IT Alliance for Public Sector
A Division of ITI

March 3, 2016

The Honorable Mac Thornberry
Chairman
House Committee on Armed Services
U.S. House of Representatives
Washington, DC 20510

The Honorable Adam Smith
Ranking Member
House Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Re: ITAPS Proposed Acquisition Reform Recommendations for FY 2017 National Defense Authorization Act

Dear Chairman Thornberry and Ranking Member Smith:

On behalf of the members of the Information Technology Alliance for Public Sector (ITAPS)[1], the most innovative information technology companies offering hardware, software, services, and solutions to the federal government, I am writing to share our industry's top priorities for next year's National Defense Authorization Act (NDAA). We appreciate your leadership in tackling acquisition reform in the Fiscal Year (FY) 2016 NDAA, particularly around those elements intended to secure the warfighters' technological advantage and access to commercial products through the introduction of the Agile Acquisition to Retain Technological Edge Act. The incorporation of that bill into the FY16 NDAA served as a foundation for this generation of reforms, but there is more that can be done.

We intend for the following recommendations (in no particular order) to act as a catalyst for further conversation. They span topics that are of utmost importance to the federal technology industry (promotion of commercial item acquisitions, flexible funding and contract mechanisms, improving federal IT management, etc.), and we believe they should be a priority for the government as well in order to give the Department the tools and skills it needs to retain its technological edge. With cybersecurity being of critical importance for our nation's security, we must fully leverage innovations being developed in the private sector that address those challenges head on. The procurement system created decades ago must adapt to today's threat environment and we believe that continual improvement to the system with multi-stakeholder involvement will produce the most effective results.

Thank you for your attention to these recommendations and for your continued support of acquisition reform in this year's bill. We look forward to continuing the dialogue about additional and ongoing reforms that will enable the government's greater adoption and success with information technologies.

Should you have any questions, please contact Erica R. McCann at emccann@itic.org.

Respectfully submitted,

A.R. "Trey" Hodgkins, III, CAE
Senior Vice President, Public Sector

Cc: House Armed Services Committee

[1] **About ITAPS**. ITAPS, a division of the Information Technology Industry Council (ITI), is an alliance of leading technology companies building and integrating the latest innovative technologies for the public sector market. With a focus on the federal, state, and local levels of government, as well as educational institutions, ITAPS advocates for improved procurement policies and practices, while identifying business development opportunities and sharing market intelligence with our industry participants. Visit itaps.itic.org to learn more. Follow us on Twitter @ITAllliancePS.

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Protection of proprietary and other information related to commercial item determinations by the Department of Defense

ISSUE

This provision expands the Department of Defense's (DoD) centralized capability established in last year's NDAA to provide assistance on market research and price reasonableness. This allows the centralized capacity to provide assistance to contracting officers on the key elements of awarding a commercial contract. Also, the proposal limits the access to the commercial item database to just government audiences and not to the general public.

DISCUSSION

Section 851 of the National Defense Authorization Act for Fiscal Year 2016, (FY16 NDAA), among other actions, created new a statute, 10 USC 2380, that requires that the Department of Defense to create a centralized capability to oversee making commercial item determinations in the Department of Defense. The statutory mandate, however, does not address the additional steps for effective acquisition of commercial items (market research and determinations of price reasonableness) for which contracting officers and other acquisition officials would benefit from the support of a central capability. The new statute also requires that commercial item determinations be accessible to the general public, requiring significant additional work to create a database that would prevent exposure of business sensitive and proprietary information; creating new risks of exposure of such information for industry; and producing no clear offsetting policy benefit.

As noted above, in section 851 of the FY16 NDAA, Congress required the creation of a centralized commercial item determination capability in the Department of Defense. This capability is likely to create consistent application of standards to support the work of contracting officers and other DoD officials in defense procurement decision-making. Industry believes that the other separate processes and determinations required for effective acquisition of commercial items, such as market research and determinations of price reasonableness, should also be required to be supported by a central capability in the Department of Defense in order to achieve a similar level of consistency.

Unfortunately, Congress has required that a facility be established within the centralized capability to allow public access to commercial item determinations which raises a number of concerning issues. The public access requirement creates a number of potentially costly, resource intensive challenges. The scope and depth of such information involved in any particular commercial item determination will likely vary significantly, depending on the item in question. If there is any perceived risk that competition-sensitive sales information or proprietary technical information used in the course of making commercial item determinations will not be adequately protected, commercial companies and non-traditional defense contractors may have yet another disincentive to offer their commercial items and services to the Department of Defense.

Finally, industry believes that the Congress should clarify its intent that the centralized capability should provide a means to ensure that a commercial item determination, once made, will preclude the need for a contractor to reapply to have a commercial item determination for the item in the future.

RECOMMENDATION

Amend 10 USC 2380 as shown (*highlighted in red italics*) to expand the mandate for the central capability to support the range of separate steps involved in the acquisition of commercial items and to limit access to commercial item determination information to officials of the Department of Defense:

"§ 2380. Commercial item determinations by Department of Defense

"The Secretary of Defense shall—

"(1) establish and maintain a centralized capability with necessary expertise and resources to ~~*oversee*~~ *provide assistance to the military services and defense agencies with regard to* the making of commercial item determinations*, conducting market research, and performing price reasonableness analysis* for the purposes of procurements by the Department of Defense; and

"(2) provide ~~*public*~~ access *of previous commercial item determinations, market research, and price reasonableness analyses only* to Department of Defense *officials* ~~*commercial item determinations*~~ for the purposes of procurements by the Department of Defense."

Report language:

"The committee intends that the centralized capability be managed in such as to preclude the need to reapply for a commercial item determination once such determination has been made for an item."

Value analysis for the determination of price reasonableness

ISSUE

This provision requires contracting officers to account for the associated value and cost avoidance to the government when evaluating commercial prices.

DISCUSSION

Government decisions concerning commercial item price reasonableness typically are based on a narrow approach that relies solely on commercial sales data. This approach does not account for the inherent value of commercial items. This approach also fails to address "first to market" products with no or limited sales history – the very products the DoD is seeking to rapidly acquire. While a few contracting officers are aware that "value analysis" is available for analyzing price, the legislative and regulatory direction and guidance does not sufficiently address this pricing method.

Federal Acquisition Regulation (FAR) 15.404-1 provides contracting officers guidance on proposal analysis techniques for commercial items and non-commercial items. The FAR lists examples of price analysis techniques that include: (1) comparison of proposed prices in response to a solicitation, (2) comparison of proposed prices to historical prices paid, (3) use of parametric estimating, (4) comparison of competitive published price lists, comparison to independent government cost estimates and comparison with prices obtained through market research. The FAR states that the first two techniques are the preferred techniques and that value analysis maybe used in conjunction with price analysis.

Value analysis is a critical element for the determination of price reasonableness. Otherwise, how would contracting officers evaluate intellectual property, data rights, cost avoidance of research and development, speed to delivery – just to name a few "value" factors contained in a commercial price?

Section 852 of the FY16 NDAA amended 10 USC 2379 subsection (d) to require the offeror to submit prices paid for same or similar commercial items, under comparable terms and conditions, by both Government and commercial customers, to the contracting officer. If the contracting officer is unable to determine the reasonableness of price, then the contracting officer is directed to request additional information on: (1) prices for the same or similar items sold under different terms and conditions; (2) prices for similar levels of work or effort on related products or services; (3) prices for alternative solutions or approaches; and (4) other relevant information that can serve as the basis for a price assessment. If the contracting officer determines the information submitted is not sufficient, the contracting officer will seek other relevant data regarding the bases for price and cost.

Industry believes if value analysis was performed in conjunction with price analysis, the contracting officer would be able to document the value in the determination of price reasonableness. Industry believes this will facilitate price reasonableness determinations and reduce the additional requests for information from the offeror.

RECOMMENDATION

Add a section in Title XIII of the bill that requires guidance (see section (a)) for value analysis and amends 10 USC 2730 to allow for the submission of value analysis by the offeror (see section (b) – the legislative changes are *highlighted in red italics below*).

SEC. 8XX. VALUE ANALYSIS FOR THE DETEMRINATION OF PRICE REASONABLENSS

(a) GUIDANCE REQUIRED. Not later than 180 days after the date of enactment of this Act, the Under Secretary of Defense for Acquisition, Technology and Logistics shall issue guidance to ensure that contracting officers of the Department of Defense incorporate value analysis for the determination of price reasonableness. The guidance issues pursuant to this subsection shall, at a minimum-

(1) ensure price reasonableness decisions include information available, from within the government, sources other than the offeror and from the offeror (in that order);

(2) require use of analytical procedures and techniques set forth at FAR 15.404-1(b).

(3) include value analysis of the benefits the Government receives from avoiding costs it would otherwise incur if it did not procure the item commercially, such as, but limited to -

1. innovation and investment in new technology;
2. product design;
3. development time;
4. duplicative cost of pursuing unique alternatives;
5. industrial base efficiencies;
6. speed of delivery to meet requirements;
7. intellectual property;
8. warranties;
9. brand value;
10. economies of scale;
11. cost of carried inventory;
12. supply chain integrity;
13. parts obsolescence management;
14. product support infrastructure;
15. market demand versus available supply;
16. total cost of ownership;
17. next best alternative; and
18. fluctuation in materiel costs.

(4) require documentation of alternative approaches considered to assess price reasonableness for commercial items, including value analysis, before requesting cost data from a supplier.

(b) INFORMATION SUBMITTED.-Subsection (d) of 10 USC 2379 is amended to read as follows: *(drafters note, the changes are highlighted in red, italic and underline):*

"(d) INFORMATION SUBMITTED.— (1) To the extent necessary to determine the reasonableness of the price for items acquired under this section, the contracting officer shall require the offeror to submit—

"(A) prices *offered or* paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers;

"(B) associated value analysis that accounts for cost avoidance to the Government, such as, but not limited to -

(i) innovation and investment in new technology;

(ii) product design;

(iii) development time;

(iv) duplicative cost of pursuing unique alternatives;
(v) industrial base efficiencies;
(vi) speed of delivery to meet requirements;
(vii) intellectual property;
(viii) warranties;
(ix) brand value;
(x) economies of scale;
(xi) cost of carried inventory;
(xii) supply chain integrity;
(xiii) parts obsolescence management;
(xiv) product support infrastructure;
(xv) market demand versus available supply;
(xvi) total cost of ownership
(xvii) next best alternative; and
(xviii) fluctuation in materiel costs; and

"(~~B~~ *C*) if the contracting officer determines that the offeror does not have access to and cannot provide sufficient information described in subparagraph (A) *and (B)* to determine the reasonableness of price, information on—

"(i) prices *offered or paid* for the same or similar items sold under different terms and conditions;
"(ii) prices *offered or paid* for similar levels of work or effort on related products or services;
"(iii) prices *offered or paid* for alternative solutions or approaches; and
"(iv) other relevant information that can serve as the basis for a price assessment; and

"(~~C~~ *D*) if the contracting officer determines that the information submitted pursuant to subparagraphs (A) and (B) is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.

"(2) An offeror may not be required to submit information described in paragraph (1)(~~C~~ *D*) with regard to a commercially available off-the-shelf item and may be required to submit such information with regard to any other item that was developed exclusively at private expense only after the head of the contracting activity determines in writing that the information submitted pursuant to paragraphs (1)(A), ~~and~~ (1)(B), and *(1)(C)*is not sufficient to determine the reasonableness of price.".

Report language:

"The committee intends that value analysis be included to the determination of the reasonableness of price for commercial items."

Market research for the determination of price reasonableness

ISSUE

This provision requires contracting officers to conduct market research in the determination of price reasonableness. Currently, the military service is only required by law to conduct market research to determine if a military requirement can be met by a commercial item. Commercial capability market research is not the same as market research to understand the price offered in the commercial marketplace.

DISCUSSION

Government decisions concerning commercial item price reasonableness typically are based on a narrow approach that relies solely on commercial sales data provided by the offeror. This approach fails to account price and materiel factors found in market research. While 10 USC 2377 establishes the preference for acquisition of commercial items, it limits the requirement for market research only to preliminary market research. Preliminary market research is defined in terms of understanding what commercial items are suitable to meet military requirements. Similarly, Federal Acquisition Regulation (FAR) Part 10.001 focuses the requirement for market research on potentially identifying commercial items that can meet an agency's needs and requirements.

There is a distinct difference between conducting market research to determine if commercial technology is available to meet military requirements and market research done to support price reasonableness of commercial items. The former is a capabilities based research that focuses on identifying commercial items that can meet government requirements – to include the modification of commercial items (of a type). The latter is a decision-based process to evaluate prices offered in context of the marketplace to determine the prices proposed are fair and reasonable. Without market research when evaluating commercial item prices, the determination of price reasonableness is constrained. Commercial prices are not developed in a vacuum free of market forces, resources constraints and material availability. Just as it is important for the government to perform market research to understand what is available in the marketplace, it is equally important to understand prices offered in context of that same marketplace.

RECOMMENDATION

Amend 10 USC 2377 by adding a new subsection (d) *(highlighted in red italics below)* as shown to include market research in the determination of price reasonableness:

"(d) Market Research for Price Analysis – (1) the contracting officer shall conduct market research to support the determination of the reasonableness of price for commercial items."

Report language:

"The committee intends that market research be included to the determination of the reasonableness of price for commercial items."

Nontraditional Defense Contractors

ISSUE

This provision requires the head of the contracting activity to treat nontraditional contractors' products as commercial items (changing may to shall). It expands the definition of nontraditional contractors from entity (a corporation) to Data Universal Numbering System (a unique business unit). This allows other nondefense business units – that have not sold to the federal government in the past year – to qualify as a nontraditional contractor. This will significantly expedite the adoption of commercial technology from nontraditional business units.

DISCUSSION

10 USC 2380A as created by section 857 of the National Defense Authorization Act for Fiscal Year 2016 (FY16 NDAA) authorizes the Department of Defense to treat items or services from a nontraditional entity as commercial items or services. In order to achieve the aims for the provision intended by Congress, the authority should be made a requirement.

ITAPS shares the aims expressed in the Senate Armed Services Committee report to accompany its version of the FY16 NDAA (Senate Report 114-49).

> The committee believes that it is critical for the Department of Defense to access non-traditional commercial contractors to address future technology challenges where commercial technology is rapidly advancing beyond military technology. There are significant barriers to the participation of these contractors in the DoD marketplace. .. This committee recognizes that the defense market is not large enough for some commercial firms to go to the trouble and expense of changing their business processes to comply with a Federal Acquisition Regulation (FAR) Part 15 type contract traditionally used for most defense purchases.

Section 815 of the FY16 NDAA establishes a new definition of nontraditional defense contractor as an entity "that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section."

Section 857 of the FY16 NDAA created a new statute (10 USC 2380A) that allows heads of defense agencies to treat the goods or services from such entities as commercial items or services for purposes of procurement and to allow the use of Federal Acquisition Regulation part 12 procedures to do so. ITAPS is concerned, however, that there may be insufficient motivation for the Department of Defense to develop training and procedures to allow this authority to be used in a meaningful and consistent manner across DoD, and that stronger direction will be required to institutionalize the benefits of this approach intended by Congress.

RECOMMENDATION

First, amend 10 USC 2380A as shown to expand the mandate for the central capability to support the range of separate steps involved in the acquisition of commercial items and to limit access to commercial item determination information to officials of the Department of Defense (*changes highlighted in red italics*):

"§ 2380A. Treatment of goods and services provided by nontraditional defense contractors as commercial items

"Notwithstanding section 2376(1) of this title, items and services provided by nontraditional defense contractors (as that term is defined in section 2302(9) of this title) ~~*may*~~ *shall* be treated by the head of an agency as commercial items for purposes of this chapter."

Second, amend 10 USC 2302(9) as shown to change entity to Data Universal Number System (*changes highlighted in red italics*):

(9) The term "nontraditional defense contractor", with respect to a procurement or with respect to a transaction authorized under section 2371(a) or 2371b of this title, means a~~n entity~~ *specific business unit or function identified by a unique Data Universal Number System* that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section.

Report Language:

"The committee intends that the definition of non-traditional contractors be expanded to leverage broader commercial technologies from traditional non-defense units.

NOTES:

1. The DUNS system has been around since 1963. These numbers, assigned by Dun and Bradstreet, are a nine digit number assigned to each business location that has a unique, separate and distinct operation for the purposes of identifying them. https://en.wikipedia.org/wiki/Data_Universal_Numbering_System.
2. The government requires DUNS numbers to be loaded into the System for Award Management (SAM) (https://www.sam.gov/portal/SAM/##11) by any contractor that want to conduct business with the government.
3. For the Department of Defense, the Defense Logistics Agency records the DUNS number as well as assigns a unique Commercial and Government Entity Code (CAGE Code) to suppliers for various government or defense agencies. https://en.wikipedia.org/wiki/Commercial_and_Government_Entity_code

Limiting contractual requirements that are flowed down to the commercial supply chain

ISSUE

This provision excludes unique government flow down requirements from commercial suppliers providing commodities that are fulfilling both commercial and government orders. In short, if a commercial contractor is buying bulk commodities from a commercial supplier – and those commodities are then being used in the manufacturing line for both commercial and government orders – those commercial suppliers in the commercial supply chain will not be subject to unique federal flowdown requirements as outlined in FAR Part 12.301 and FAR Subpart 213.3.

DISCUSSION

All companies buy commodities for production and operations that do not relate in any way to a particular contract, customer or customer requirements. This is generally referred to as "general procurement of commodity items purchased in the ordinary course of business", and is a standard commercial practice. Companies purchase items in this manner in order to take advantage of bulk pricing and for efficiency of operations and production.

The proliferation of the application of unique terms and conditions as flow-down requirements on government contracts has created a uniquely problematic situation for these general procurement purchases, where the supply chain is largely commercial in nature and is comprised of a significant number of small businesses. The suppliers are not subcontractors on any particular program, and no specific contract is yet known for purposes of the ultimate use of the commodity. The flowdown requirements should not be applied in these situations.

RECOMMENDATION

Amend 41 USC 1906, "List of Laws inapplicable to procurements of commercial items," as follows (*new language in red italics*):

(c) Subcontracts.—
(1) Definition.—In this subsection, the term "subcontract" includes the transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor; *the term does not include agreements entered into by a contractor with a nontraditional defense contractor or for the supply of commodities that are intended for use in the performance of multiple contracts with the Government and other parties and that are not identifiable to any particular contract.*

Report Language:

"The committee intends that the definition of subcontract not include agreements for commodities that are used to meet both commercial and military contracts."

Commercial Item Definition

ISSUE

This provision clarifies the definition of commercial items to those items used by the general public or by non-governmental entities. It modifies the definition minor modifications made to commercial items – those commercial items that require minor modifications to meet military requirements – to preserve commercial status if a predominance or preponderance of characteristics of a modified item remains commercial.

DISCUSSION

For over two decades, the Congress has expressed support for providing the U.S. Government with access to the latest commercial technologies. Title VIII of the 1994 Federal Acquisition Streamlining Act (Public Law 103-355) (FASA) established the statutory requirements for acquiring commercial items which subsequently resulted in the creation of FAR Part 12. Section 8104 of the Act specifies a preference for commercial item acquisitions. Section 8105 specifies that certain provisions of law do not apply to acquisitions of items that meet the definition of a commercial item when acquired by the Government.

The commercial item definition was intended to be broad and includes items "of a type" that have been sold, leased, or licensed or even merely offered for sale, lease, or license to the general public. This includes items that are not yet available in the marketplace due to their advances in technology or performance, items that have modifications of a type customarily available in the commercial marketplace, and items with minor modifications of a type not customarily available in the commercial marketplace but made to meet U.S. Government requirements. Commercial items "off the shelf" are also a subset of a commercial item as defined by the FAR. The commercial item definition is thus broad, and intentionally so, in order to allow the Government to have access to the latest and most innovative commercial items, technologies and companies.

In recent years, the Department of Defense has tried to narrow the statutory definition, either through legislative proposals, which were rejected by the Congress, or through policies such as assigning a specific percentage to a modification in order for it to be determined as "minor" or requiring a certain percentage of sales to be commercial, both of which are not consistent with the statutory language or congressional intent.

More recently, the Department has attempted to define "of a type" itself by requiring the exact item offered to the Government (no modifications, alterations, additions, etc.) be sold, leased, or licensed or offered for sale, lease, or license, to the general public. This narrows the definition of "of a type" to only items sold in the commercial marketplace, and subsequently, excludes similar items in terms of form, fit, or function that are capable of meeting governmental requirements. This construct essentially eliminates "of a type" items and allows only "off the shelf" items.

By narrowing the definition of commercial items, the Government not only limits the types of commercial items it is able to access, but also limits its potential sources of supply to only those companies that have established the infrastructure to accommodate unique government cost accounting, audits, and other requirements. These requirements cause companies not to compete for DoD programs or, in cases where they do compete, often results in separate businesses for government and commercial customers so that the increased costs of the government infrastructure can be allocated to the government contracts.

There is ample evidence that the commercial item definition was intended to be interpreted broadly. In a January 5, 2001 policy memo, the Under Secretary of Defense for Acquisition Technology and Logistics stated that "of a

type" broadens the commercial item definition so that qualifying items do not have to be identical to those in the commercial marketplace. More recently, in the SASC report for the FY13 NDAA, the committee stated FASA "adopted a broad definition of commercial items to ensure the federal agencies would have ready access to products that are available in the commercial marketplace – including new products and services and modified products that are just becoming available." Further, in its July 2014 report, the Defense Business Board (DBB) concluded that the procurement process for acquiring non-commercial items (FAR Part 15) is a significant barrier to innovation and does not accommodate commercial operating or investment models; the report recommended that FAR Part 12 be established as the default procurement method for non-platform acquisitions. The DBB's number one recommendation was for DoD to utilize its existing FAR Part 12 authorities more and to expand rather than restrict the definition of "of a type" commercial items.
The Government's current, narrow approach to commercial items that are "of a type" is creating an acquisition environment within which commercial suppliers cannot depend on reasonable and practical approaches to valuing their products. Ultimately, these challenges will drive suppliers out of the market and create an impenetrable barrier to entry for new, innovative suppliers.

Congress should reinforce the broad definition of commercial items, including items "of a type", items with modifications customarily available in the commercial marketplace, and items with minor modifications required by the Government. It should be noted that these modifications do not need to be derived from an item sold to the general public, but only be similar in terms of form, fit, or function.

RECOMMENDATION

Amend 41 U.S. Code §103 as shown (*changes highlighted in red italics*) to clarify the "of a type" items with modification or minor modifications:

In this subtitle, the term "commercial item" means—

(1) Any item *or service*, 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*~~ --

(A) *is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes,* ~~*Has been sold, leased, or licensed to the general public;*~~ *or*~~,~~

(B) *is of a type that has been sold, leased, or licensed to the general public, or offered for sale, lease or license to the general public;* ~~*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 --

(A) 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 mean 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*~~ *For minor modifications, the item need only retain a predominance or preponderance of nongovernmental functions or essential physical characteristics. In either case – modifications of a type customarily available in the commercial marketplace or minor modifications – the source of funding for the modifications shall not be a factor in a determination that an item is a commercial item under this subsection or in determining the Government's rights in any technical data pertaining to such modified commercial item or in computer software qualifying as a commercial item;*

Report Language:

The Committee intends that a commercial item does not have to be "off the shelf" to be classified as commercial and that modification of a type and that minor modification should be acquired to meet Federal Government requirements.

Nondevelopmental Items

ISSUE

This provision expands the definition of a nondevelopmental item to include those items sold to foreign governments in order for the Department of Defense to avoid developmental costs for similar items developed for countries.

DISCUSSION

In FAR Part 2.101, Definitions, the definition of "Nondevelopmental item" means –

> (1) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;
> (2) Any item described in paragraph (1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or
> (3) Any item of supply being produced that does not meet the requirements of paragraph (1) or (2) solely because the item is not yet in use.

Since sales to foreign governments are excluded from the definition of "general public", it would be appropriate to include such sales under the section for nondevelopmental items, given that term currently includes sales to other types of government entities. This will enable the USG to acquire products that are already developed without incurring costs to develop a government-unique item.

RECOMMENDATION

Subsection 8 of 41 USC 103 and the FAR 2.101 definition of a Commercial Item should be changed as follows (*highlighted in red italics*):

> (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 *more than one* ~~multiple~~ State*,* ~~*and*~~ local, *or foreign* government~~s~~.

Report language:

The Committee intends that a nondevelopmental item includes those an item developed at private expense and sold to state, local, and foreign governments.

Applying Commercial Item Provisions Governmentwide

ISSUE

The FY16 NDAA made productive advancements in the acquisition of commercial items at the Department of Defense and many of those provisions can and should be applied governmentwide.

DISCUSSION

Maximizing the benefits of procuring commercial items should not be limited to the Department of Defense. We believe that many of the provisions from last year's bill would be beneficial to the civilian agencies, and would recommend the Title 10 provisions from last year's bill find complimentary inclusion in Title 41 where applicable. Some of the recommendations on commercial items as amended herein to this package on last year's provisions should be considered for the governmentwide application as well.

RECOMMENDATION

ITAPS requests that Congress apply the following sections from the FY16 NDAA to Title 41 as applicable to make them governmentwide provisions. Any edits made to those sections herein to this package should also be taken into consideration.

1. SEC. 844. MANDATORY REQUIREMENT FOR TRAINING RELATED TO THE CONDUCT OF MARKET RESEARCH
   (1) Amends 10 USC 2377 that requires the Secretary of Defense provide mandatory training for DoD employees responsible for the conduct of market research.

   Why is this important? Congress has long asserted that DoD contracting officers need to conduct market research when performing price reasonableness. This legislative change codifies that direction to the DoD.

2. SEC. 851. PROCUREMENT OF COMMERICAL ITEMS
   (1) Adds a new section (10 USC 2380) that requires the Secretary of Defense to maintain a centralized capability with the resources and expertise to oversee commercial item determinations and provide public access to those determinations.
   (2) Amends 10 USC 2306a(b) that establishes a presumption of commerciality – meaning that once a determination is made that item retains its commerciality for subsequent procurements – unless there is a redetermination by the Head of the Contracting Authority with a written explanation of the bases for the revision.

   Why is this important? This will significantly curtail commercial to military conversions.

3. SEC. 852. MODIFICATION TO INFORMATION REQUIRED TO BE SUBMITTED BY OFFERROR IN PROCUREMENT OF MAJOR WEAPONS SYSTEMS AS COMMERCIAL ITEMS
   (1) Amends 10 USC 2379 that eliminates the use of price reasonableness as a requirement of commercial item determination.

(2) Clarifies that a commercial item can either be on a commercial major weapons system or a commercial item on a military major weapons system.
(3) Clarifies the hierarchy of information that can be requested by the DoD to be submitted by a contractor to support a price reasonableness determination.
(4) Requires approval from Head of the Contracting Activity to for a contracting officer to request cost data on commercial items developed at private expense.

Why is this important? This eliminates the link between price and determination. This change requires a commercial determination to be made first and then price reasonableness determined second.

4. SEC. 853. USE OF RECENT PRICES PAID BY THE GOVERNMENT IN THE DETERMINATION OF PRICE REASONABLENESS
(1) Amends section 10 USC 2306(a) by adding a requirement for a contracting officer to consider evidence provided by an offeror of recent purchase prices paid by the Government for the same or similar commercial items in establishing price reasonableness.

Why is this important? Contracting officers must accept or include recent prices paid by other military services and government agencies in their price reasonableness determinations.

5. SEC. 854. REPORT ON DEFENSE-UNIQUE LAWS APPLICABLE TO THE PROUCREMENT OF COMMERCIAL ITEMS AND COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEMS
(1) Requires the DoD to report to the congressional defense committee identifying the defense-unique provisions of law that are applicable for the procurement of commercial times or commercial-off-the shelf items, not at the prime and subcontract level.
(2) The report will discuss the flow down clauses in subcontracts for commercial items required by law or executive order.

Why is this important? Commercial companies are required to accept executive order restrictions and legal requirements not intended to be applied to commercial companies. This report will highlight those requirements that are not consistent with standard commercial practices.

6. SEC. 855. MARKET RESEARCH AND PREFERENCE FOR COMMERCIAL ITEMS
(1) Requires guidance to ensure that acquisition officials of the Department of Defense fully comply with the requirements of section 2377 of title 10, United States Code – which is the statutory preference for acquisition of commercial items.
(2) Prohibits contacts for information technology items above the simplified acquisition threshold – unless head of agency determines in writing there are no commercial items suitable to meet requirements.
(3) Mandates market research to inform price reasonableness determinations.
(4) Requires a review of the requirements process to ensure that the DoD fully complies with Section 2377 (preference for acquisition of commercial items) and FAR 10.001 acquisition procedures (elements of commercial market research).

Why is this important? This provision restates Congressional direction for the DoD to adhere to commercial preferences for goods and services.

7. SEC. 856. LIMITATION ON CONVERSION OF PROCUREMENTS FROM COMMERCIAL ACQUISITION PROCEDURES

(1) Limits the conversion of commercial items or services from commercial acquisition procedures (FAR 12) to non-commercial acquisition procedures (FAR 15).
(2) Requires that each conversion valued at more than $1,000,000 the contracting officer must determine - in writing - that the earlier use of commercial acquisit6on procedures was in error or based on inadequate information and that the DoD will realize a cost savings.
(3) For procurements valued at more than $100,000,000 a contract may not be converted until the head of the contracting activity approves the determination and a copy of the determination is provided to the USD(ATL).
(4) Requires future conversions account for forgone commercial research and development costs, transaction costs and increased regulatory costs in converting existing FAR Part 12 contracts.
(5) Terminates this requirement 5 years after the date of enactment of the FY 2016 NDAA.

Why is this important? This provision clarifies that unless the DoD can quantify and declare, in writing, the expected savings of a conversion, the only rationale for initiating a conversion is that the prior determination was made in error or the contractor provided inadequate information at the time of the initial conversion.

Share-in-Savings Contracts

ISSUE

Clear legislative authority to share savings with contractors offers one of the best ways for the government to generate cost savings. Such legislation is needed to overcome the general reluctance of government agencies to use share-in-savings contracts. Legislation should authorize agencies to use share-in-savings (SiS) contracts to leverage limited resources to reduce program costs, make tangible improvements related to mission and administrative processes, and at the same time provide better value for taxpayers.

DISCUSSION

Share-in-Savings (SiS) contracts, in which the government contracts with companies to implement cost savings initiatives and pays them a portion of the savings realized, have the potential to produce significant cost savings but are not broadly embraced by government agencies. By providing contractors a reasonable portion of the actual savings they generate, SiS contracts motivate contractors to identify and implement significant cost savings initiatives on government programs with relatively low government risk. Such contracts are low risk because the government's initial investment is minimal and the contractor bears the risk of generating cost savings, without which the contractor will not be paid. SiS contracts offer a seemingly ideal tool to help address current budgetary challenges.

Since the mid-1980's, government agencies have used SiS contracts such as energy savings performance contracts. Even when specifically authorized, however, government agencies have been reluctant to widely adopt SiS contracts. One of the biggest reasons for such reluctance is the lack of clear statutory authority to share savings with the contractors that generate the savings. Clear legislative authority would help overcome some of the arcane fiscal rules regarding the Antideficiency Act, termination liability, and budgetary scoring rules. Statutory authority to share savings with contractors exists for energy contracts under The National Energy Conservation Policy Act, as amended, provides the legislative authority for ESPCs and specifies that agencies may enter into such contracts. This authority has been used to generate over $7 billion since its inception.

Additional, limited legislation exists for SiS contracts under the Improper Payments Elimination and Recovery Act of 2010 (IPERA). IPERA generally requires government agencies to establish programs to conduct risk assessments to identify and estimate improper payments, and to report on actions taken to reduce such payments. An improper payment is defined very broadly as "any payment that should not have been made or that was made in an incorrect amount." More specifically, IPERA requires agencies to conduct payment recovery audits if they would be cost-effective and permits the use of contractors to conduct such audits. Recovered funds can be used as follows: to pay the contractor; up to 25% returned to the agency for financial management improvement activities; up to 25% returned to the agency for the same general purposes as the appropriation from which the improper payment was made; and up to 5% for the agency Inspector General to conduct activities related to improper payments. The Office of Management and Budget (OMB) issued guidance implementing IPERA, which clearly envisions the use of contingent fee contracts and includes the statement that "contingency fee contracts shall preclude any payment to the payment recapture audit contractor until the recoveries are actually collected by the agency." While IPERA was enacted over three years ago, government agencies have made fairly limited use of the IPERA authority to enter into SiS contracts.

The Clinger Cohen Act of 1996 authorized limited pilot programs of SiS contracts for information technology. Apparently, only one SiS contract was awarded under the original Clinger Cohen Act by the Department of Education (DoED) in 1999. The contract involved consolidation of several legacy IT systems under the Student Financial Aid program. DoE realized nearly $40 million in savings and paid the contractor a share of those savings. The contractor assumed the risk of generating savings by making the upfront investment for the IT consolidation.

Despite the success of the DoED contract, no other government agency adopted SiS under the original Clinger Cohen Act. The E-Government Act of 2002 amended the Clinger Cohen Act and authorized SiS contracts more broadly where a contractor would provide government agencies with an information technology (IT) solution to (1) improve the agencies' mission-related or administrative processes or (2) to accelerate the achievement of agencies' mission. As an additional incentive, agencies were permitted to keep the savings from a SiS contract to use toward other IT projects. Such contracts were permitted for up to 10 years, "even if funds are not made specifically available for the full costs of cancellation or termination of the contract if funds are available and sufficient to make payments with respect to the first fiscal year of the contract." This share-in-savings provision in the E-Government Act was intended, in part, to address any remaining doubts regarding potential violation of the Antideficiency Act. The authority of this legislation expired at the end of Fiscal Year 2005, and despite the additional incentives, a July 2005 GAO report found that no SiS contracts were entered into under this authority.

In 2003, GAO reviewed *commercial* use of share-in-savings arrangements, and concluded that such arrangements could "*be a highly effective contracting technique* to motivate contractors to generate savings and revenues for their clients."[2] Not surprisingly, the GAO found variations in the commercial SiS contracts they studied. The contracts ranged from a contractor's total compensation paid entirely from sharing a portion of a client's savings, to arrangements where contractors were paid for at least some portion of their investment, regardless of the outcome. The GAO identified four key conditions for success: clearly defined expected outcomes such as generating savings from revising inefficient business practices; both client and contractor had incentives to use SiS contracting; a baseline and performance metrics could be established to measure savings; and the client's management committed to support the project, including implementing recommendations. These key conditions are also relevant to the government's use of SiS contracting as discussed below.

Our recommendation also includes coordination with the acquisition training facilities (DAU and FAI) to make sure that there is an educational component to this tool. We hear that contracting officers are uncomfortable with this sort of contract because they are not properly trained in how to use it effectively. The recommendation addresses that by directing the acquisition academies to incorporate training into their curriculum.

Proposed legislation that could broadly be used for reducing a government agency's current costs such as real property optimization, data center consolidation, supply chain optimization, and restructuring would provide the greatest benefit, rather than specifically targeting legislation to a particular contract type.

RECOMMENDATION

Legislation is proposed as follows (*highlighted in red italics*):

Section 2332 of Title 10, and Section 317 of the Federal Property and Administrative Services Act of 1949, are amended to read as follows:

Section XXXX. Share-in savings contracts

(a) Authority to Enter Into Share-in-Savings Contracts.—

(1) The head of an agency may enter into a share-in-savings contract for any existing program, project, function, or operation in which the government awards a contract to improve mission-related or administrative processes or to accelerate the achievement of its mission and share with the contractor savings achieved from initiatives identified during contract performance.

[2] GAO Report "Contract Management: Commercial Use of Share-in-Savings Contracting," GAO-03-327, January 2003 (emphasis added).

(2) A share-in-savings contract shall be awarded for a period of not more than ten years.

(3) Contracts awarded pursuant to the authority of this section shall, to the maximum extent practicable, be performance-based contracts that identify objective outcomes and contain performance standards that will be used to measure achievement and milestones that must be met before payment is made. Agencies shall consider including an initial assessment, an industry best practice, as part of such contract (subject to availability of funding), which would permit the contractor to review the targeted area for potential savings before entering the execution phase to validate the objective outcomes, performance standards and likelihood of generating savings.

(4) Contracts awarded pursuant to the authority of this section shall include a provision containing a quantifiable baseline that is to be the basis upon which a savings share ratio is established that governs the amount of payment a contractor is to receive under the contract. Before commencement of performance of such a contract, the contracting officer shall determine in writing that the terms of the provision are quantifiable and will likely yield value to the Government.

(5) (A) The head of the agency may retain savings realized through the use of a share-in-savings contract under this section that are in excess of the total amount paid to the contractor under the contract. Except as provided in subparagraph (B), savings shall be credited to the appropriation or fund against which charges were made to carry out the contract.

(B) Amounts retained by the agency under this subsection shall without further appropriation, remain available until expended.

(b) Cancellation and Termination.—

(1) If a share-in-savings contract entered into under this section is canceled or terminated for convenience by the government for any reason, the costs of cancellation or termination, if any, may be paid out of—

(A) appropriations available for the performance of the contract;

(B) appropriations available for acquisition of the type of property or services procured under the contract, and not otherwise obligated; or

(C) funds subsequently appropriated for payments of costs of cancellation or termination, subject to the limitations in paragraph (3).

(2) The amount payable in the event of cancellation or termination of a share-in-savings contract shall be negotiated with the contractor, including consideration of no payment, at the time the contract is entered into.

(3) The head of an agency may enter into share-in-savings contracts under this section in any given fiscal year even if funds are not made specifically available for the full costs of cancellation or termination of the contract if funds are available and sufficient to make payments with respect to the first fiscal year of the contract and the amount of unfunded contingent liability for the contract does not exceed the lesser of—

(A) 50 percent of the estimated costs of a cancellation or termination; or

(B) $5,000,000.

(c) Regulations—The Office of Management and Budget shall issue final regulations to the Federal Acquisition Regulations and any addition guidance deemed necessary to implement this section within 180 days of enactment.

(d) Training—The Defense Acquisition University and the Federal Acquisition Institute shall develop and implement training on share-in-savings contract within 180 days of enactment.

(e) Annual Report—The Office of Management and Budget shall issue an annual report on all share –in—savings contracts that have been awarded and the savings that they have generated, with the first report due December 31, 2018 for the prior fiscal year.

(f) Definitions.--In this section:

(1) The term `contractor' means a private entity that enters into a contract with an agency.

(2) The term `savings' means—

(A) monetary savings to an agency; or

(B) savings in time or other benefits realized by the agency, including enhanced revenues.

(3) The term `share-in-savings contract' means a contract under which—

(A) a contractor provides solutions for—

(i) improving the agency's mission-related or administrative processes; or

(ii) accelerating the achievement of agency missions; and

(B) the head of the agency pays the contractor an amount equal to a portion of the savings derived by the agency from—

(i) any improvements in mission-related or administrative processes that result from implementation of the solution; or

(ii) acceleration of achievement of agency missions.''.

National Defense Information Technology Fund

ISSUE

The pace of IT innovation rapidly and exponentially outpaces the current appropriations and budget cycles. This leaves agencies unable to procure the latest innovations that the private sector offers, and poses significant risk for agencies concerned about cybersecurity. Cyber threats will not wait for the federal IT budget to be approved.

DISCUSSION

Based on the National Defense Sealift Fund, the recommendation below tackles the critical lapse of time between when appropriations are funded and when innovation occurs in the private sector. Agencies and the Department need proper incentives to migrate away from legacy systems and this sort of proposal does not penalize them for adhering to a fixed budget cycle. In short, the current budget cycle limits innovation.[3]

RECOMMENDATION

Insert new section (highlighted in red italics):

Section 2219. National Defense Information Technology Fund

(a) Establishment. - There is established in the Treasury of the United States a fund to be known as the "National Defense Information Technology Fund".

(b) Administration of Fund. - The Secretary of Defense shall administer the Fund consistent with the provisions of this section.

(c) Fund Purposes. - (1) Funds in the National Defense Information Technology Fund shall be available for obligation and expenditure for the following purposes:

(A) Supplies that are procured or otherwise acquired, manufactured, repaired, issued, or used, including the cost of the procurement and qualification of information technology-enhanced maintenance capabilities that improve either reliability, maintainability, sustainability, or supportability and have, at a minimum, been demonstrated to be functional in an actual system application, operational environment or commercial market;

(B) Commercial cloud services, cloud-based solutions, and other emerging commercial information technology capabilities acquired through commercial delivery approaches; and

(C) Services or work performed in support of the acquisition and deployment of the supplies and solutions in (A) or (B).

(2) Funds in the National Defense Information Technology Fund may be obligated or expended only in amounts authorized by law.

[3] http://www.brookings.edu/blogs/techtank/posts/2016/02/04-federal-budget-process-inhibits-it-innovation-chenok

(d) Deposits. - There shall be deposited in the Fund the following:

(1) All funds appropriated to the Department of Defense for-

(A) Purchase and alteration of national defense information technology, including the acquisition of commercial cloud services and cloud-based solutions and other emerging commercial information technology capabilities;

(B) Operations, maintenance, and lease of national defense information technology, including the acquisition of commercial cloud services, cloud-based solutions, and other emerging commercial information technology capabilities; and

(C) Research and development relating to national defense information technology.

(e) Acceptance of Support. - (1) The Secretary of Defense may accept from any person, foreign government, or international organization any contribution of money, personal property, or assistance in kind for support of the information technology functions of the Department of Defense.

(2) Any contribution of property accepted under paragraph (1) may be retained and used by the Department of Defense or disposed of in accordance with procedures prescribed by the Secretary of Defense.

(3) The Secretary of Defense shall deposit in the Fund money and receipts from the disposition of any property accepted under paragraph (1).

(f) Expiration of Funds After 5 Years. - No part of an appropriation that is deposited in the National Defense Information Technology Fund pursuant to subsection (d)(1) shall remain available for obligation more than five years after the end of fiscal year for which appropriated except to the extent specifically provided by law.

(g) Budget Requests. - Budget requests submitted to Congress for the National Defense Information Technology Fund shall separately identify-

(1) the amount requested for programs, projects, and activities for construction, purchase, alteration, and conversion of national defense information technology;

(2) the amount requested for programs, projects, and activities for operation, maintenance, or lease of national defense information technology;

(3) the amount requested for the acquisition of commercial cloud services, cloud-based solutions, and other emerging commercial information technology capabilities; and

(4) the amount requested for programs, projects, and activities for research and development relating to national defense information technology.

(h) Definitions. - In this section:

(1) The term "Fund" means the National Defense Information Technology Fund established by subsection (a).

(2) The term "information technology" has the meaning given that term in section 11101 of title 40.

(3) The term "head of an agency" has the meaning given that term in section 2302(1) of this title.

Information Technology Inventory and Investment Plan

ISSUE

Government cannot fully realize the benefits of acquisition reform efforts until it has a plan to address what it already owns and operates. An IT inventory and investment plan are a critical first step to true IT acquisition reform.

DISCUSSION

The GAO has recommended in multiple reports[4] that agencies migrate their IT assets to a more modern, reliable, cloud computing infrastructure, and yet, they are slow to make that transition. One of the main inhibitors is that agencies do not know what they already own and what is even eligible to transition within their IT environment. Agencies must create automated, reliable inventories of their assets as a first step in modernizing their IT – the key word is *automated*. Agencies should be capturing purchasing data at the time of the transaction.

Once an inventory is assessed and suitability for cloud migration is determined, agencies will have a better set of tools to make smarter investment decisions.

RECOMMENDATION

New language (highlighted in red italics):

Sec. 8XX: Information Technology Inventory and Investment Plan

1) Inventory of Information Technology Assets

(a) Plan - The Director of the Office of Management and Budget shall direct the Federal Chief Information Officer, in coordination with the Chief Information Officers Council, to develop a plan for conducting a Governmentwide inventory of information technology (as defined by 40 U.S. Code § 11101(6)) assets.

(b) Matters covered - The plan required by subsection (a) shall include at a minimum the following:

(1) Information technology categories identified by the Chief Information Officer in coordination with the Chief Information Officers Council, including, but not limited to commercial hardware, software, cloud computing services, and cloud-based solutions.

(2) A system for creating itemized inventories of all information technologies in each category;

3) A strategy for federal agencies to review all IT investments and assess for suitability for migration to a cloud computing service or cloud-based solutions;

(4) A schedule for a governmentwide refresh of all existing information technology inventories with a plan to transition to an automated mechanism that tabulates government purchases in real time;

[4] GAO 14-753, Cloud Computing: Additional Opportunities and Savings Need to Be Pursued http://gao.gov/assets/670/666133.pdf; GAO 15-617, Information Technology Reform: Billions of Dollars in Savings have been Realized, But Agencies Need to Complete Reinvestment Plans http://www.gao.gov/assets/680/672517.pdf

(5) A clear statement that no additional information collections for information technology purchasing data from contractors and/or service providers will be granted;

(6) The manner in which Federal agencies can achieve the greatest possible economies of scale and cost savings in the procurement of information technology assets, including cloud computing services and cloud-based solutions based on a complete cost-benefit analysis;

(7) Reduction plans for inappropriate duplicative or overlapping procurements at agencies and departments; and

(8) A methodology to conduct ongoing Governmentwide refreshes of all existing information technology assets, and for a review of all IT investments to assess for suitability for migration to a cloud computing service or cloud-based solutions.

(c) Deadline and submission to Congress - Not later than 180 days after the date of the enactment of this Act, the Director, in coordination with the Federal Chief Information Officer and the Council of Chief Information Officers, shall complete and submit to Congress the plan required by subsection (a).

(d) Plan Review by Comptroller General - Not later than six months after the plan is submitted to Congress, the Comptroller General of the United States shall review the plan required by subsection (a) and submit to the relevant congressional committees a report on the review.

(e) Implementation - Not later than two years after the date of the enactment of this Act, the Federal Chief Information Officer, in coordination with the Chief Information Officers Council, shall complete the inventory and implementation of the plan required by subsection (a) and deliver a final report to the Director.

(f) Availability - The inventory of information technology assets shall be available to the Director of the Office of Management and Budget, the Federal Chief Information Officer, the agency Chief Information Officers, and such other Federal officials as the Chief Information Officers may, in consultation with the Chief Information Officers Council, designate. The inventories will not be made public.

2) Information Technology Investment Strategy

(a) Strategy – In order for Federal agencies to achieve the greatest possible economies of scale and cost savings based on a complete cost-benefit analysis through the reduction of inappropriate duplication in the procurement of information technology assets, the Director of the Office of Management and Budget shall direct the Federal Chief Information Officer, in coordination with the Chief Information Officers Council, to develop a Governmentwide information technology (as defined by 40 U.S. Code § 11101(6)) investment strategy using the data collected from the information technology inventory no later than 180 days after the information technology inventory is complete.

(b) Matters covered - The strategy required by subsection (a) shall include at a minimum the following:

(1) A governmentwide information technology investment strategy and a plan for reviewing all IT investments and assess for suitability for migration to a cloud computing service or cloud-based solutions issued by the Federal Chief Information Officer in coordination with the Chief Information Officers Council;

(2) A set of investment metrics defined by the Federal Chief Information Officer in coordination with the Chief Information Officers Council;

(3) A timeline for agencies to complete major benchmarks in the investment strategy with a final and complete implementation date no later than two years after the enactment of this provision;

(4) A requirement for agencies to complete information technology investment plans, in accordance with requirements established by the Federal Chief Information Officer, and maintain those plans on an ongoing basis;

(5) A requirement for agencies to track actual investment performance metrics as defined by the Federal Chief Information Officer, and define performance targets for agencies' investments;

(6) A plan to ensure that all information technology investments are assessed for suitability for transitioning away from legacy information technology systems; and

(7) Establish reevaluation dates for those investments identified as not suitable for transition away from legacy information technology systems.

(c) Deadline and submission to Congress - Not later than 180 days after the date of the enactment of this Act, the Director, in coordination with the Federal Chief Information Officer and the Council of Chief Information Officers, shall complete and submit to Congress the strategy required by subsection (a).

(d) Strategy Review by Comptroller General - Not later than six months after the plan is submitted to Congress, the Comptroller General of the United States shall review the strategy required by subsection (a) and submit to the relevant congressional committees a report on the review.

(e) Implementation - Not later than two years after the date of the enactment of this Act, agencies shall develop and gain approval by the Federal Chief Information Officer for agency investment plans that comply with the investment strategy described by subsection (a). The Federal Chief Information Officer must deliver a final report on the governmentwide investment strategy to the Director no later than 60 days after receiving all agency plans.

(f) Availability - The agency investment plans shall be made available to the Director of the Office of Management and Budget, the Federal Chief Information Officer, the agency Chief Information Officers, and such other Federal officials as the Chief Information Officers may, in consultation with the Chief Information Officers Council, designate. The investment plans will not be made public.

Eliminate Non-Value-Added Burdens from the Acquisition System

Limit the Scope and Applicability of the Fair Pay and Safe Workplaces Executive Order

ISSUE

The Fair Pay and Safe Workplaces Executive Order (Executive Order 13673) and the implementing rules and guidance will add significant compliance and reporting burdens and costs for both government and industry.[5] It requires any company seeking to do business with the federal government to identify and self-report any violations or alleged violations of 14 federal labor laws or their undefined equivalent state laws. Companies would also be required to collect and assess such information regarding their suppliers and subcontractors. All information must be provided at the time a company submits its proposal(s) to the government and every six months thereafter if awarded the contract. Information provided by the companies is an indicator of contractor responsibility during the federal acquisition source selection process.

While industry agrees that contractors with an adjudicated history of willfully and repeatedly violating labor laws should be subject to additional review before receiving federal contracts, the Executive Order and the proposed implementation documents have numerous serious flaws in addressing this policy. The Council of Defense and Space Industry Associations (CODSIA), including many ARWG associations, provided detailed comments outlining the flaws of the Executive Order and implementation documents.[6] First, they deny contractors their full due process rights by requiring them to self-report alleged violations of, and certify to their compliance with, 14 federal and unidentified equivalent state labor laws.[7] Any company that reports an alleged violation will be at an extremely high level of risk for "de facto" debarment as an already overburdened federal acquisition workforce may decide to forego making an award to a company rather than sorting through the processes and nuances of making an award to a company that has reported an alleged violation. Additionally, the Executive Order unfairly targets federal contractors while ignoring thousands of DoL cases where Federal Agencies have been found in violation of federal labor laws.

Second, the Executive Order is duplicative and unnecessary. The DoL, primarily through the Office of Federal Contract Compliance Programs (OFCCP) and the Wage and Hour Division, already conducts broad oversight of companies that contract with the federal government. When their investigative work identifies a potential infraction, DoL pursues the case further and has a number of remedial actions at its disposal, including the ability to suspend or debar the company from future federal contracts. DoL also maintains databases and extensive case files containing information about infractions. The Executive Order and proposed rule and guidance ignore this existing oversight regime and instead creates a significant burden on companies by requiring them to repeatedly gather and report information about its own and its suppliers' and subcontractors' labor records. DoL should simply realign its own systems to provide the required information to contracting officials without shifting the heavy information collection and reporting burden to industry.

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[5] The Executive Order is being implemented through both a Federal Acquisition Regulation (FAR) rulemaking process and Department of Labor guidance. As of 2/17/2016, both documents are still in the "proposed" stage of the regulatory process.

[6] CODSIA comments on the FAR proposed rule and DoL proposed guidance, August 26, 2015, available at http://www.itic.org/dotAsset/c/5/c5ae5723-2f96-4976-b847-ae95e8291065.pdf

[7] As of 2/17/2016, the Department of Labor has failed to identify or define "equivalent state laws", which raises legitimate concerns about the accuracy of the regulatory compliance analysis conducted by OIRA.

Third, the Executive Order acknowledges that "most federal contractors play by the rules" regarding labor law compliance. Yet, the Executive Order and proposed rule and guidance require nearly all federal contractors and subcontractors to collect and report the required information. Preliminary analysis by several large companies has shown that the per company implementation and compliance costs is over $1 million annually even when there are no prime contractor violations to report. Hence, the Executive Order and implementation documents punish even the most compliant federal contractors while ignoring that DoL often already has identified bad actors and has existing punitive capabilities and incentives for corrective action.

RECOMMENDATION

Narrow the scope of Executive Order 13673 to require only those companies that have been suspended or debarred for a federal labor law violation within the past twelve months to provide information required by the Executive Order and the implementing regulations.

Legislative Language:

For the National Defense Authorization Act

Purpose: To protect against unnecessary, costly, burdensome and duplicative defense contractor responsibility determination processes associated with Executive Order 13673. New language *highlighted in red italics*.

> *Sec. XXX: Applicability of Executive Order 13673 to Department of Defense Contractors*
>
> *(a) Limitation. Within 30 days of enactment of this Act, the Secretary of Defense shall restrict the application of any acquisition regulations or any Department of Labor guidance promulgated pursuant to Executive Order 13673 to only contractors or subcontractors who have been suspended or debarred within the most recent twelve month period for violations of the covered federal labor laws specified in Executive Order 13673 in effect as of January 1, 2016.*
>
> *(b) Compliance Requirements. The Secretary of Defense shall ensure that potential or actual contractors or subcontractors who are not described under subsection (a) are not compelled or required to comply with the conditions for contracting eligibility as stated in any acquisition regulations or any Department of Labor guidance promulgated to implement Executive Order 13673.*

Governmentwide Provision

Purpose: To protect against unnecessary, costly, burdensome and duplicative defense contractor responsibility determination processes associated with Executive Order 13673. New language *highlighted in red italics*.

> *Sec. XXX: Applicability of Executive Order 13673*
>
> *(a) Limitation. Within 30 days of enactment of this Act, the Director of the Office of Management and Budget shall restrict the application of any acquisition regulations or any Department of Labor guidance promulgated pursuant to Executive Order 13673 to only contractors or subcontractors who have been suspended or debarred within the most recent twelve month period for a violation of the covered federal labor laws specified in Executive Order 13673 in effect as of January 1, 2016.*
>
> *(b) Compliance Requirements. The Director of the Office of Management and Budget shall ensure that potential or actual contractors or subcontractors who are not described under subsection (a) are not*

compelled or required to comply with the conditions for contracting eligibility as stated in any acquisition regulations or any Department of Labor guidance promulgated to implement Executive Order 13673.

Additional Resources:

- Letter from House Committee Chairmen requesting the E.O. proposed rule and DoL guidance be withdrawn
- Fair Pay rules are a "disaster waiting to happen" – Washington Technology article
- Multi-Association letter on Fair Pay and Safe Workplaces E.O. implementation
- ARWG letter to Congressional defense leaders
- CODSIA Letter on FAR Case
- ITAPS Blog – August 27, 2015
- ITAPS Blog – November 7, 2014

Request for GAO Assessment on Efficiencies and Effectiveness of Set Aside Programs

ISSUE

The U.S. federal government is the largest buyer of IT goods and services, spending billions of taxpayer dollars every year to support and provide service to citizens that will improve their everyday lives. Because of the sheer volume and value of government spending, the government has a stake in promoting certain socio-economic goals through the procurement of goods and services. The cost and benefits of the current system have not been fully analyzed in some time, however, to assess for its success in providing quality goods and services at fair and reasonable prices to the federal government and the taxpayer, while benefiting the U.S. economy through the development of small businesses.

DISCUSSION

There have been some attempts by Congress in recent years to shed more light on how agencies award contracts to small businesses and to begin to attach metrics to those programs to more effectively measure their effectiveness, but more can be done to increase the level of data regarding set aside programs and to ensure that there is purposeful value and resulting benefits to the taxpayers in the way that these set asides are awarded. Our experience and anecdotal evidence indicate that, in many cases, the current system may actually cause more harm than good and may not provide the intended lasting benefits to the Government and its citizens.

ITAPS believes that Congress should request of the Comptroller General a study to examine some specific conditions and practices to get a current and accurate picture of how the small business set aside programs are being utilized in today's federal market. The goal in asking for this review is not to diminish the role that small businesses play in the federal marketplace, but rather ensure that there is proper balance between competition, preference, benefits, and desired outcomes. The results of the GAO study will highlight the effectiveness of set aside programs, help measure whether or not funding is reaching the intended audiences, and whether or not the federal market allows those businesses to flourish and grow to the benefit of the overall U.S. economy.

RECOMMENDATION

ITAPS believes that Congress should request that the Government Accountability Office (GAO) measure a number of factors and conditions regarding set asides currently employed by agencies to achieve their small business targets. The following should form the basis for that study.

1. The Small Business Set aside programs are based on the requirements of 15 U.S.C. 644(a)(3), which provide that federal agencies are to ensure that "a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns…" See also FAR 19.502-1(a)(2).

   Also, Congress has provided only broad guidance to the Small Business Administration (SBA) for establishing size standards. 15 U.S.C. 632(a)(2). In turn, SBA has, over the years, created a fairly complicated process for

establishing size standards.[8] The result is that as size standards have grown, small business set aside awards to small business concerns in certain industry categories tend to be dominated by a small number of the very largest small business concerns that in turn receive an overwhelming percentage of their revenue from federal dollars. Some have argued that the original intent of the program was to insure the presence of an industrial base that could fill the national security and critical needs of the Nation. With the purpose of the programs being to assist small business concerns become more viable in the overall U.S. economy and not just the federal marketplace, Congress should consider statutory changes that would limit the federal award amounts that small business concerns are eligible to receive.

Questions:

Please estimate the percentage, by dollar value, the number of contracts and task or delivery orders of acquisitions that were set aside for exclusive participation by small business concerns in each North American Industry Classification System industry category (NAICS code) for each of the past five fiscal years.

Please estimate the obligated dollar distribution of small business set aside awards, contracts, subcontracts, and task and delivery orders, by industry category awarded to small business by a reasonable size range within a particular industry category. Please include the total number of small business concerns in each size range.

What percent of work set aside for performance by small business is being performed by an entity that is solely able to meet the requirements of the project or would not be able to be performed if not for the government set aside?

2. Section 644(a) of title 15 U.S.C. prohibits the award of a contract set aside for exclusive participation "if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price." For all other federal contracts, award may only be made if the price is "fair and reasonable." FAR 15.402(a).

   Question:

   For the past 3 fiscal years, please calculate the estimated difference in the total of "fair market prices" awarded for contracts and task and delivery orders set aside for exclusive participation by small business concerns versus what the price would have been had a "fair and reasonable" standard been used under full and open competitive procedures. To calculate the difference, please use available historical prices paid for contracts awarded under full and open competitive procedures for similar work. In order to determine whether agencies reject pricing offered by small business concerns, please also identify the number and total value of set aside contracts that were not awarded by the agencies because the offered price exceeded the "fair market price" as determined by the agency.

3. The set aside program, rather than assisting small business concerns to become more competitive in the commercial marketplace and thereby growing the entire U.S. economy, has resulted in a large number of small business concerns with an entire revenue base of just federal work. It appears to industry to be a distortion of the intent of Congress that, once that federal work results in a concern exceeding the relevant

[8] See SBA SIZE STANDARDS METHODOLOGY, Prepared by: Size Standards Division Office of Government Contracting & Business Development, April 2009, available at https://www.sba.gov/sites/default/files/articles/size_standards_methodology.pdf.

small business size standard, owners frequently sell their business and any remaining contract revenue to an other than small business. Such a distortion would seem to do little to ensure that the tax dollars invested in the small businesses result in ongoing economic value or drive an overall improvement in the total U.S. economy, but instead seem to create an economic windfall for certain small business owners focused only on the federal marketplace.

Question:

We believe that the GAO should assess the impact of this distortion by answering the following:

- The number and value of contracts, subcontracts, and task and delivery orders awarded to small business concerns that have been in business for more than 5 years that were awarded pursuant to set asides and where the federal contracts, subcontracts and task and delivery orders represent more than 90 % of total revenue for the small business concern.
- the total number and percentage of all 8(a) firms that have graduated from the 8(a) program between 2005 and 2010 and remain in business currently. For the firms that remain in business, identify the number and percentage that continue to receive more than 90% of their revenue from federal contracts and task and delivery orders.
- the total number and percentage of small business concerns that have recertified as other than small business concerns in the past 5 years and that remain owned by the same individual(s).

4. The 8(a) program, the service-disabled, veteran-owned small business program, and the women-owned small business programs have been established to assist the qualified owners of the small business concerns but do not have any requirements for employing similarly situated qualified employees. Congress may want to further enhance the impact of taxpayer dollars in these disadvantaged small business categories by modifying the requirements of the programs so that the maximum number of qualified individuals benefit from the programs, either as owners or employees.

   Question:

   To measure this effect, the GAO can estimate, for small business concerns that receive 80% or more of their revenue from federal contracts, subcontracts, and task and delivery orders:

   - The percentage of total employees employed by service-disabled, veteran-owned business concerns that would otherwise meet the qualification requirements for being an owner.
   - The percentage of total employees employed by 8(a) business concerns that would otherwise meet the qualification requirements for being an owner.
   - The percentage of total employees employed by women-owned small business concerns that would otherwise meet the qualification requirements for being an owner.

5. As agencies seek to make awards to small businesses in order to meet statutory goals, larger and larger contracts, particularly long term indefinite delivery/indefinite quantity contracts, are being set aside for exclusive participation by small business concerns. At the same time, SBA has published regulations that do not require recertification as to size status for newly awarded task or delivery orders, allowing agencies to

take "credit" for a small business award that could in reality be performed by a concern that no longer qualifies as small.

Also, in order to meet the statutory prime contract small business goals, contracting officers are bundling smaller contracts into larger and larger contracts for small businesses that are well beyond the scope that many small businesses are capable of performing. This endangers not only the industrial base but also the potential for the agency's program success. As a result, larger companies are often subcontracted to these smaller companies to help them achieve the necessary scope in capability. The unintended consequence is that the number of small businesses subcontracting to prime contractors is decreased and there is actually less opportunity for small business. For example, instead of having five small businesses support a single large prime contractor, one small business is being supported by one large business concern with the other four small businesses left without work.

Question:

Congress should explore how agencies calculate the statutory goals for awards to small business concerns in order to ensure that small businesses are actually receiving the benefits of the set aside program by seeking to measure:

- The number and dollar value of contracts and task and delivery orders that have been set aside for exclusive small business participation that are so large as to likely result in the small business concern losing its status as a small business concern at the expiration of the contract.
- The number and dollar value of task and delivery orders that were issued in the past three fiscal years where the agency did not require recertification as to size status for the individual task or delivery order.
- The number of small business concerns that are still owned by the same owner two years after exceeding the applicable size standards for contracts awarded to it while it was a small business concern.

- how many contracts over the past 10 years, by number and total dollar value, previously performed by large businesses with subcontracting plans have been converted to small business set asides? Of those contracts, how many small businesses performed work on the contracts when awarded on a full and open basis versus when set aside?

- How many contracts that are converted from full and open to set aside have been subject to remediation or change orders in order to meet program success? How many set aside contracts have been converted to full and open?

6. Some have suggested that the "rule of two" is an arbitrary and ineffective way to determine what should and should not be set aside. Data is needed to determine whether or not an overreliance on the "rule of two" exists, and what that may have cost the taxpayer.

   Question:

   GAO should measure how many contracts have been converted from full and open to small business set aside under the justification of the rule of two? What was the cost savings associated with these set asides?

7. SBA is required to complete a scorecard for each agency regarding their use of small businesses in acquisition. Part of that report is based on successfully meeting the established small business prime and subcontracting goals for each agency. Industry is concerned that the current assessment is not creating a true picture of the scope of small business participation in government procurement, as only a select portion of contracting actions are included in efforts to assess participation.

   Questions:

   Please identify what elements are currently being counted towards small business contracting goals and what percentage of total contracting is represented by these elements. Are there major elements of contracting activity that are not being accounted for in these reports at the prime or subcontract level? Also, please identify what are the current sources of data regarding small business participation and determine if there are gaps in that data that prohibit a full picture of participation. If gaps or missing elements are identified, please provide recommendations as to how to include them and improve methods of capturing additional data for future assessments.

Advisory Panel on Streamlining Acquisition Laws

ISSUE

Section 809 of the FY16 NDAA requires the creation of a multi-stakeholder advisory panel to review the vast body of procurement regulations impacting the Department of Defense. While this is a productive effort that we wholly support, we believe that a review of the procurement statutes are also necessary as many of the regulations stem from statute.

DISCUSSION

A panel of industry and government experts should periodically review the statutory impediments to improving the procurement system. The last time such a panel was completed was the Section 800 panel in 1993.[9]

RECOMMENDATION

New language *highlighted in red italics*.

SEC. 8XX. ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION LAWS.

(a) ESTABLISHMENT.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall establish under the sponsorship of the Defense Acquisition University and the National Defense University an advisory panel on streamlining acquisition statutes.

(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 governmentwide acquisition statutes with a view toward streamlining and improving the efficiency and effectiveness of the federal acquisition process and maintaining technological advantage; and

(2) make any recommendations for the amendment or repeal of such statutes 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 departments and agencies; and

(E) eliminate any statutes that are unnecessary for the purposes described in subparagraphs (A) through (D).

(d) ADMINISTRATIVE MATTERS.—

[9] http://www.dtic.mil/dtic/tr/fulltext/u2/a273896.pdf

(1) IN GENERAL.—The Committees shall provide the advisory panel established pursuant to subsection (a) with timely access to appropriate information, data, resources, and analysis 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).

(e) REPORT.—

(1) PANEL REPORT.—Not later than two years after the date on which the Committees establish the advisory panel, the panel shall transmit a final report to the 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 statute and a recommendation as to whether the statute and related regulations (if applicable) should be retained, modified, sunsetted, 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 panel shall submit a report to or brief the congressional 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 Committees for purposes of providing the interim reports required under this paragraph.

(4) FINAL REPORT.—Not later than 30 days after receiving the final report of the advisory panel, the panel shall transmit the final report to the congressional committees.

(f) DEFENSE ACQUISITION WORKFORCE DEVELOPMENT FUND SUPPORT.—The Committees 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.