reserve components; and~~

~~(B) the aggregate of the amounts authorized to be appropriated for the fiscal year preceding the fiscal year referred to in subparagraph (A) for the procurement of items of equipment, and for military construction, for the reserve components.~~

~~(3) A report required under paragraph (1) for a fiscal year shall be submitted not later than 90 days after the date on which the President submits to Congress the budget for such fiscal year under section 1105(a) of title 31.~~

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NATIONAL DEFENSE AUTHORIZATION ACTS

National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107)

SEC. 232. [10 U.S.C. 2431 note] MISSILE DEFENSE AGENCY TEST PROGRAM.

(a) ***

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(h) ANNUAL OT&E ASSESSMENT AND CHARACTERIZATION OF CERTAIN BALLISTIC MISSILE DEFENSE MATTERS.—(1) The Director of Operational Test and Evaluation shall each year assess the adequacy and sufficiency of the Missile Defense Agency test program during the preceding fiscal year.

(2) The Director of Operational Test and Evaluation shall also each year characterize the operational effectiveness, suitability, and survivability of the ballistic missile defense system, and its elements, that have been fielded or tested before the end of the preceding fiscal year.

~~(3) Not later than February 15 each year the Director shall submit to the congressional defense committees a report on the assessment under paragraph (1) and the characterization under paragraph (2) with respect to the preceding fiscal year.~~

*****

John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364)

SEC. 122. ADHERENCE TO NAVY COST ESTIMATES FOR CVN–78 CLASS OF AIRCRAFT CARRIERS.

(a) ***

(f) REQUIREMENTS FOR CVN–79.—

~~(1) QUARTERLY COST ESTIMATE.—The Secretary of the Navy shall submit to the congressional defense committees on a quarterly basis a report setting forth the most current cost estimate for the aircraft carrier designated as CVN–79 (as estimated by the program manager). Each cost estimate shall include the current percentage of completion of the program, the total costs incurred, and an estimate of costs at completion for ship construction, Government-furnished equipment, and engineering and support costs.~~

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SEC. 1017. OBTAINING CARRIAGE BY VESSEL: CRITERION REGARDINGOVERHAUL, REPAIR, AND MAINTENANCE OF VESSELS IN THE UNITED STATES.

(a) ***

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~~(e) ANNUAL REPORT.—The Secretary, acting through the United States Transportation Command, shall annually submit to the Committees on Armed Services of the Senate and the House of Representatives a report regarding overhaul, repair, and maintenance performed on covered vessels of each offeror of carriage to which the acquisition policy applies.~~

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Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417)

SEC. 1047. [10 U.S.C. 2366b note] FORMAL REVIEW PROCESS FOR BANDWIDTH REQUIREMENTS.

(a) ***

(d) ***

~~(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 meeting the bandwidth requirements for major defense acquisition programs and major system acquisition programs during the preceding fiscal year.~~

*****

Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383)

SEC. 1217. [22 U.S.C. 7513 note] AUTHORITY TO ESTABLISH A PROGRAM TO DEVELOP AND CARRY OUT INFRASTRUCTURE PROJECTS IN AFGHANISTAN.

(a) ***

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~~(i) REPORTS.—~~

~~(1) REPORT REQUIRED.—Not later than 30 days after the end of each fiscal year in which funds are obligated, expended, or transferred under the program authorized under subsection (a), the Secretary of Defense, in coordination with the Secretary of State, shall submit to the appropriate congressional committees a report regarding implementation of the program during such fiscal year.~~

~~(2) MATTERS TO BE INCLUDED.—The report required under paragraph (1) shall include the following:~~

~~(A) The allocation and use of funds under the program during the fiscal year.~~

~~(B) A description of each project for which funds were expended or transferred during the fiscal year.~~

*****

National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239)

SEC. 904. ***

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(h) [10 U.S.C. 133 note] REPORTS TO CONGRESS ON FAILURE TO COMPLY WITH RECOMMENDATIONS.—

~~(1) REPORT REQUIRED.—Not later than 60 days after the end of each fiscal year, from fiscal year 2013 through fiscal year 2018, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on each case in which a major defense acquisition program, in the preceding fiscal year—~~

~~(A) proceeded to implement a test and evaluation master plan notwithstanding a decision of the Deputy Assistant Secretary of Defense for Developmental Test and Evaluation to disapprove the developmental test and evaluation plan within that plan in accordance with former section 139b(a)(5)(B) of title 10, United States Code; or~~

~~(B) proceeded to initial operational testing and evaluation notwithstanding a determination by the Deputy Assistant Secretary of Defense for Developmental Test and Evaluation on the basis of an assessment of operational test readiness that the program is not ready for operational testing.~~

~~(2) MATTERS COVERED.—~~

~~(A) For each program covered by paragraph (1)(A), the report shall include the following:~~

~~(i) A description of the specific aspects of the developmental test and evaluation plan that the Deputy Assistant Secretary determined to be inadequate.~~

~~(ii) An explanation of the reasons why the program disregarded the Deputy Assistant Secretary's recommendations with regard to those aspects of the developmental test and evaluation plan.~~

~~(iii) The steps taken to address those aspects of the developmental test and evaluation plan and address the concerns of the Deputy Assistant Secretary.~~

~~(B) For each program covered by paragraph (1)(B), the report shall include the following:~~

~~(i) An explanation of the reasons why the program proceeded to initial operational testing and evaluation notwithstanding the findings of the assessment of operational test readiness.~~

~~(ii) A description of the aspects of the approved testing and evaluation master plan that had to be set aside to enable the program to proceed to initial operational testing and evaluation.~~

~~(iii) A description of how the program addressed the specific areas of concern raised in the assessment of operational test readiness.~~

~~(iv) A statement of whether initial operational testing and evaluation identified any significant shortcomings in the program.~~

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Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291)

SEC. 1026. AVAILABILITY OF FUNDS FOR RETIREMENT OR INACTIVATION OF TICONDEROGA CLASS CRUISERS OR DOCK LANDING SHIPS.

(a) ***

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(d) REPORTS.—

~~(1) IN GENERAL.—At the same time as the submittal to Congress of the budget of the President under section 1105 of title 31, United States, for each fiscal year during which activities under the modernization of vessels will be carried out under this section, the Secretary of the Navy shall submit to the congressional defense committees a written report on the status of the modernization of vessels under this section.~~

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SEC. 1662. [10 U.S.C. 2431 note] TESTING AND ASSESSMENT OF MISSILE DEFENSE SYSTEMS PRIOR TO PRODUCTION AND DEPLOYMENT.

(a) ***

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(c) ASSESSMENT BY DIRECTOR OF OPERATIONAL TEST AND EVALUATION.—The Director of Operational Test and Evaluation shall-

(1) provide to the Secretary the assessment of the Director, based on the available test data, of the sufficiency, adequacy, and results of the testing of each covered system, including an assessment of whether the covered system will be sufficiently effective, suitable, and survivable when needed; and

~~(2) submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a written summary of such assessment~~.

(d) ASSESSMENT BY COMMANDER OF UNITED STATES STRATEGIC COMMAND.—The Commander of the United States Strategic Command shall-

(1) provide to the Secretary a military utility assessment of the operational utility of each covered system; and

~~(2) not later than 30 days after providing such assessment to the Secretary, submit to the congressional defense committees a written summary of such assessment~~.

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National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328)

SEC. 1061. [10 USC 111 note] TEMPORARY CONTINUATION OF CERTAIN DEPARTMENT OF DEFENSE REPORTING REQUIREMENTS.

(a) EXCEPTIONS TO REPORTS TERMINATION PROVISION.—Section 1080 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 129 Stat. 1000; 10 U.S.C. 111 note) does not apply to any report required to be submitted to Congress by the Department of Defense, or by any officer, official, component, or element of the Department, pursuant
to a provision of law specified in this section, notwithstanding the enactment of the reporting requirement by an annual national defense authorization Act or the inclusion of the report in the list of reports prepared by the Secretary of Defense pursuant to subsection (c) of such section 1080.

(b) FINAL TERMINATION DATE FOR SUBMITTAL OF EXEMPTED REPORTS.—

(1) IN GENERAL.—Except as provided in paragraph (2), each report required pursuant to a provision of law specified in this section that is still required to be submitted to Congress as of December 31, 2021, shall no longer be required to be submitted to Congress after that date.

(2) REPORTS EXEMPTED FROM TERMINATION.—The termination dates specified in paragraph (1) and section 1080 of the National Defense Authorization Act for Fiscal Year 2016 do not apply to the following:

(A) The submission of the reports on the National Military Strategy and Risk Assessment under section 153(b)(3) of title 10, United States Code.

(B) The submission of the future-years defense program (including associated annexes) under section 221 of title 10, United States Code.

(C) The submission of the future-years mission budget for the military programs of the Department of Defense under section 221 of such title.

(D) The submission of audits of contracting compliance by the Inspector General of the Department of Defense under section 1601(b) of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66; 10 U.S.C. 2533a note).

(c) REPORTS REQUIRED BY TITLE 10, UNITED STATES CODE.—Subject to subsection (b), subsection (a) applies to reporting requirements contained in the following sections of title 10, United States Code:

(1) Section 113(i).
(2) Section 117(e).
(3) [Section] 118a(d).
(4) Section 119(a) and (b).
(5) Section 127b(f).
(6) Section 139(h).
(7) [Former] Section 139b(d).
(8) Sections [sic] 153(c).
(9) Section 171a(e) and (g)(2).
(10) Section 179(f).
~~(11) Section 196(d)(1), (d)(4), and (e)(3).~~
~~(12) Section 223a(a).~~
(13) Section 225(c)[.]
~~(14) Section 229.~~
(15) Section 231.
~~(16) Section 231a.~~
~~(17) Section 238.~~
(18) Section 341(f) of title 10, United States Code, as amended by section 1246 of this Act.
(19) Section 401(d).
(20) Section 407(d).
(21) Section 481a(c).
(22) Section 482(a).
(23) Section 488.
(24) Section 494(b).
(25) Section 526(j).
(26) Section 946(c) (Article 146 of the Uniform Code of Military Justice).
(27) Section 981(c).
(28) Section 1116(d).
(29) Section 1566(c)(3).
(30) Section 1557(e).
(31) Section 1781a(e).
(32) Section 1781c(h) [now 1781c(g)].
(33) Section 2011(e) [now 322(e)].
(34) Section 2166(i) [now 343(i)].
(35) Section 2218(h).
~~(36) Section 2228(e).~~
(37) Section 2229(d).
(38) Section 2229a.
(39) Section 2249c(c) [now 345(c)].
~~(40) Section 2275.~~
~~(41) Section 2276(e).~~

(42) Section 2367(d).
(43) Section 2399(g).
(44) Section 2445b.
(45) Section 2464(d).
~~(46) Section 2466(d).~~
(47) Section 2504.
(48) Section 2561(c).
(49) Section 2684a(g).
(50) Section 2687a.
(51) Section 2711.
(52) Sections [sic] 2884(b) and (c).
(53) Section 2911(a) and (b)(3).
(54) Section 2925.
(55) Section 2926(c)(4).
(56) Section 4361(d)(4)(B).
(57) Section 4721(e).
(58) Section 6980(d)(4)(B).
~~(59) Section 7310(c).~~
(60) Section 9361(d)(4)(B).
(61) Section 10216(c).
(62) Section 10541.
~~(63) Section 10543.~~
(64) Section 10504(b).
(65) Section 235.
(66) Section 115a.
(67) Section 2193b(g).

(d) REPORTS REQUIRED BY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015.—Subject to subsection (b), subsection (a) applies to reporting requirements contained in the following sections of the Carl Levin and Howard P. ``Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291):

(1) Section 546(d) (10 U.S.C. 1561 note).
(2) Section 1003[A] (10 U.S.C. 221 note).
~~(3) Section 1026(d) (128 Stat. 3490).~~
(4) Section 1055 (128 Stat. 3498).
(5) Section 1204(b) (10 U.S.C. 2249e note) [now 10 U.S.C. 362 note].
(6) Section 1205(e) (128 Stat. 3537).
(7) Section 1206(e) (10 U.S.C. 2282 note).
(8) Section 1211 (128 Stat. 3544).
(9) Section 1225 (128 Stat. 3550).
(10) Section 1235 (128 Stat. 3558).
(11) Section 1245 (128 Stat. 3566).
(12) Section 1253(b) (22 U.S.C. 2151 note).
(13) Section 1275(b) (128 Stat. 3591).
(14) Section 1343 (128 Stat. 3605; 50 U.S.C. 3743).
(15) Section 1650 (128 Stat. 3653).
~~(16) Section 1662(c)(2) and (d)(2) (128 Stat. 3657; 10 U.S.C. 2431 note).~~
(17) Section 2821(a)(3) (10 U.S.C. 2687 note).
(18) Section 1209(d) (128 Stat. 3542).

(e) REPORTS REQUIRED BY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014.—Subject to subsection (b), subsection (a) applies to reporting requirements contained in the following sections of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66):

(1) Section 704(e) (10 U.S.C. 1074 note).
(2) Sections [sic] 713(f), (g), and (h) (10 U.S.C. 1071 note).
(3) Section 904(d)(2) (10 U.S.C. 111 note).
(4) [Former] Section 1205(f)(3) ([Former] 32 U.S.C. 107 note).

(f) REPORTS REQUIRED BY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013.—Subject to subsection (b), subsection (a) applies to reporting requirements contained in the following sections of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239):

(1) Section 524(c)(2) (10 U.S.C. 1222 note).
~~(2) Section 904(h)(1) and (2) (10 U.S.C. 133 note).~~
(3) Section 1009 (126 Stat. 1906).
(4) Section 1023 (126 Stat. 1911).
(5) Section 1052(b)(4) (126 Stat. 1936; 49 U.S.C. 40101 note).

(g) REPORTS REQUIRED BY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011.—Subject to subsection (b), subsection (a) applies to reporting requirements contained in the following sections of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383):

(1) Section 123 (10 U.S.C. 167 note).
(2) Section 1216(c) (124 Stat. 4392).
~~(3) Section 1217(i) (22 U.S.C. 7513 note).~~
(4) Section 1631(d) (10 U.S.C. 1561 note).

(h) REPORTS REQUIRED BY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010.—Subject to subsection (b), subsection (a) applies to reporting requirements contained in the following sections of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84):

(1) Section 711(d) (10 U.S.C. 1071 note).
(2) Section 1003(b) (10 U.S.C. 2222 note).
(3) Section 1244(d) (22 U.S.C. 1928 note).
(4) Section 1245 (123 Stat. 2542) [10 U.S.C. 113 note].
(5) Section 1806 (10 U.S.C. 948a note).

(i) REPORTS REQUIRED BY OTHER LAWS.—Subject to subsection (b), subsection (a) applies to reporting requirements contained in the following provisions of law:

(1) Sections [sic] 1412(i) and (j) of the National Defense Authorization Act, 1986 [probably should be "Department of Defense Authorization Act, 1986"] (50 U.S.C. 1521), as amended by section 1421 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383).

(2) Section 1703 of the National Defense Authorization Act for Fiscal Year 1994 (50 U.S.C. 1523).

(3) Section 717(c) of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106; 10 U.S.C. 1073 note).

(4) Section 234 of the National Defense Authorization Act for Fiscal Year 1998 (50 U.S.C. 2367).

(5) Section 1309(c) of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85; 10 U.S.C. 113 note).

(6) Section 1237(b)(2) of the [Strom Thurmond] National Defense Authorization Act for Fiscal Year 1999 (Public Law 105-261; 50 U.S.C. 1701 note).

(7) Section 1202 of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65; 10 U.S.C. 113 note).

~~(8) Section 232(h)(2) [probably should be "232(h)(3)"] of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107; 10 U.S.C. 2431 note).~~

(9) Section 366(a)(5) and (c)(2) of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314; 10 U.S.C. 113 note).

(10) Section 1208(f) of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375; 118 Stat. 2086).

(11) Section 1208(d) of the National Defense Authorization Act for [Fiscal Year] 2006 (Public Law 109-163; 119 Stat. 3459).

(12) Section 1405(d) of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163; 10 U.S.C. 801 note).

~~(13) Section 122(f)(1) of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364; 120 Stat. 2104).~~

(14) Section 721 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364; 120 Stat. 2294).

~~(15) Section 1017(e) of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364; 10 U.S.C. 2631 note).~~

(16) Section 1517(f) of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364; 120 Stat. 2443).

(17) Section 911(f)(2) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 10 U.S.C. 2271 note).

(18) Section 1034(d) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 309) [10 U.S.C. 272 note].

(19) Section 1107(d) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 358) [10 U.S.C. 2358 note].

(20) Section 1233(f) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 393).

(21) Section 1234(e) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 394).

(22) Section 219(c) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417; 10 U.S.C. 2358 note).

(23) Section 533(i) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110–417; 10 U.S.C. prec. 701 note).

~~(24) Section 1047(d)(2) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417; 10 U.S.C. 2366b note).~~

(25) Section 1201(b)(1) of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81; 125 Stat. 1619).

(26) Section 1236 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81; 125 Stat. 1641).

(27) Section 103A(b)(3) of the Sikes Act (16 U.S.C. 670c-1(b)(3)).

(28) Section 1511(h) of the Armed Forces Retirement Home Act of 1991 (24 U.S.C. 411(h)).

(29) Section 901(f) [now 901(g)] of the Office of National Drug Control Policy Reauthorization Act of 2006 (Public Law 109-469; 32 U.S.C. 112 note), as added by section 1008 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239).

(30) Section 14 of the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98h-5).

(31) Section 105A(b) of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20308(b)), as added by section 586 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84).

(32) Section 112(f) of title 32, United States Code.

(33) Section 310b(i)(2) [probably should be "301b(i)(2)"] of title 37, United States Code.

(34) Section 509(k) of title 32, United States Code.

(35) Section 1022(c) of the National Defense Authorization Act for 2004 (Public Law 108–136; 10 U.S.C. 371 note).

(j) CONFORMING AMENDMENT.—Section 1080(a) of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 129 Stat. 1000; 10 U.S.C. 111 note) is amended—

(1) by striking ``on the date that is two years after the date of the enactment of this Act" and inserting ``November 25, 2017"; and

(2) by striking ``effective".

(k) REPORT TO CONGRESS.—Not later than February 1, 2017, the Secretary of Defense shall submit to the congressional defense committees a report that includes each of the following:

(1) A list of all reports that are required to be submitted to Congress as of the date of the enactment of this Act [Dec. 23, 2016] that will no longer be required to be submitted to Congress as of November 25, 2017.

(2) For each such report, a citation to the provision of law under which the report is or was required to be submitted.

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National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-328)

~~SEC. 1080. [10 USC 111 note] TERMINATION OF REQUIREMENT FOR SUBMITTAL TO CONGRESS OF REPORTS REQUIRED OF DEPARTMENT OF DEFENSE BY STATUTE.~~

~~(a) TERMINATION.—Effective November 25, 2017, each report described in subsection (b) that is still required to be submitted to Congress as of such date shall no longer be required to be submitted to Congress.~~

~~(b) COVERED REPORTS.—A report described in this subsection is a report that is required to be submitted to Congress by the Department of Defense, or by any officer, official, component, or element of the Department, by any annual national defense authorization Act as of April 1, 2015.~~

~~(c) REPORT TO CONGRESS.—Not later than February 1, 2016, the Secretary of Defense shall submit to the congressional defense committees a report that includes each of the following:~~

~~(1) A list of all reports described in subsection (b).~~

~~(2) For each such report, a citation to the provision of law under which the report is required to be submitted.~~

~~(3) Draft legislation that would repeal each such report.~~

Conclusion

The Section 809 Panel's work provides a unique opportunity to reform DoD's acquisition system in conjunction with ongoing efforts—particularly the realignment of USD(AT&L), the work of the DFAR regulatory reform task force, and the initiatives in the Military Departments. The Section 809 Panel will continue to coordinate closely with these efforts and others that may arise in the coming months.

There is currently a rare alignment of will and ability that make it possible to make substantial shifts in defense acquisition policy. As commissioners of the Section 809 Panel stated to the House Armed Services Committee when submitting the *Interim Report* in May 2017, "[DoD] must be agile enough to respond to rapidly evolving threats and fast enough to develop and deliver new capabilities within the arc of emerging threats. Let's design for the 22nd century in the beginning of the 21st."

The Section 809 Panel has challenged itself to think boldly as it sets in place a framework for systemic transformation of the dynamic defense marketplace that will match effort to task, and will help ensure processes, oversight, and regulations are suited to the complexity and risk required by the situation and applicable solution. This approach, which builds on what is good and right in the current system, is dynamic enough to make simple acquisitions easier and complex acquisitions smarter. The Section 809 Panel's continued efforts will complement the framework by removing as many of the smaller regulatory and statutory obstacles as possible.

DoD is tasked with meeting strategic challenges and routine responsibilities. To support its mission and address those challenges and responsibilities, DoD makes purchases that range from ball-point pens to ballistic missiles. Despite the differences between buying major systems and ordinary items or

short-term and long-term investments, DoD acquires everything it purchases using a similar process modelled after one that is most appropriate for high-dollar-value systems.

Defending the nation is priority one. To achieve that objective, myriad other missions exist within DoD—the most essential of which is supporting its warfighters—and all rely on a smoothly functioning acquisition system. It is shortsighted to look solely at major weapons systems and other high-dollar buys, when even the most mundane purchases are, at some level, mission essential. Congress charged the Section 809 Panel with making recommendations to streamline the acquisition process across the entire DoD enterprise—for the archaeologist at the Defense POW/MIA Accounting Agency, the cyber operator at 24th Air Force, the administrative professional in the Pentagon, the student at Naval Postgraduate School, and the Ranger in Afghanistan.

The Section 809 Panel enlisted the assistance of Institute for Defense Analysis (IDA) to evaluate past acquisition reform effort reports. IDA's research shows that in no less than eight reports since 1969, unstable requirements were cited as a root cause of acquisition challenges and failures. The system requires stable requirements to solicit proposals; however, as the threat and demand evolve, new ideas are sparked and innovations appear. It is time to build a system that honors both the nature of the mission and the needs of those who must implement it. It is time to recognize that DoD must do business in a far more dynamic marketplace.

In today's acquisition system, risk is equated with dollar value, when risk might be driven by time, design, or environment. The Section 809 Panel's recommendations recognize that buying high dollar-amounts of low-risk, readily-available items should not have the same approval processes as required for purchasing a unique, customized requirement. Future Section 809 Panel reports will recommend shifts to address this reality and emphasize collaborative problem solving, improve responsiveness, increase transparency, value time, and allow for appropriate tradeoffs between dollars spent and risk taken.

These shifts are only part of the solution. The other part comes from an engaged community—buyers and sellers, program managers, contracting officers and contractors, government, academia, and industry. To ensure successful implementation, the entire acquisition community needs to partner in different ways. Recognizing that vague recommendations are not actionable, the Section 809 Panel aims to find the statutes and regulations that need improvement and provide specific language that details how to create an environment that fosters mission achievement.

This *Volume 1 Report* of the Section 809 Panel is part of a larger whole. Two additional volumes will be published in June 2018 and January 2019 respectively. The Section 809 Panel's *Interim Report,* published in May 2017, addressed a number of small issues that strain the system when aggregated—proving that bold does not always need to be big. The Section 809 Panel continues to seek out other recommendations in an effort to streamline the system and develop a new framework for the dynamic defense marketplace. Future volumes will elaborate on the themes above, as well as include recommendations on workforce hiring authorities, development, and retention, use of workforce development funds, replicating the shared characteristics of successful programs, and budget challenges.

The initial recommendations in this volume seek to make selling commercial items to the federal government as simple as possible and bring clarity to the definitions of personal and nonpersonal services. In alignment with DoD's strategy, these recommendations support better use of small businesses to increase DoD's lethality, technological dominance, and the maintenance of that technical dominance, along with putting business experts in charge of business systems. As USD(AT&L) begins its reorganization, the Section 809 Panel seeks to increase the Secretary's organizational flexibility and eliminate reporting requirements.

Though the Section 809 Panel is at the midpoint of its tenure, this submission to Congress is but the beginning of the panel's recommendations. The Section 809 Panel continues to seek public input to support the work of developing a responsive, adaptive, cost-effective approach to DoD acquisition that is bold, agile, simple, and effective.

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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."

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1	Revise definitions related to commercial buying to simplify their application and eliminate inconsistency.	18
2	Minimize government-unique terms applicable to commercial buying.	32
3	Align and clarify FAR commercial termination language.	44
4	Revise DFARS sections related to rights in technical data policy for commercial products.	46
5	Align DCAA's mission statement to focus on its primary customer, the contracting officer.	64
6	Revise the elements of DCAA's annual report to Congress to incorporate multiple key metrics.	67
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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
7b	Define the term *audit*.	72
7c	DCAA should use the full range of audit and nonaudit services available.	72
7d	Direct a review of the roles of DCAA and DCMA to ensure appropriate alignment and eliminate redundancies.	74
8	Establish statutory time limits for defense oversight activities.	76
9	Permit DCAA to use IPAs to manage resources to meet time limits.	80
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
11	Develop a Professional Practice Guide for DoD's oversight of contractor costs and business systems.	87
12	Require DCAA to obtain peer review from a qualified external organization.	91
13	Increase coverage of the effectiveness of contractor internal control audits by leveraging IPAs.	93
14	Incentivize contractor compliance and manage risk efficiently through robust risk assessment.	95
15	Clarify and streamline the definition of and requirements for an adequate *incurred cost proposal* to refocus the purpose of DoD's oversight.	100
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
17	Eliminate separate requirement for annual IRB certification of DBS investments.	130

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18	Fund DBSs in a way that allows for commonly accepted software development approaches.	137
19	Eliminate the Earned Value Management mandate for software programs using Agile methods.	151
20	Clarify the definitions of personal and nonpersonal services and incorporate in the DFARS a description of supervisory responsibilities for service contracts.	159
21	Refocus DoD's small business policies and programs to prioritize mission and advance warfighting capabilities and capacities.	169
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
21b	Build on the successes of the SBIR/STTR and RIF programs.	193
21c	Enable innovation in the acquisition system and among industry partners.	194
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
22a	Repeal the statutory requirement for Department of Defense Test Resource Management Center, 10 U.S.C. § 196.	199
22b	Repeal the statutory requirement for Office of Corrosion Policy and Oversight, 10 U.S.C. § 2228.	200
22c	Repeal the statutory requirement for Director for Performance Assessment and Root Cause Analysis (PARCA), 10 U.S.C. § 2438.	201
22d	Repeal the statutory requirement for Office of Technology Transition, 10 U.S.C. § 2515.	203
22e	Repeal the statutory requirement for Office for Foreign Defense Critical Technology Monitoring and Assessment, 10 U.S.C. § 2517.	204
22f	Repeal the statutory requirement at 10 U.S.C. § 204 for a Small Business Ombudsman within each defense audit agency.	206
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
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
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
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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
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24	Repeal, preserve, or maintain various DoD congressional reporting requirements.	229
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24b	Repeal the statutory requirement for the Ballistic Missile Defense Programs annual budget justification reports, 10 U.S.C. § 223a(a).	235
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24l	Repeal the statutory requirement for the Reserve Components annual procurement threshold report, 10 U.S.C. § 10543(c).	250
24m	Repeal the statutory requirement for the Missile Defense Agency annual overview report, FY 2002 NDAA, 232(h)(3).	252
24n	Repeal the statutory requirement for the Ford-Class Aircraft Carrier annual cost estimate report, FY 2007 NDAA, 122(d)(1).	253
24o	Repeal the statutory requirement for the Carriage by Vessel annual Repair Work in Foreign Shipyards report, FY 2007 NDAA, 1017(e).	254
24p	Repeal the statutory requirement for the Bandwidth Capacity annual overview report, FY 2009 NDAA, 1047(d)(2).	255
24q	Repeal the statutory requirement for the Afghanistan Infrastructure Fund annual overview report, FY 2011 NDAA, 1217(i).	257

#	Recommendations	Page
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
24s	Repeal the statutory requirement for the Ticonderoga-Class Cruisers and Dock Landing Ships annual modernization report, FY 2015 NDAA, 1026(d).	260
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
24u	Preserve the statutory requirement for the Director of Operational Test and Evaluation annual overview report, 10 U.S.C. § 139(h).	264
24v	Preserve the statutory requirement for Naval Vessel Construction annual strategic plan report, 10 U.S.C. § 231.	265
24w	Preserve the statutory requirement for the Director of Operational Test and Evaluation annual program report, 10 U.S.C. § 2399(g).	267
24x	Terminate in 2021 the statutory requirement for the Ballistic Missile Defense Programs annual acquisition baselines report, 10 U.S.C. § 225(c).	268
24y	Terminate in 2021 the statutory requirement for Depot-Level Maintenance biennial capability requirements report, 10 U.S.C. § 2464(d).	269
24z	Terminate in 2021 the statutory requirement for the National Technology and Industrial Base annual policy overview report, 10 U.S.C. § 2504.	271
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
24ab	Terminate in 2021 the statutory requirement for the Research and Development in Defense Laboratories annual funding report, FY 2009 NDAA, 219(c).	274

Appendices

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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 approached. 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: PANEL ACTIVITIES

Monthly Full-Panel Meetings

September 20-21, 2016	
Identifying the "Big Rocks" to Improving Defense Acquisition and Maintaining Defense Technology Advantage	▪ BG David Ehrhart, USAF (Ret.), Lockheed Martin Corp. ▪ Susan Warshaw Ebner, ABA Public Contract Law
AIA Perspectives	▪ Jason Timm, Aerospace Industries Association
Updating the Regulatory Source Code	▪ Andrew Hunter, Center for Strategic and International Studies
Acquisition Transformation Project, Acquisition of the Future (AOF)	▪ Ann-Marie Johnson, ASI Government ▪ Dina Jeffers, Deputy Secretary of the Army, Procurement ▪ Kymm McCabe, Deloitte Consulting
OFPP Priorities and Category Management	▪ Anne Rung, OFPP, OMB
Perspectives on Acquisition Reform, Lessons Learned from Research	▪ Dan Chenok, IBM Center for Business of Government
Acquisition Reform to Enable Military Effectiveness	▪ Lou Kratz, Lockheed Martin Corp.
Industry Roundtable (cohosted by U.S. Chamber of Commerce and Professional Services Council)	▪ 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	▪ Chris Gunderson, U.S. Air Force ▪ Louis Kratz, Lockheed Martin Corp. ▪ Wendy Ginsberg, Congressional Research Service
December 14, 2016	
Expert Presentations to the Panel	▪ Soraya Correa, U.S. Department of Homeland Security ▪ Paul Francis, Government Accountability Office
January 24-25, 2017	
Major Defense Acquisition Programs	▪ 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	▪ 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	▪ 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	▪ 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
April 25-26, 2017	
Expert Panel: The Effects of Socio-Economic Policies on Defense Acquisitions	▪ 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	▪ Tim Greeff, NSTXL
Imagining a Post-Barriers World	▪ Meagan Metzger, DCode42
May 23-24, 2017	
Former Navy Secretary Perspective	▪ The Honorable John Lehman, former Secretary of the Navy
SOF AT&L "Pain Points"	▪ James "Hondo" Geurts, SOCOM AT&L
June 20-21, 2017	
SMC's Acquisition Challenges: PM, Contracting, and Budgeting Perspectives	▪ Barbara Baker, SMC/PID, ACE Chief ▪ Col Tom Hoskins, USAF ▪ Mike Wood, SMC
Cyber Acquisition Challenges	▪ John Metzger, IOC PEO C4I, SPAWARSYSCOM
SSC Pacific's Views on Acquisition	▪ Sharon Pritchard and Scott Crellin, SSC-Pacific
Improving the Speed and Impact of Acquisitions	▪ Eric Patten, President/CEO, Ocean Aero
Venture Capital in the Defense Space	▪ James Cross, Vice President, Franklin Equity Group
Access to Emerging Tech and Innovation	▪ VADM Ted Branch, USN (ret), President, Drone Aviator
Workforce Strategy and Tools	▪ Tracy Price, CEO, QMerit
July 18-19, 2017	
Perspectives from Congress	▪ Ben FitzGerald and Arun Seraphin, SASC ▪ Doug Bush and Alexis Lasselle Ross, PhD, HASC

August 22-23, 2017	
Regulatory Updates	▪ Joo Chung, DCMO ▪ Linda Neilson, DPAP
September 12-13, 2017	
Deliberations for Volume 1 Report	▪ Internal Volume 1 Report Discussion and Voting
October 17-18, 2017	
Deliberations for Volume 1 Report	▪ Internal Volume 1 Report Discussion and Voting
November 14-15, 2017	
Deliberations for Volume 1 Report	▪ Internal Volume 1 Report Discussion and Voting
December 12-13, 2017	
Deliberations for Volume 1 Report	▪ Internal Volume 1 Report Discussion and Voting
January 23-24, 2018	
Deliberations for Volume 2 Report	▪ Internal Volume 2 Report Discussion and Voting
Space Related Acquisition	▪ Col Norm Dozier, SMC Comptroller ▪ Michael Wood, Chief of the Financial Analysis Division ▪ Lisa Dybvad, Senior Consultant to FM ▪ Theresa Humphrey, Senior Consultant FM

Semimonthly Stakeholder Meetings

January 12, 2017	
Thinking Holistically and Broadly About the Panel Mandate	▪ Stan Soloway, Celero Strategies
State of Defense IT Acquisition Reform	▪ John Weiler, IT Acquisition Advisory Council (IT-AAC) ▪ Marvin Langston, Langston Associates, LLC
PSC Research on DoD Task Order Awards Made Under IDIQ Contracts	▪ Alan Chvotkin and Matthew Taylor, Professional Services Council (PSC)
IDIQ Discussion	▪ Jeff Koses, GSA, Office of Government-wide Policy ▪ Roger Waldron, Coalition for Government Procurement
January 26, 2017	
Commercial Subcontract Flowdown; Simplified Acquisition Procedures	▪ Ron Smith, Ronald Smith Contracts
Acquisition Reform and Successful Programs	▪ Jeff Wieringa, Navy International Programs Office (NIPO)
February 23, 2017	
Security Cooperation Reforms and the Impact of FY17 NDAA	▪ VADM Joseph Rixey, Defense Security Cooperation Agency
DoD's Use of Project Structure	▪ Mike Morgan, Charles Mahon, and John Driessnack, Project Management Institute
Successful Acquisition and Fielding of Software in the DoD: Impediments and Improvements	▪ Matt Chandler, Palantir Technologies
Acquisition Workforce Study	▪ Rene Thomas-Rizzo, Human Capital Initiatives, OUSD (AT&L)
March 9, 2017	
Technology: How to Use and Buy More Effectively	▪ Kenneth Allen, Jennifer Napper, and Lou Kerestesy, ACT-IAC
Doing Business with DoD: Small Business Perspective	▪ Bryson Bort, Grimm
Strategies for Contracting Digital Services	▪ David Zvenyach, GSA, 18F
March 23, 2017	
Challenges Related to Government Practices for Commercial Items and Services Acquisitions	▪ Danielle Berti and Stephanie Gilson, Johnson & Johnson
The State of Public Procurement Metrics	▪ Raj Sharma, Public Spend Forum
Organizational Culture and the Panel's Mission	▪ Lou Kerestesy, Gov Innovation
Acquisition of the Future (AOF) Model	▪ Stan Soloway, Celero Strategies ▪ Kymm McCabe, Deloitte
DoD Acquisition	▪ 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 Rothzeid, 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	▪ James Moreland, Jr., PhD, Deputy Director, Naval Warfare OUSD ATL/Tactical Warfare Systems
Using Data Analytics to Enhance Decision-making in DoD Procurement	▪ Eric Heffernan and Christine Kettler, Grant Thornton
NASA iTech	▪ Kira Blackwell, NASA HQ, Innovation Program Executive, Office of the Chief Technologist
September 28, 2017	
IDIQ Contracts, SWACs, and MACs	▪ Richard Ginman, former Director, DPAP
Measurement, Workforce Competencies, and Procurement Technology	▪ Raj Sharma, Chairman, Public Spend Forum
Recommendations to the Section 809 Panel	▪ Roger Waldron, Coalition for Government Procurement
January 11, 2018	
Improving Services Acquisition	▪ 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	▪ Gary Kyle, President, Persistent Agility, Inc. ▪ Ron Poussard, Applied Federal Contract Associates
Rapid Acquisition	▪ Tonico Beope, Director of Contracting, Air Force Special Access Programs, SAF/AQ
The Future Impact of Cloud Computing on Acquisition	▪ Jay Huie, Director, GSA TTS Secure Cloud Portfolio ▪ John Hamilton, FedRAMP PM for Operations ▪ Evan Issacs, FedRAMP PMO Support

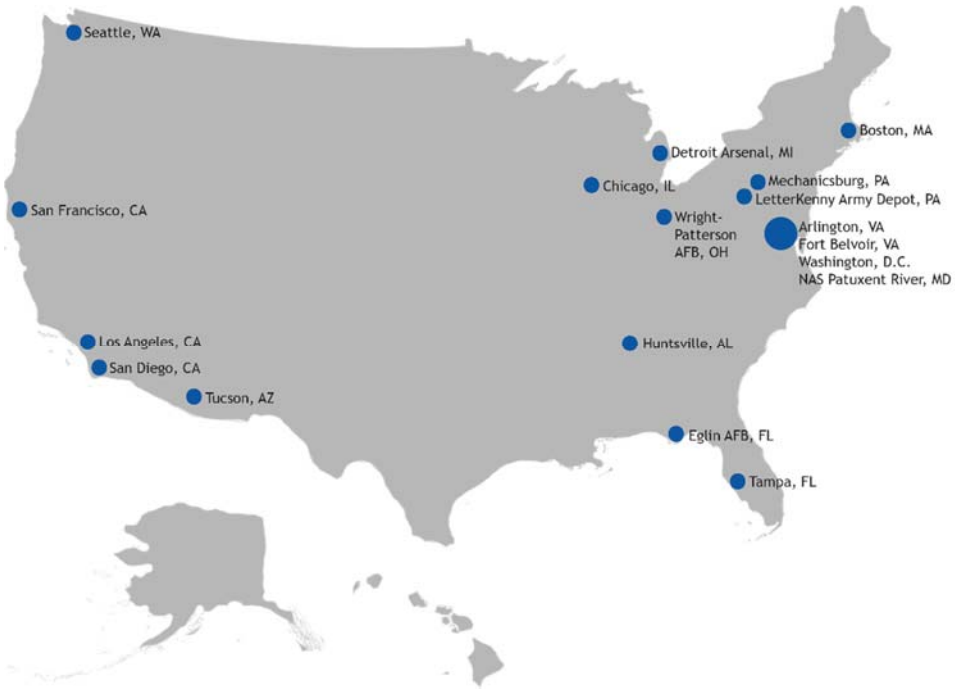
Team Meetings/Interviews

- (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 C: 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 D: COMMUNICATION WITH THE PANEL

Website

The Section 809 Panel seeks feedback from diverse stakeholders interested in issues related to defense acquisition, including DoD officials, members of the DoD acquisition workforce at all levels, service members, industry officials from small and large businesses, and U.S. citizens.

The panel offers multiple avenues for offering feedback on its website at section809panel.org. Stakeholders can submit general comments and questions about the Section 809 Panel by choosing the *General Comments* option under the *Contact Us* tab. Stakeholders who would like to suggest recommendations for the panel can do so by choosing the *Recommendations* option under the *Contact Us* tab.

Members of the public and media may attend the open sessions at Section 809 Panel meetings. To inquire about attending meetings, contact Jennifer McKinney at jennifer.mckinney@dau.mil.

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.

Daily Media Clips

Social Media

For information related specifically to the panel, stakeholders can follow the Section 809 Panel on Twitter (@Section809Panel) and connect on LinkedIn (Section 809 Panel).

Public Information

Organizations interested in hosting panel members for speaking engagements and media outlets interested in publishing or broadcasting items about the commission should contact Shayne Martin at shayne.martin@dau.mil.

50 Worst!

The Section 809 Panel requests input in an effort to compile the 50 worst acquisition rules, regulations, or policies that warrant serious study, revision, or possible removal. Members of the public or media may submit recommendations through the *50 Worst!* tab at section809panel.org/50worst.

50 WORST!

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 soliciting feedback from stakeholders. To review these notices, please visit the Federal Register or section809panel.org/media/news-releases/.

APPENDIX E: PROFESSIONAL STAFF

Michael D. Madsen, Col, USAF (ret)
Executive Director

Lawrence A. Asch
Professional Staff Member

Sharon D. Bickford
Professional Staff Member

Katie A. Cook
Professional Staff Member

Robert W. Cover, II
Legislative Counsel

COL Harry R. Culclasure, USA
Professional Staff Member

Herb L. Fenster
Outside Counsel

Karen S. Fischetti
Professional Staff Member

Paula B. Frankel
Professional Staff Member

Shirley J. Franko
Professional Staff Member

MG Theodore C. Harrison, USA
Professional Staff Member

Darren S. Harvey
Professional Staff Member

Alison M. Hawks, PhD
Deputy Research Director

Jeremy H. Hayes
Professional Staff Member

George C. Hill
Professional Staff Member

E. Sanderson Hoe
Outside Counsel

Dina T. Jeffers, CPCM
Professional Staff Member

Michelle VJ Johnson, PhD
Professional Staff Member

LTC Thomas D. Kelley, USA
Professional Staff Member

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Table F-1. Clauses with Unique Relief for COTS Items

FAR/DFARS	Title	Basis	COTS Context	Recommendation
4.1902 52.204-21	Basic Safeguards of Covered Contractor Information Systems	E.O. 13556 COTS exemption by FAR Council determination (81 FR 30439)	Applies to subcontractors, including commercial items, **other than COTS items**	Revise exception to *other than commercial products or services* See Recommendation 3-2 regarding applicability of this clause to commercial products or services
9.405-2 52.209-6	Restrictions of subcontracting Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment	COTS exemption by Section 815, FY10 NDAA	Clause includes definition of COTS; Contractor shall not enter into a subcontract >$35,000 (**other than a subcontract for COTS**) with a subcontractor that has been debarred, suspended, or proposed for debarment	Delete definition of COTS in clause; Revise exception to *other than a subcontract for commercial products or services* See Recommendation 3-2 regarding applicability of this clause to commercial products or services
22.1701 22.1705 52.222-50 52.222-56	Combating trafficking in persons Combating Trafficking in Persons Certification Regarding Trafficking in Persons Compliance Plan	Section 1703, FY13 NDAA COTS exemption by FAR Council (80 FR 4967) See FAR 12.505(c)	Clause includes definition of COTS Requires a certification and a compliance plan if for supplies other than COTS acquired outside the US; clause also applies to subcontractors (**other than for COTS**	Delete definition of COTS Revise exception to "other than commercial products" See Recommendation 3-2 regarding applicability of this clause to commercial products or services

FAR/DFARS	Title	Basis	COTS Context	Recommendation
22.1803 52.222-54	Employment Eligibility Verification	E.O. 12989 COTS exemption by FAR Council (73 FR 67651)	Clause includes definition of COTS Clause applies to "commercial or noncommercial services (except for commercial services that are part of the purchase of a **COTS item (or an item that would be a COTS item, but for minor modifications**), performed by the **COTS provider**, and are normally provided for that **COTS item**)"	Delete definition of COTS in clause Revise applicability to *noncommercial services* See Recommendation 3-2 regarding applicability of this clause to commercial products or services
23.406 52.223-9	Use of recovered materials Estimate of Percentage of Recovered Material Content for EPA-Designated Items	41 U.S.C. § 6962 (c)(3)(A) COTS exemption by OFPP memo 2/14/08 See FAR 12.505(b)	Insert provision "Recovered Material Certificate" and clause "Estimate of Percentage of Recovered Material Content for EPA-Designated Items, **except in contracts for COTS**	Revise exception to "contracts for commercial products" See Recommendation 3-2 regarding applicability of this clause to commercial products or services

FAR/DFARS	Title	Basis	COTS Context	Recommendation
25.001 25.003 25.100 25.200 52.225-1 52.225-3 52.225-9 52.225-11	Foreign Acquisitions Buy American – Supplies Buy American – Free Trade Agreement – Israeli Trade Act Buy American Act – Construction Materials Buy American Act – Construction Materials under TAA	41 U.S.C. Chap 83 COTS exemption by OFPP memo 2/14/08 See FAR 12.505(a)	Waives Domestic End Item component test for **COTS items** and construction materials Clauses include COTS definition Waives Domestic End Item component test for **COTS items** and construction materials	Waive component test for *commercial products* Delete definition of COTS See Recommendation 3-2 regarding applicability of this clause to commercial products or services
252.225-7000 252.225-7001	Buy American – Balance of Payments Program Certificate Buy American and Balance of Payment Program - Basic	41 U.S.C. Chap 83 COTS exemption by OFPP memo 2/14/08 74 FR 2422	Waives component test for **COTS** Includes definition of COTS Waives domestic end product component test **for COTS**	Revise waiver to cover commercial products Delete definition of COTS Revise waiver to cover commercial products See Recommendation 3-2 regarding applicability of this clause to commercial products or services

FAR/DFARS	Title	Basis	COTS Context	Recommendation
225.7003	Restrictions on the acquisition of specialty metals	COTS exemption by 10 U.S.C. § 2533b See DFARS 212.570	*Automotive item* does not include a **commercially-available off-the-shelf vehicle**	Revise to *automotive item* does not include a vehicle acquired as a commercial product See Recommendation 3-2 regarding applicability of this clause to commercial products or services.
225.7003 252.225-7009	Restrictions on the acquisition of specialty metals Restriction on the Acquisition of Certain Articles Containing Specialty Metals	COTS exemption by 10 U.S.C. § 2533b See DFARS 212.570	Restrictions of 225.7003-2 **do not apply to COTS items** containing specialty metals… Clause includes definition of COTS Restrictions in paragraph (b) of this clause **do not apply to "commercially available off-the-shelf items**…"	Revise to – restrictions of 225.7003-2 do not apply to commercial products containing specialty metals… Delete definition of COTS See Recommendation 3-2 regarding applicability of this clause to commercial products or services

FAR/DFARS	Title	Basis	COTS Context	Recommendation
227.7103-13 252.227-7037	Government right to review, verify, challenge, and validate asserted restrictions Validation of Restrictive Markings on Technical Data	COTS exemption by 10 U.S.C. § 2321	Presumption regarding developed exclusively at private expense **applies to COTS and COTS with customary or minor modifications**	See Panel recommendation 3-1 and 3-4; revise to reference definition of commercial product at 41 U.S.C. § 103 See Recommendation 3-2 regarding applicability of this clause to commercial products or services
234.7002	Acquisition of Major Weapon Systems as Commercial Items	COTS exemption by 10 U.S.C. § 2379	A subsystem of a major weapon system (**other than a COTS item**) may be treated and acquired as a commercial item under certain conditions (including a determination by the CO that the item is a commercial item A component or spare part (**other than a COTS item**) may be treated as a commercial item under certain conditions (including a determination by the CO that the item is a commercial item.	Delete both reference to COTS; provides no relief for COTS (still requires commercial item determination and support for pricing)

FAR/DFARS	Title	Basis	COTS Context	Recommendation
204.7304(a) 252.204-7008	Compliance with safeguarding covered defense information controls	Section 941, FY13 NDAA; Section 1632, FY15 NDAA COTS exemption by DPAP (81 FR 72986)	Include provision 252.204-7008 in contracts for commercial items **except for acquisitions of COTS items**.	Revised to "Include the provision 252.204-7008 in solicitations except for the acquisition of commercial items" See Recommendation 3-2 regarding applicability of this clause to commercial products or services.
204.7304(c) 252.204-7012	Safeguarding Covered Defense Information and Cyber Incident Reporting	Section 941, FY13 NDAA; Section 1632, FY15 NDAA COTS exemption by DPAP (81 FR 72986)	Include the clause at 252.204-7012 in all contracts, including contracts for commercial items, **except for COTS**	Revised to "Include the clause at 252.204-7012 in all contracts, except contracts for commercial items" See Recommendation 3-2 regarding applicability of this clause to commercial products or services

Table F-2. Commercial Item Citations That Do Not Incorporate the Primary Definition at Title 41

Citation	Chapter	Title	Is there a Definition?	Location of Definition	Context for Definition
FY 2015 NDAA, Section 843(2) (10 U.S.C § 2302 note)	137	Prohibition on Contracting with the Enemy	No	N/A	N/A
FY 2016 NDAA, Section 856 (10 U.S.C § 2377 note)	140	Limitation on Conversion of Procurements from Commercial Acquisition Procedures	Yes	FAR Part 12	Text references "commercial acquisition procedures under Part 12 of the Federal Acquisition Regulation"
10 U.S.C § 2451(d)	145	Defense Supply Management	No	N/A	N/A
10 U.S.C. §2464(a)(3)	146	Core Logistics Capabilities	Yes	10 U.S.C § 2464(a)(5)	Text references 10 U.S.C § 2464(a)(5), which defines commercial items as "commercial items that have been sold or leased in substantial quantities to the general public and are purchased without modification in the same form that they are sold in the commercial marketplace, or with minor modifications to meet Federal Government requirements."
10 U.S.C § 2533a(i)	148	Requirement to Buy Certain Articles from American Sources; Exceptions	No	N/A	N/A
10 U.S.C § 2533b(h)	148	Requirement to Buy Strategic Materials Critical to National Security from American Sources; Exceptions	No	N/A	N/A

Table F-3. FAR/DFARS Definitions for the Term *Subcontract.*

Provision	Definition and Recommendation
FAR 3.502-1, Other Improper Business Practices, Subcontractor Kickbacks	*Subcontract* means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract. Note: This definition is based on 41 U.S.C. § 8701. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 3.901, Whistleblower Protections for Contractor Employees, Definitions	*Subcontract* means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 3.1001, Contractor Code of Business Ethics and Conduct	*Subcontract* means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 4.1701, Service Contracts Inventory, Definitions	*First-tier subcontract* means a subcontract awarded directly by the prime contractor ~~for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the contractor's supplier agreements with vendors, such as long-term arrangements for~~ materials or supplies that benefit multiple contracts and/or the costs ~~of which are normally applied to a contractor's general and administrative expenses or indirect costs~~. **Recommendation: Delete all text after definition of *first-tier*; defer to definition in FAR Subpart 2.101 for the balance of the definition.**
FAR 12.001, Acquisition of Commercial Items—General, Definition (Applies to Multiple Clauses)	*Subcontract,* as used in this part, includes, but is not limited to, a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**

Provision	Definition and Recommendation
FAR 15.401, Contract Pricing, Definitions	*Subcontract*, except as used in 15.407-2, also includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor, 10 U.S.C. § 2306a(h)(2) and 41 U.S.C. § 3501(a)(3)). **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 19.701, Small Business Subcontracting Program, Definitions	*Subcontract,* means any agreement, other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract, contract modification, or subcontract. **Recommendation: Delete; defer to definition in FAR Subpart 2.101…….**
FAR 22.801, Equal Employment Opportunity, Definitions	*Subcontract,* means any agreement or arrangement between a contractor and any person, in which the parties do not stand in the relationship of an employer and an employee)— (1) For the purchase, sale, or use of personal property or nonpersonal services that, in whole or in part, are necessary to the performance of any one or more contracts; or (2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed. Note: EO 11246 does not include a definition of *subcontract.* **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 22.1702, Combatting Trafficking in Persons, Definitions	*Subcontract* means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 22.1801, Employment Eligibility Verification, Definitions	*Subcontract* means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**

Provision	Definition and Recommendation
FAR 44.101, Subcontracting Policies and Procedures, Definitions	*Subcontract* means any contract as defined in Subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 44.401, Subcontracts for Commercial Items and Commercial Components, Applicability	For the purpose of this subpart, the term *subcontract* has the same meaning as defined in Part 12. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.203-7, Anti-Kickback Procedures (Prescribed by FAR 3.502-3)	*Subcontract,* as used in this clause, means a contract or contractual action entered into by a prime Contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.203-13, Contractor Code of Business Ethics and Conduct (Prescribed by FAR 3.1004(a))	*Subcontract* means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.203-18, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Prescribed by FAR 3.909-3(a))	*Subcontract* as used in this provision, are defined in the clause at 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Prescribed by FAR 3.909-3(b))	*Subcontract* means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**

Provision	Definition and Recommendation
FAR 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards (Prescribed by FAR 4.1403(a))	*First-tier subcontract* means a subcontract awarded directly by the prime Contractor ~~for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a Contractor's general and administrative expenses or indirect costs~~. **Recommendation: Delete all text after definition of *first-tier*; defer to definition in FAR Subpart 2.101 for the balance of the definition.**
FAR 52.204-14, Service Contract Reporting Requirements (Prescribed by FAR 4.1403(a))	*First-tier subcontract* means a subcontract awarded directly by the prime Contractor ~~for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a Contractor's general and administrative expenses or indirect costs.~~ **Recommendation: Delete all text after definition of *first-tier*; defer to definition in FAR Subpart 2.101 for the balance of the definition.**
FAR 52.204-15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts (Prescribed by FAR 4.1705(b))	*First-tier subcontract* means a subcontract awarded directly by the prime Contractor ~~for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a Contractor's general and administrative expenses or indirect costs~~. **Recommendation: Delete all text after definition of *first-tier*; defer to definition in FAR Subpart 2.101 for the balance of the definition.**

Provision	Definition and Recommendation
FAR 52.212-4, Contract Terms and Conditions—Commercial Items (Alternate I) (Prescribed by FAR 12.301(b)(3))	*Subcontract* means any contract, as defined in FAR subpart 2.1, entered into with a subcontractor to furnish supplies or services for performance of the prime contract or a subcontract including transfers between divisions, subsidiaries, or affiliates of a contractor or subcontractor. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.215-23, Limitations on Pass-Through Charges (Prescribed by FAR 15.408(n)(2))	*Subcontract* means any contract, as defined in FAR 2.101, entered into by a subcontractor to furnish supplies or services for performance of the contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.219-9, Small Business Subcontracting Plan (Prescribed by FAR 19.708(b))	*Subcontract* means any agreement, other than one involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.222-50, Combating Trafficking in Persons (Prescribed by FAR 22.1705(a)(1))	*Subcontract* means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.222-54, Employment Eligibility Verification (Prescribed by FAR 22.1803)	*Subcontract* means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**

Provision	Definition and Recommendation
FAR 52.244-2, Notification of Changes (Prescribed by FAR 44.204(a)(1))	*Subcontract* means any contract, as defined in FAR Subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of the prime contract or a subcontract. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.244-6, Subcontracts for Commercial Items (Prescribed by FAR 44.403)	*Subcontract* includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Contractor or subcontractor at any tier. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
DFARS 252.222-7006, Restrictions on the Use of Mandatory Arbitration Agreements (Prescribed by DFARS 222.7405)	*Subcontract* means any contract, as defined in Federal Acquisition Regulation subpart 2.1, to furnish supplies or services for performance of this contract or a higher-tier subcontract thereunder. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**

Table F-4. FAR/DFARS Definitions for the Term *Subcontractor.*

Provision	Definition and Recommendation
FAR 2.101, Definitions	*Small business subcontractor* means a concern that does not exceed the size standard for the North American Industry Classification Systems code that the prime contractor determines best describes the product or service being acquired by the subcontract. **Recommendation: No change.**
FAR 3.502-1, Other Improper Business Practices, Subcontractor Kickbacks	Subcontractor, for purposes of this subpart, includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor. **Recommendation: Delete and amend text as indicated; retain unique component of the definition.**
FAR 3.901 Whistleblower Protections for Contractor Employees, Definitions	*Subcontractor* means any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 3.1001, Contractor Code of Business Ethics and Conduct	*Subcontractor* means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 22.801, Equal Employment Opportunity, Definitions	*Subcontractor*, for purposes of this subpart, includes any person who holds, or has held, a subcontract subject to E.O. 11246. The term "first-tier subcontractor" means a subcontractor holding a subcontract with a prime contractor. **Recommendation: Delete and amend text as indicated; retain unique component of the definition.**
FAR 22.1001, Service Contract Labor Standards, Definitions	*Contractor* includes a subcontractor at any tier whose subcontract is subject to the provisions of the statute. **Recommendation: No change.**

Provision	Definition and Recommendation
FAR 22.1702, Combatting Trafficking in Persons, Definitions	*Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 22.1801, Employment Eligibility Verification, Definitions	*Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 44.101, Subcontracting Policies and Procedures, Definitions	*Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 46.101, Quality Assurance, Definitions	*Subcontractor* (see 44.101). **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.203-7, Anti-Kickback Procedures (Prescribed by FAR 3.502-3)	Subcontractor," for purposes of this clause, includes any person who offers to furnish or furnishes general supplies to the prime Contractor or a higher tier subcontractor. **Recommendation: Delete and amend text as indicated; retain unique component of the definition.**
FAR 52.203-13, Contractor Code of Business Ethics and Conduct (Prescribed by FAR 3.1004(a))	*Subcontractor* means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.203-18, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Prescribed by FAR 3.909-3(a))	*Subcontractor* as used in this provision, are defined in the clause at 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**

Provision	Definition and Recommendation
FAR 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Prescribed by FAR 3.909-3(b))	*Subcontractor* means any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.215-23, Limitations on Pass-Through Charges (Prescribed by FAR 15.408(n)(2))	*Subcontractor*, as defined in FAR 44.101, means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.222-50, Combating Trafficking in Persons (Prescribed by FAR 22.1705(a)(1))	*Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.222-54, Employment Eligibility Verification (Prescribed by FAR 22.1803)	*Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
FAR 52.232-27, Prompt Payment for Construction Contracts (Prescribed by FAR 32.908(b))	Third-party deficiency reports—Withholding from subcontractor. If a Contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor (hereafter referred to as a *second-tier subcontractor*). **Recommendation: No change.**

Provision	Term	Definition
DFARS 252.209-7008, Notice of Prohibition Relating to Organizational Conflict of Interest—Major Defense Acquisition Program (Prescribed by DFARS 209.571-8(a))	**Major subcontractor**	*Major subcontractor* is defined in the clause at 252.209-7009, Organizational Conflict of Interest—Major Defense Acquisition Program. **Recommendation: No change.**
DFARS 252.209-7009, Organizational Conflict of Interest—Major Defense Acquisition Program (Prescribed by DFARS 209.571-8(b))	**Major subcontractor**	*Major subcontractor*, as used in this clause, means a subcontractor that is awarded a subcontract that equals or exceeds— (i) Both the certified cost or pricing data threshold and 10 percent of the value of the contract under which the subcontracts are awarded; or (ii) $55 million. **Recommendation: No change.**
DFARS 252.246-7003, Notification of Potential Safety Issues (Prescribed by DFARS 246.371(a))	**Subcontractor**	*Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for the Contractor or another subcontractor under this contract. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**
DFARS 252.247-7023, Transportation of Supplies by Sea (Including Alternates I and II) (Prescribed by DFARS 247.574(b))	**Subcontractor**	*Subcontractor* means a supplier, materialman, distributor, or vendor at any level below the prime contractor whose contractual obligation to perform results from, or is conditioned upon, award of the prime contract and who is performing any part of the work or other requirement of the prime contract. **Recommendation: Delete; defer to definition in FAR Subpart 2.101.**

Table F-5. FAR and DFARS Clauses Based on Statute That Meet the 41 U.S.C. §§ 1906/1907 Criteria, But Are Not Recommended for Applicability to Procurements of Commercial Products or Services

- Table F-5 lists the FAR and DFARS clauses[1] that are based on statute and
  - Satisfy one of the following criteria prescribed in 41 U.S.C. §§ 1906, 1907 and 10 U.S.C. § 2375:[2]
    - Provides for civil or criminal penalties;
    - Specifically refers to 41 U.S.C. §§ 1906, 1907 or 10 U.S.C. § 2375 and provides that, notwithstanding 41 U.S.C. §§ 1906, 1907 or 10 U.S.C. § 2375, it is applicable to contracts for the procurement of commercial items;[3] and
    - Requires that certain articles be bought from American sources pursuant to 10 U.S.C. § 2533a, or requires that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. § 2533b.[4]
- The Section 809 Panel recommends these clauses be revised to exempt contracts for commercial items because these clauses:
  - Impose a cost or administrative burden on suppliers that is not otherwise typical in commercial transactions;
  - Impose requirements unique to a government procurement that are already sufficiently addressed in requirements applicable to the general commercial marketplace;
  - Focus on the supplier's business practices and systems rather than the product or service being procured; and
  - Otherwise unnecessarily placing commercial suppliers at risk and thereby limiting the federal government's access to the commercial sector.
- The Section 809 Panel recommends the clauses in Table F-5 be removed from DFARS 212.301.
- 6 clauses (0 FAR and 6 DFARS)

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.225-7008	Restriction on Acquisition of Specialty Metals	10 U.S.C. § 2533b Statute specifically refers to 41 U.S.C. §§ 1906 and 1907.	Applicable to specialty metals procured as an end item.	Remove from DFARS 212.301.

[1] Lists of clauses based on FAR 52.212-4 (January 2017), FAR 52.212-5 (November 2017), and DFARS 212.301 (December 2017).
[2] 41 U.S.C. 1906 and 1907 (formerly sections 34 and 35 of the OFPP Act, codified at 41 U.S.C. § 430 and 431)
[3] See 41 U.S.C. § 1906. 41 U.S.C. § 1907, and 10 U.S.C. § 2375
[4] See 10 U.S.C. § 2375

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.225-7009	Restriction on Acquisition of Certain Articles Containing Specialty Metals	10 U.S.C. § 2533b Statute specifically refers to 41 U.S.C. §§ 1906 and 1907.	Generally, only applicable to weapon systems and components.	Remove from DFARS 212.301.
DFARS	252.225-7010	Commercial Derivative Military Article – Specialty Metals Compliance Certificate	10 U.S.C. § 2533b Statute specifically refers to 41 U.S.C. §§ 1906 and 1907.	Generally, only applicable to weapon systems and components .	Remove from DFARS 212.301.
DFARS	252.225-7012	Preference for Certain Domestic Commodities	10 U.S.C. § 2533a DAC 91-9 Statute specifically refers 41 U.S.C. § 1906	Berry Amendment	Remove from DFARS 212.301.
DFARS	252.225-715	Restriction on Acquisition of Hand or Measuring Tools	10 U.S.C. § 2533a DAC 91-9 Statute specifically refers to 41 U.S.C. § 1906.	Berry Amendment	Remove from DFARS 212.301.
DFARS	252.226-7001	Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns	Section 8021 of FY 2017 DoD Appropriations Act Statute specifically refers to 41 U.S.C. § 1906.	Incentive payments to utilize certain subcontractors would be inconsistent with procurement from the commercial marketplace.	Remove from DFARS 212.301.

Table F-6. FAR and DFARS Clauses Based on Statutes That Do Not Meet the 41 U.S.C. §§ 1906 and 1907 Criteria, and Are Not Recommended for Applicability to Procurements of Commercial Products or Services

- Table F-6 lists the FAR and DFARS clauses that are based on statute, but do not satisfy the criteria identified for clauses in 41 U.S.C. §§ 1906, 1907 and 10 U.S.C. § 2375. These clauses do not:
  - Provide for civil or criminal penalties;
  - Specifically refer to 41 U.S.C. §§§ 1906, 1907 or 10 U.S.C. § 2375 and provides that, notwithstanding 41 U.S.C. §§§ 1906, 1907 or 10 U.S.C. § 2375, it is applicable to contracts for the procurement of commercial items[5]; and
  - Require that certain articles be bought from American sources pursuant to 10 U.S.C. § 2533a, or requires that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. § 2533b[6].
- The Section 809 Panel recommends the clauses in Table F-6 be removed from FAR 52.212-4 (r), 52.212-5 and DFARS 212.301.
- 109 clauses (54 FAR and 55 DFARS)

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.203-3	Gratuities	10 U.S.C. § 2207 No FAR Council Determination	Prescribed for commercial items procured by DoD in DFARS 212.301.	Remove from DFARS 212.301.
FAR	52.203-6	Restrictions on Subcontractor Sales to the Government	10 U.S.C. § 2402 FAC 90-32	Alternate I for commercial products only require Federal Gov't not be treated differently.	Remove from FAR 52.212-5.
FAR	52.203-13	Contractor Code of Business Ethics and Conduct	41 U.S.C. § 3509 Mandated by the "Close the Contractor Fraud Loophole Act"; but neither Act specifically refers to 41 U.S.C. §§ 1906, 1907.	Requires commercial supplier to have a written code of business ethics and conduct and make it available to each employee.	Remove from FAR 52.212-5.

[5] See 41 U.S.C. § 1906. 41 U.S.C. § 1907, and 10 U.S.C. § 2375
[6] See 10 U.S.C. § 2375

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.203-15	Whistleblower Protections Under the American Recovery and Reinvestment Act	Section 1553, Pub L. 111-5 FAR Council determination – *Best Interest of the Government*	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.203-19	Prohibition on Requiring Internal Confidentiality Agreements or Statements	Section 743, Division E, Title VII, 2015 Appro. Act FAR Council determination – *Best Interest of the Government*	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.204-10	Reporting Executive Compensation and First-Tier Subcontract Awards	31 U.S.C. 6101 Note FAR Council determination – *Best Interest of the Government*	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.204-14	Service Contract Reporting Requirements	Section 743, Division C, Pub L. 111-117 FAR Council determination – *Best Interest of the Government*		Remove from FAR 52.212-5.
FAR	52.204-15	Service Contract Reporting Requirements for Indefinite-Delivery Contracts	Section 743, Division C, Pub L. 111-117 FAR Council determination – *Best Interest of the Government*		Remove from FAR 52.212-5.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.209-6	Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment	31 U.S.C. § 6101 note Statute does not specifically refer to 41 U.S.C. §§ 1906, 1907.	Only applies to first tier subcontractors of commercial item suppliers, and does not apply to any COTS subcontractors. However, it places unique administrative requirement on the supplier's purchasing organization with regard to validating its existing supply chain against the GSA debarred/suspended list.	Remove from FAR 52.212-5.
FAR	52.209-9	Updates of Publicly Available Information Regarding Responsibility Matters	41 U.S.C. § 2313 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.209-10	Prohibition on Contracting with Inverted Domestic Corporations	Section 743, Division D, 2009 Appro. Act FAR Council determination – "Best Interest of the Government"	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.212-4 (r)	Limitations on the use of appropriated funds to influence certain Federal contracts	31 U.S.C. § 1352 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-4 (r).
FAR	52.212-4 (r)	Officials not to benefit	18 U.S.C. § 431 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-4 (r).
FAR	52.212-4 (r)	Contract Work Hours and Safety Standards	40 U.S.C. Chap 37 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-4 (r).

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.212-4 (r)	Kickbacks	41 U.S.C. Chap 87 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-4 (r).
FAR	52.212-4 (r)	Whistleblower protections	41 U.S.C. § 4712 and 10 U.S.C. § 2409 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-4 (r).
FAR	52.212-4 (r)	Fly American	49 U.S.C. § 40118 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-4 (r).
FAR	52.212-4 (r)	Procurement integrity	41 U.S.C. Chap 21 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-4 (r).
FAR	52.219-3	Notice of HUBZone Set-Aside or Sole-Source Award	15 U.S.C. § 657a No FAR Council Determination	Notice	Remove from FAR 52.212-5.
FAR	52.219-4	Notice of Price Evaluation Preference for HUBZone Small Business Concerns	15 U.S.C. § 657a No FAR Council Determination	Notice	Remove from FAR 52.212-5.
FAR	52.219-6	Notice of Total Small Business Set-Aside	15 U.S.C. § 631 No FAR Council Determination	Notice	Remove from FAR 52.212-5.
FAR	52.219-7	Notice of Partial Small Business Set-Aside	15 U.S.C. § 631 No FAR Council Determination	Notice	Remove from FAR 52.212-5.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.219-8	Utilization of Small Business Concerns	15 U.S.C. § 631 FAC 90-32	Burden is imposed on supplier's existing purchasing system. Commercial suppliers must categorize all existing and new suppliers by business size and maintain data currency. Supplier must agree to participate in any SBA compliance review. Not appropriate when supply base is already established.	Remove from FAR 52.212-5.
FAR	52.219-9	Small Business Subcontracting Plan	15 U.S.C. § 631 FAC 90-32	Burden is imposed on supplier's existing purchasing system. Commercial suppliers must prepare a prescribed 15 element commercial subcontracting plan on its already planned subcontracting; requires categorizing all existing and new suppliers by business size and preparing periodic reporting on subcontracting. Not appropriate when supply base is already established. Essentially a data collection and reporting requirement with little impact on the product or service.	Remove from FAR 52.212-5.
FAR	52.219-13	Notice of Set-Aside of Orders	15 U.S.C. § 644(r) No FAR Council Determination	Notice	Remove from FAR 52.212-5.
FAR	52.219-14	Limitations on Subcontracting	15 U.S.C. § 631 FAC 90-32	Only applies if the procurement is a small business set-asides	Remove from FAR 52.212-5.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.219-16	Liquidated Damages – Subcontracting Plan	(15 U.S.C. § 637(d)(4)(F)(i)) No FAR Council Determination	Associated with subcontracting plan (also removed)	Remove from FAR 52.212-5.
FAR	52.219-27	Notice of Service-Disabled Veteran-Owned Small Business Set-Aside	15 U.S.C. § 631 No FAR Council Determination	Notice	Remove from FAR 52.212-5.
FAR	52.219-28	Post Award Small Business Program Representation	15 U.S.C. § 632(a)(2) No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.219-29	Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns	15 U.S.C. § 637(m) No FAR Council Determination	Notice	Remove from FAR 52.212-5.
FAR	52.219-30	Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program	15 U.S.C. § 637(m) No FAR Council Determination	Notice	Remove from FAR 52.212-5.
FAR	52.222-35	Equal Opportunity for Veterans	38 U.S.C. Chap 42 FAC 90-32	Refers back to equal opportunity clause; flows down to subcontractors.	Remove from FAR 52.212-5.
FAR	52.222-36	Equal Opportunity for Workers with Disabilities	29 U.S.C. § 793 FAC 90-32	Refers back to equal opportunity clause; Flows down to subcontractors.	Remove from FAR 52.212-5.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.222-37	Employment Reports on Veterans	38 U.S.C. Chap 42 FAC 90-32	Requires commercial supplier to collect military service-related data on its current and future employees; requires reporting of data; requirements flow down to subcontractors.	Remove from FAR 52.212-5.
FAR	52.222-41	Service Contract Labor Standards	41 U.S.C. Chap 67 FAC 90-32	Only applies to certain services; commercial services may be exempted under specific circumstances.	Remove from FAR 52.212-5.
FAR	52.222-42	Statement of Equivalent Rates for Federal Hires	41 U.S.C. Chap 67 FAC 90-32	Only applies to certain services; commercial services may be exempted under specific circumstances.	Remove from FAR 52.212-5.
FAR	52.222-43	Fair Labor Standards Act and Service Contract Labor Standards – Price Adjustment (Multiple Year and Option Contracts)	41 U.S.C. Chap 67 FAC 90-32	Only applies to certain services; commercial services may be exempted under specific circumstance.	Remove from FAR 52.212-5.
FAR	52.222-44	Fair Labor Standards Act and Service Contract Labor Standards – Price Adjustment	41 U.S.C. Chap 67 FAC 90-32	Only applies to certain services; commercial services may be exempted under specific circumstances.	Remove from FAR 52.212-5.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.222-51	Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment – Requirements	41 U.S.C. Chap 67 Associated with FAR 52.222-41 No FAR Council determination	Only applies when contracting officer determines SCA does not apply to commercial services (FAR 22.1003-4(c)).	Remove from FAR 52.212-5.
FAR	52.222-53	Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services – Requirements	41 U.S.C. Chap 67 Associated with FAR 52.222-41 No FAR Council determination	Only applies when contracting officer determines SCA does not apply to commercial services (FAR 22.1003-4(d)).	Remove from FAR 52.212-5.
FAR	52.223-9	Estimate of Percentage of Recovered Material Content for EPA-Designated Items	42 U.S.C. § 6962(c)(3)(A)(ii) No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.223-15	Energy Efficiency in Energy-Consuming Products	42 U.S.C. § 8259b No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.224-3	Privacy Training	5 U.S.C. § 552a No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907. Applied to CI contracts where contractor has access to "system of records." Does not apply to COTS.	Remove from FAR 52.212-5.
FAR	52.225-1	Buy American – Supplies	41 U.S.C. Chap 83 FAC 90-32 Statute specifically refers to 41 U.S.C. § 431	Clause provides waiver of component test for COTS products (per 41 U.S.C. § 431).	Remove from FAR 52.212-5.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.225-3	Buy American – Free Trade Agreements – Israeli Trade Act	41 U.S.C. Chap 83 Replaced Free Trade Agreement clauses in FAC 90-32 Statute specifically refers to 41 U.S.C. § 1907 .	Clause provides waiver of component test for COTS products (per 41 U.S.C. § 1907).	Remove from FAR 52.212-5.
FAR	52.225-5	Trade Agreements	19 U.S.C. Chap 25 Replaced 52.225-9 from FAC 90-32		Remove from FAR 52.212-5.
FAR	52.225-26	Contractors Performing Private Security Functions Outside the United States	10 U.S.C. § 2302 Note FAR Council determination – "Best Interest of the Government"	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.226-4	Notice of Disaster or Emergency Area Set-Aside	42 U.S.C. § 5150 No FAR Council Determination	Notice	Remove from FAR 52.212-5.
FAR	52.226-5	Restrictions on Subcontracting Outside Disaster or Emergency Area	42 U.S.C. § 5150 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.226-6	Promoting Excess Food Donation to Nonprofit Organizations	42 U.S.C. § 1792 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.237-11	Accepting and Dispensing of $1 Coin	31 U.S.C. § 5112(p)(1) No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.239-1	Privacy or Security Safeguards	5 U.S.C. § 552a No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.242-5	Payments to Small Business Subcontractors	15 U.S.C. § 637(d) (3) FAR Council Determination - Best Interest of the Government	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.
FAR	52.247-64	Preference for Privately-Owned U.S.-Flag Commercial Vessels	46 U.S.C. § 1241 FAC 90-32	Requirements generally do not apply to commercial items. Unique requirements should not apply to supplier's supply chain..	Remove from FAR 52.212-5.
DFARS	252.203-7000	Requirements Relating to Compensation of Former DoD Officials	Section 847 of FY 2008 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.203-7003	Agency Office of the Inspector General	41 U.S.C. § 3509 Specifically refers to commercial items, but does not refer to 41 U.S.C. §§ 1906, 1907.	Provides contractor with information related to DFARS 252.203-13 .	Remove from DFARS 212.301.
DFARS	252.203-7005	Representation Relating to Compensation of Former DoD Officials	Section 847 of FY 2008 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.204-7008	Compliance with Safeguarding Covered Defense Information Controls	Section 941 of FY 2013 NDAA; Section 1632 of FY 2015 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.204-7009	Limitations on the Use or Disclosure of Third Party Contractor Information	Section 941 of FY 2013 NDAA; Section 1632 of FY 2015 NDAA) No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.204-7012	Safeguarding Covered Defense Information and Cyber Incident Reporting	Section 941 of FY 2013 NDAA; Section 1632 of FY 2015 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.204-7013	Limitations on the Use or Disclosure of Information by Litigation Support Solicitation Offerors	Section 802 of FY 2012 NDAA DAR Council Determination – Best Interest of the Government	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.204-7014	Limitations on the Use or Disclosure of Information by Litigation Support Contractors	Section 802 of FY 2012 NDAA DAR Council Determination – Best Interest of the Government	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.204-7015	Notice of Authorized Disclosure of Information to Litigation Support Contractors	Section 802 of FY 2012 NDAA DAR Council Determination – Best Interest of the Government	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.205-7000	Provision of Information to Cooperative Agreement Holders	10 U.S.C. § 2416 DAC 91-9	Commercial suppliers should not be required to provide information to cooperative agreement holders.	Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.219-7000	Advancing Small Business Growth	Section 1611 of FY 2014 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.219-7003	Small Business Subcontracting Plan (DoD Contracts)	15 U.S.C. § 631 DAC 91-9	Rational in 52.219-9 applies to this clause also.	Remove from DFARS 212.301.
DFARS	252.219-7004	Small Business Subcontracting Plan (Test Program)	Section 821, FY2015 NDAA; Section 872, FY16 NDAA No DAR Council Determination	Test program; alternative approach to 252.219-7003. Only applies to contractors participating in this test program; not applicable to commercial plans.	Remove from DFARS 212.301.
DFARS	252.225-7000	Buy American – Balance of Payments Program Certificate	41 U.S.C. Chap 83 No DAR Council Determination	Certificate associated with 252.225-7001.	Remove from DFARS 212.301.
DFARS	252.225-7001	Buy American and Balance of Payments Program	41 U.S.C. Chap 83 DAC 91-9 Statute specifically refers to 41 U.S.C. § 1907	Clause for DoD use; clause provides waiver of component test for COTS products (per 41 U.S.C. § 1907).	Remove from DFARS 212.301.
DFARS	252.225-7006	Acquisition of the American Flag	Section 8123 of FY 2014 DoD Appropriations Act; Section 8119 of FY 2015 DoD Appropriations Act No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.225-7016	Restriction on Acquisition of Ball and Roller Bearings	Section 8064 of DoD Appropriations Act for FY 2001 No FAR Council determination	Statute provides that it does not apply to commercial components; Only applies to ball and roller bearings procured as an end item.	Remove from DFARS 212.301.
DFARS	252.225-7017	Photovoltaic Devices	Section 846 of FY 2011 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.225-7018	Photovoltaic Devices – Certificate	Section 846 of FY 2011 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.225-7020	Trade Agreements Certificate	19 U.S.C. Chap 245 No DAR Council Determination	Certificate associated with 252.225-7021.	Remove from DFARS 212.301.
DFARS	252.225-7021	Trade Agreements	19 U.S.C. Chap 25 DAC 91-9 No DAR Council Determination	Clause for DoD use.	Remove from DFARS 212.301.
DFARS	252.225-7023	Preference for Products or Services from Afghanistan	Section 886 and 892 of FY 2008 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.225-7024	Requirements for Products or Services from Afghanistan	Section 886 and 892 of FY 2008 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.225-7026	Acquisition Related to Products or Services from Afghanistan	Section 886 and 892 of FY 2008 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.225-7029	Acquisition of Uniform Components for Afghan Military or Afghan National Police	Section 826 and 842 of FY 2013 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.225-7031	Secondary Arab Boycott of Israel	10 U.S.C. § 2410i No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.225-7035	Buy American – Free Trade Agreements – Balance of Payments Program Certificate	41 U.S.C. Chap 83 No DAR Council Determination	Certificate associated with 252.225-7036.	Remove from DFARS 212.301.
DFARS	252.225-7036	Buy American – Free Trade Agreements – Balance of Payments Program	41 U.S.C. Chap 83 DAC 91-9 Statute specifically refers to 41 U.S.C. § 1907.	Clause for DoD use; provides component test waiver for COTS.	Remove from DFARS 212.301.
DFARS	252.225-7037	Evaluation of Offers for Air Circuit Breakers	10 U.S.C. § 2534 No DAR Council Determination	Offeror information associated with 252.225-7038.	Remove from DFARS 212.301.
DFARS	252.225-7038	Restriction on Acquisition of Air Circuit Breakers	10 U.S.C. § 2534 DAC 91-9		Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.225-7039	Defense Contractors Performing Private Security Functions Outside the United States	Section 862 of FY 2008 NDAA; Section 853 of FY 2009 NDAA; Sections 831 and 832 of FY 2011 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.225-7049	Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities	Section 1602 of FY 2014 NDAA DAR Council Determination – Best Interest of the Government	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.225-7050	Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism	10 U.S.C. § 2327 No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.227-7013	Rights in Technical Data – Noncommercial Items	10 U.S.C. § 2320 No DAR Council Determination	Applicable to non-commercial items.	Remove from DFARS 212.301.
DFARS	252.227-7015	Technical Data – Commercial Items	10 U.S.C. § 2320 DAC 91-9	Clause should be rescinded. Clause goes beyond the intent of FASA and is not representative of commercial practice and represents a disincentive for commercial firms to do business with the federal government.	Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.227-7037	Validation of Restrictive Markings on Technical Data	10 U.S.C. § 2321 DAC 91-9	Clause should be rescinded. Clause goes beyond the intent of FASA and is not representative of commercial practice and represents a disincentive for commercial firms to do business with the federal government.	Remove from DFARS 212.301.
DFARS	252.232-7003	Electronic Submission of Payment Requests	Section 1008 of FY 2001 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.232-7010	Levies on Contract Payments	Section 887 of PL 108-357 No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.232-7011	Payments in Support of Emergencies and Contingency Operations	31 U.S.C. Chap 39 (Prompt Payment Act) No DAR Council Determination	Clause is used in conjunction with FAR 52.212-4. Suspends Prompt Payment Act in declared emergency to allow faster payments. Beneficial to support of emergency response.	Remove from DFARS 212.301.
DFARS	252.237-7010	Prohibition on Interrogation of Detainees by Contractor Personnel	Section 1038 of FY 2010 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.237-7019	Training for Contractor Personnel Interacting with Detainees	Section 1092 of FY 2005 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.239-7009	Representation of Use of Cloud Computing	Section 941 of FY 2013 NDAA; Section 1632 of FY 2015 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.239-7010	Cloud Computing Services	Section 941 of FY 2013 NDAA; Section 1632 of FY 2015 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.239-7017	Notice of Supply Chain Risk	Section 806 of FY 2011 NDAA; Section 806 of FY 2013 NDAA DAR Council Determination – Best Interest of the Government	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.239-7018	Supply Chain Risk	Section 806 of FY 2011 NDAA; Section 806 of FY 2013 NDAA DAR Council Determination – Best Interest of the Government	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.246-7003	Notification of Potential Safety Issues	Section 8143 of FY 2004 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.246-7004	Safety of Facilities, Infrastructure, and Equipment for Military Operations	Section 807 of FY 2010 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.246-7008	Sources of Electronic Parts	Section 818 of FY 2012NDAA & Section 817 of FY 2015 NDAA No DAR Council determination		Remove from DFARS 212.301.
DFARS	252.247-7003	Pass-Through of Motor Carriage Fuel Surcharge Adjustment to the Cost Bearer	Section 884 of FY 2009 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.247-7022	Representation of Extent of Transportation by Sea	10 U.S.C. § 2631 No DAR Council Determination	Representation associated with 252.247-7024	Remove from DFARS 212.301.
DFARS	252.247-7023	Transportation of Supplies by Sea	10 U.S.C. § 2631 No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.
DFARS	252.247-7024	Notification of Transportation of Supplies by Sea	46 U.S.C. § 1241 DAC 91-9	Requirements generally do not apply to commercial items. Unique requirements should not apply to supplier's supply chain.	Remove from DFARS 212.301.
DFARS	252.247-7025	Reflagging or Repair Work	Section 315 of FY 1994 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301
DFARS	252.247-7026	Evaluation Preference for Use of Domestic Shipyards – Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade	Section 1017 of FY 2007 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.247-7027	Riding Gang Member Requirements	Section 3504 of FY 2009 NDAA No DAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from DFARS 212.301.

Table F-7. FAR and DFARS Clauses Derived from Executive Orders and Agency Regulations That Are Not Recommended to Apply to Procurements of Commercial Items

- Table F-7 lists FAR and DFARS clauses that are derived from an executive order or an agency regulation, but do not:
- Specifically refer to 41 U.S.C. § 1906 or § 1907/10 U.S.C. § 2375 and provides that, notwithstanding 41 U.S.C. § 1906 or § 1907/10 U.S.C. § 2375, it is applicable to contracts for the procurement of commercial items[7];
- Require that certain articles be bought from American sources pursuant to 10 U.S.C. § 2533a, or requires that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. § 2533b[8]; or
- Otherwise specifically state that it must be applicable to procurements of commercial items.
- The Section 809 Panel recommends that these clauses in Table F-7 be removed from FAR 52.212-5 and DFARS 212.301.
- 43 clauses (19 FAR and 24 DFARS)

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.222-3	Convict Labor	E.O. 11755 FAC 90-32	EO does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.222-17	Non-displacement of Qualified Workers	E.O. 13495 No FAR Council Determination	EO does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.222-19	Child Labor – Cooperation with Authorities and Remedies	E.O. 13126 No FAR Council Determination	EO does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.222-21	Prohibition of Segregated Facilities	E.O. 11246 No FAR Council Determination	Statute makes no mention of 41 U.S.C. § 1906 or § 1907.	Remove from FAR 52.212-5.

[7] See 41 U.S.C. § 1906. 41 U.S.C. § 1907, and 10 U.S.C. § 2375
[8] See 10 U.S.C. § 2375

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.222-26	Equal Opportunity	E.O. 11246 FAC 90-32	Clause's primary focus largely duplicates existing law generally applicable to US businesses. Creates unique data collection and reporting requirements; results in periodic OFCCP audits; requires flow down to subcontractors. Requirements are generally applicable to US companies; flows down to subcontractors.	Remove from FAR 52.212-5.
FAR	52.222-40	Notification of Employee Rights Under the National Labor Relations Act	E.O. 13496 No FAR Council Determination	EO does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.222-50	Combatting Trafficking in Persons	22 U.S.C. Chap 78/E.O. 13627 FAR Council determination – *Best Interest of the Government*	Statute does not mention CI or COTS. FAR clause based on E.O.; EO does not mention CI or COTS. Rule applies to COTS except for compliance plan and certification.	Remove from FAR 52.212-5.
FAR	52.222-54	Employment Eligibility Verification	E.O. 12989 FAR Council determination - Best Interest of the Government	E.O. does not mention CI or COTS; rule exempts COTS and COTS with *minor mods*, but not *commercial items.*	Remove from FAR 52.212-5.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.222-55	Minimum Wages Under Executive Order 13658	E.O. 13658 No FAR Council Determination	E.O. does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.222-62	Paid Sick Leave Under Executive Order 13706	E.O. 13706 FAR Council Determination - Best Interest of the Government	EO does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.223-11	Ozone-Depleting Substances and High Global Warming Potential Hydrofluorocarbons	E.O. 13693 No FAR Council Determination	EO does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.223-12	Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioners	E.O. 13693 No FAR Council Determination	EO does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.223-13	Acquisition of EPEAT-Registered Imaging Equipment	E.O. 13423, 13514 No FAR Council Determination	EO does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.223-14	Acquisition of EPEAT-Registered Televisions	E.O. 13423, 13514 No FAR Council Determination	EO does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.223-16	Acquisition of EPEAT-Registered Personal Computer Products	E.O.s 13423, 13514 No FAR Council Determination	E.O. does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.223-18	Encouraging Contractor Policies to Ban Text Messaging While Driving	E.O. 13513 No FAR Council Determination	E.O. does not mention CI or COTS.	Remove from FAR 52.212-5.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.223-20	Aerosols	E.O. 13693 No FAR Council Determination	E.O. does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.223-21	Foams	E.O. 13696 No FAR Council Determination	E.O. does not mention CI or COTS.	Remove from FAR 52.212-5.
FAR	52.225-13	Restrictions on Certain Foreign Purchases	Various E.O.s No FAR Council Determination	E.O.s does not mention CI or COTS.	Remove from FAR 52.212-5.
DFARS	252.204-7011	Alternative Line Item Structure	Defense Finance and Accounting System working group process reviews No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.211-7003	Item Unique Identification and Valuation	DoD regulation No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.211-7006	Passive Radio Frequency Identification	DoD Plan for Supplier Implementation of RFID No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.211-7007	Reporting of Government-Furnished Property	Regulation No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.211-7008	Use of Government-Assigned Serial Numbers	Regulation No DAR Council Determination		Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.213-7000	Notice to Prospective Suppliers on Use of Past Performance Information Retrieval System – Statistical Reporting in Past Performance Evaluations	Regulation No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.215-7003	Requirement for Submission of Data Other than Certified Cost or Pricing Data – Canadian Commercial Corporation	Regulation No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.215-7004	Requirement for Submission of Data Other than Certified Cost or Pricing Data – Modifications – Canadian Commercial Corporation	Regulation No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.215-7007	Notice of Intent to Resolicit	Under Secretary of Defense, AT&L, 11/3/10 Memo No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.215-7008	Only One Offer	Under Secretary of Defense, AT&L, 11/3/10 Memo No DAR Council Determination		Remove from DFARS 212.301
DFARS	252.222-7007	Representation Regarding Combatting Trafficking in Persons	E.O. 13627 No DAR Council Determination		Remove from DFARS 212.301.

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.223-7008	Prohibition of Hexavalent Chromium	Under Secretary of Defense, AT&L, 4/8/09 Memo No DAR Council Determination		Remove from DFARS 212.301..
DFARS	252.225-7027	Restriction on Contingent Fees for Foreign Military Sales	Regulation DAC 91-9	Contingent fees as an "allowable cost" is inconsistent with commercial product pricing.	Remove from DFARS 212.301.
DFARS	252.225-7028	Exclusionary Policies and Practices of Foreign Governments	Regulation DAC 91-9	Imposition of exclusionary polices is inconsistent with sales of commercial products and the suppliers existing supply chain.	Remove from DFARS 212.301.
DFARS	252.225-7040	Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States	DoD Instruction 3020.41 No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.225-7043	Antiterrorism/Force Prevention Policy for Defense Contractors Outside the United States	Regulation No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.229-7014	Taxes – Foreign Contracts in Afghanistan	Security and Defense Cooperation Agreement Between Islamic Republic of Afghanistan and U.S. DAR Council Determination – Best Interest of the Government		Remove from DFARS 212.301

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
DFARS	252.229-7015	Taxes – Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement)	Security and Defense Cooperation Agreement Between Islamic Republic of Afghanistan and U.S. DAR Council Determination – Best Interest of the Government		Remove from DFARS 212.301.
DFARS	252.232-7006	Wide Area Workflow Payment Instructions	Regulation No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.232-7009	Mandatory Payment by Government-wide Commercial Purchase Card	Principal Deputy Undersecretary of Defense for Acquisition and Technology, 10/2/98 Memo No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.232-7014	Notification of Payment in Local Currency (Afghanistan)	Regulation No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.243-7002	Requests for Equitable Adjustment	Regulation No DAR Council Determination		Remove from DFARS 212.301.
DFARS	252.244-7000	Subcontracts for Commercial Items	Regulation DAC 91-9	No longer necessary. Clauses specifically state if the requirement flows down.	Remove from DFARS 212.301.
DFARS	252.247-7028	Application for U.S. Government Shipping Documentation / Instruction	Regulation No DAR Council Determination		Remove from DFARS 212.301.

Table F-8. FAR Clauses Recommended for Relocation to FAR 52.212-4 or Part 12

- Table F-8 lists FAR clauses that the Panel recommends be relocated to 52.212-4 or Part 12.
- 7 FAR clauses

FAR/DFARS	Clause	Title	Basis	Comments	Recommended Action
FAR	52.232-29	Terms for Financing of Purchases of Commercial Items	Regulation FASA	Optional term that may be used if commercial financing will be used.	Move to FAR 52.212-4.
FAR	52.232-30	Installment Payments for Commercial Items	Regulation FASA	Optional term that may be used if commercial financing will be used.	Move to FAR 52.212-4.
FAR	52.232-33	Payment by Electronic Funds Transfer – System for Award Management	31 U.S.C. § 3332 FAR Council Determination - Best Interest of the Government	Administrative; Similar in intent to existing FAR 52.212-4(g)(3), Electronic Funds Transfer (EFT).	Move to FAR 52.212-4.
FAR	52.232-34	Payment by Electronic Funds Transfer – Other than System for Award Management	31 U.S.C. § 3332 FAR Council Determination - Best Interest of the Government	Administrative; Similar in intent to existing FAR 52.212-4(g)(3), Electronic Funds Transfer (EFT).	Move to FAR 52.212-4.
FAR	52.232-36	Payment by Third Party	31 U.S.C. § 3332 FAR Council Determination - Best Interest of the Government	Administrative; Similar in intent to existing FAR 52.212-4(g)(3), Electronic Funds Transfer (EFT).	Move to FAR 52.212-4.
FAR	52.233-3	Protest After Award	31 U.S.C. § 1558 FAC 90-32	Advises contractor regarding protest procedure.	Move to FAR 52.212-4.
FAR	52.233-4	Applicable Law for Breach of Contract Claim	Regulation	Notice regarding applicable law for breach of contract.	Move to FAR 52.212-4.

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APPENDIX G: ACRONYM LIST

Acronym/Term	Definition
A&AS	Advisory and Assistance Services
ACAT	Acquisition Category
ADV	Auditable Dollar Value
AFWay	Air Force Way system
AICPA	American Institute of Certified Public Accountants
AMC	Army Materiel Command
ARL	U.S. Army Research Laboratory
ATP	Authority to Proceed
BAA	Broad Agency Announcement
BCAC	Business Capability Acquisition Cycle
BCL	Business Capability Lifecycle
BEA	Business Enterprise Architecture
BMA	Business Mission Area
BMMP	Business Management Modernization Program
BPR	Business Process Reengineering
BTA	Business Transformation Agency
CAAS	Contracted Advisory and Assistance Services
CAS	Cost Accounting Standards
CASB	CAS Board
CBO	Congressional Budget Office
CCA	Clinger–Cohen Act
CICA	Competition in Contracting Act
CIO	Chief Information Officer
CMF	Cyber Mission Force
CMO	Chief Management Officer
CO	Contracting Officer
CON-IT	Contracting-Information Technology
COSO	Committee of Sponsoring Organizations
COTR	Contracting Officer Technical Representative
COTS	Commercially Available Off-The-Shelf
CPI	Cost Performance Index
CRAG	Contractor Risk Assessment Guide
DASD	Deputy Assistant Secretary of Defense
DASD (MIBP)	Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy

Acronym/Term	Definition
DASD(C3CB)	Deputy Assistant Secretary of Defense, Command, Control, and Communication (C3), Cyber, and Business Systems
DASD(DT&E)	Deputy Assistant Secretary of Defense for Development Test and Evaluation
DAU	Defense Acquisition University
DBB	Defense Business Board
DBC	Defense Business Council
DBS	Defense Business System
DBSAE	Defense Business Systems Acquisition Executive
DBSMC	Defense Business Systems Management Committee
DCAA	Defense Contract Audit Agency
DCAM	Defense Contract Audit Manual
DCAS	Defense Contract Administration Service
DCMA	Defense Contract Management Agency
DCMO	Deputy Chief Management Officer
DDR&E	Director Defense Research and Engineering
DevOps	Development Operations
DFAR	Defense Federal Acquisition Regulation
DFARS	DFAR Supplement
DISA	Defense Information Systems Agency
DITIP	DoD IT Investment Portal
DITPR	DoD Information Technology Portfolio Repository
DIUx	Defense Innovation Unit Experimental
DLA	Defense Logistics Agency
DLAD	DLA Directive
DNI	Director of National Intelligence
DoD	Department of Defense
DODD	DoD Directive
DoDI	DoD Instruction
DoDIG	Department of Defense Inspector General
DOE	Department of Energy
DOT&E	Director of Operational Test and Evaluation
DPAP	Defense Procurement and Acquisition Policy
DSMC	Defense System Management College
EC&P	Emerging Capability and Prototyping
ERP	Enterprise Resource Planning
EVM	Earned Value Management

Acronym/Term	Definition
FAR	Federal Acquisition Regulation
FARA	Federal Acquisition Reform Act of 1995
FASA	Federal Acquisition Streamlining Act of 1994
FCTMA	Foreign Defense Critical Technology Monitoring and Assessment
FMMP	Financial Management Modernization Program
FMR	Financial Management Regulation
FPDS	Federal Procurement Data System
FRESA	Federal Reports Elimination and Sunset Act of 1995
FS	Functional Strategies
FY	Fiscal Year
FYDP	Future Years Defense Program
GAGAS	Generally Accepted Government Auditing Standards
GAO	Government Accountability Office
GFEBS	General Fund Enterprise Business System
HASC	House Armed Services Committee
HEL-JTO	High Energy Laser Joint Technology Office
HSI	Human Systems Integration
IBF	Integrated Business Framework
ICAT	Integrated Cost Analysis Team
ICE	Incurred Cost Electronic
ICFR	Internal Controls over Financial Reports
I-Corps	Innovation Corps
IDIQ	Indefinite Delivery, Indefinite Quantity
IG	Inspector General
IPA	Independent Public Accountant
IPPS-A	Integrated Personnel and Pay System for the Army
IRB	Investment Review Board
IT	Information Technology
J&A	Justification and Approval
JDETO	Joint Directed Energy Transition Office
JTOH	Joint Technology Office on Hypersonics
KBS	Knowledge-Based Services
LMP	Logistics Modernization Program
MANPRINT	Manpower and Personnel Integration
MC4	Medical Communications for Combat Casualty Care
MCTL	Military Critical Technologies List

Acronym/Term	Definition
MCTP	Militarily Critical Technologies Program
MDA	Milestone Decision Authority
MDA	Missile Defense Agency
MDAP	Major Defense Acquisition Program
MDD	Materiel Development Decision
MIBP	Manufacturing and Industrial Base Policy
MOU	Memorandum of Understanding
MRTFB	Major Range and Test Facility Base
MSAP	Major Satellite Acquisition Program
NAICS	North American Industry Classification System
NASA	National Aeronautics and Space Administration
NDAA	National Defense Authorization Act
NRL	U.S. Naval Research Laboratory
NSF	National Science Foundation
NSWC	Naval Systems Warfare Center
O&M	Operations and Maintenance
OEP	Organizational Execution Plan
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget
OSBP	Office of Small Business Programs
OSD	Office of the Secretary of Defense
OTA	Other Transaction Authority
OTT	Office of Technology Transition
P2P	Procure to Pay
PARCA	(Office of) Performance Assessments and Root Cause Analysis
PARCA	Program Assessment and Root Cause Analysis
PE/BLI	Program Element/Budget Line Item
PM	Program Manager
PMI	Project Management Institute
POM	Program Objective Memorandum
PPBE	Planning, Programming, Budgeting, and Execution
PrCB	Printed Circuit Boards
PSC	Product Service Code
PTAC	Procurement Technical Assistance Center
PTAP	Procurement Technical Assistance Program
QDR	Quadrennial Defense Review

Acronym/Term	Definition
QSM	Quantitative Software Management (a software company)
R&D	Research and Development
R/R&D	Research/Research and Development
RCAS	Reserve Component Automation System
RDT&E	Research, Development, Test and Evaluation
RICEFW	Reports, Interfaces, Conversions, Extensions, Forms, and Workflows
RIF	Rapid Innovation Fund
ROI	Return on Investment
S&T	Science and Technology
SAM	Service Acquisition Mall
SAP	A software company
SASC	Senate Armed Services Committee
SBA	Small Business Administration
SBDC	Small Business Development Center
SBIR	Small Business Innovation Research
S-CAT	Service Acquisition Category
SEAPRINT	Systems Engineering, Acquisition, and Personnel Integration
SOX	Sarbanes–Oxley Act
SPI	Schedule Performance Index
STTR	Small Business Technology Transfer
T&E	Test and Evaluation
TINA	Truth in Negotiation Act
TMIP-J	Theater Medical Information Program-Joint
TRMC	Test Resource Management Center
TRP	Technology Reinvestment Program
U.S.C.	United States Code
UAS	Unmanned Aerial System
UAV	Unmanned Aerial Vehicle
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)	Under Secretary of Defense for Research and Engineering
USSOCOM	U.S. Special Operations Command
WSARA	Weapons System Acquisition Reform Act

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