

Recommendation 35: Replace commercial buying and the existing simplified acquisition procedures and thresholds with simplified readily available procedures for procuring readily available products and services and readily available products and services with customization.

What kind of a system requires a 47-page solicitation—that incorporates, by my guess, at least 500 pages of text by reference—in order to buy a max of \$18,000 worth of cheap furniture? It’s lunacy. You cannot reform such a system. You’ve got to destroy it in order to save it, and to save us.

- Vern Edwards, Wifcon Forum¹

Problem

Many of the products and services on which DoD relies are available in today’s marketplace for anyone to buy. These are products and services that both directly and indirectly enhance warfighting capabilities. DoD is just one of many customers in the dynamic marketplace. Many companies do not view DoD as a viable, much less a critical, business partner. In 2016, for example, FedEx received 40 percent of all DoD contract actions, but the dollars associated with those contracts barely accounted for 1 percent of FedEx’s total annual revenue.² GAO compiled a list of some of the top innovative companies in the United States with total sales or total revenue ranging from \$7 billion to \$216 billion and found that direct sales to DoD made up zero, less than one, or less than two percent of those figures.³ DoD’s business practices have only been able to evolve to a certain degree, leaving it with tools and processes that are not optimized for the current economic reality—one in which DoD often has limited or no influence in affecting price, terms and conditions, and product and service development in highly competitive markets.

In the past, DoD may have been able to dictate the behavior of companies that made up the traditional military industrial base in which sellers relied on DoD as an integral part of their business strategy. Increasingly, sellers dictate how DoD will behave if DoD wants access to the products and services they offer in a particular market segment. Even traditional DoD suppliers like Boeing and Honeywell, which have substantial private-sector sales, are using business-to-business e-commerce portals to sell aircraft parts used by both public and private-sector buyers and provide logistical planning functions via online shopping carts.⁴ Today there is no mechanism available to DoD buyers to leverage these types of dynamically-priced streamlined acquisition tools. Creation of the Defense Innovation Unit and increased use of OTs for more than just research and development demonstrate DoD’s need to contract in a manner that is more consistent with how the private sector does business. Many believe the only

¹ “This is What is Wrong with Government Contracting,” Vern Edwards, Wifcon Forums and Blogs, September 3, 2016, accessed July 23, 2018, <http://www.wifcon.com/discussion/index.php?topic/3712-this-is-what-is-wrong-with-government-contracting/&tab=comments#comment-33249>.

² Calculated from numbers included in Federal Express, *FedEx Annual Report 2016*, accessed November 3, 2018, http://s1.g4cdn.com/714383399/files/oar/2016/docs/FedEx_2016_Annual_Report.pdf. FPDS, *Top 100 Contractors Report, Fiscal Year 2016*, accessed November 2, 2017, <https://www.fpds.gov/fpdsng/cms/index.php/en/reports.html>.

³ GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, July 2017, 8, accessed October 31, 2018, <https://www.gao.gov/assets/690/686012.pdf>.

⁴ “Honeywell Aerospace Flies High with its Redesigned B2B Portal,” Mark Brohan, B2B E-Commerce World, July 3, 2018, accessed November 2, 2018, <https://www.digitalcommerce360.com/2018/07/03/honeywell-aerospace-flies-high-with-its-redesigned-b2b-portal/>.

way DoD can remain competitive with near-peer competitors and address emerging threats is to operate outside of the FAR, despite all the efforts over the past 25 years to improve and emphasize the use of simplified commercial buying procedures and terms and conditions.⁵

To provide capability at the speed of relevance, Congress and DoD may continue to expand, or over rely, on tools like OTs to get around the FAR and the procurement system. Alternatively, Congress and DoD could walk the pathway laid out in this section. The Section 809 Panel's recommendations that address commercial buying, simplified acquisition, and small business innovation in an *evolutionary* manner are necessary to reform the existing acquisition system in the short term. This recommendation, however, would *revolutionize* the existing procurement system into something that does not require work-arounds to meet warfighter needs quickly and efficiently. It is clear a serious problem exists when venture capital firms looking to invest in cutting-edge commercial software companies advise those companies not to do business with the federal government, even via the existing work-arounds.⁶ It is time to stop creating or expanding authorities for DoD to operate outside the acquisition system and deliberately implement changes that will make DoD's acquisition system function in today's private-sector-driven marketplace; establishing a system that meets warfighters' needs in a way that provides agility and values time. Table 1-1 highlights the differences between the complex way DoD currently buys from the commercial marketplace to the simplified and more private-sector-accessible way it would buy if this recommendation were adopted.

⁵ See "DoD is Buying Fewer, Yes, Fewer Commercial Items. Oops!," Colin Clark, Breaking Defense, July 19, 2017, accessed October 3, 2018, <https://breakingdefense.com/2017/07/dod-is-buying-fewer-yes-fewer-commercial-items-oops/>.

⁶ Stakeholder meetings with the Section 809 Panel, May–October 2018. .

Table 1-1. Comparison of Current DoD Commercial Buying Practices to Proposed Readily Available Pathways

| Current DoD Commercial Buying | Readily Available | Readily Available with Customization |
|---|--|---|
| <ul style="list-style-type: none"> ▪ Narrow and complicated 8-part definition ▪ Not-inclusive of all open market available products | <ul style="list-style-type: none"> ▪ Simpler, broader definition ▪ Includes nondevelopmental items | <ul style="list-style-type: none"> ▪ Readily available products customized via commercial processes ▪ Almost all services |
| Procedures | | |
| <ul style="list-style-type: none"> ▪ FAR 13.5 simplified acquisition procedures when under \$7M, more complex Part 15 procedures over \$7M | <ul style="list-style-type: none"> ▪ New DFARS 213.1 readily available procedures (RAPs) for under \$15M – higher authority may authorize use above \$15M | <ul style="list-style-type: none"> ▪ New DFARS 213.1 procedures with no upper threshold – contracting officer may rely on market based competition when below \$15M |
| Advertising/Competition | | |
| <ul style="list-style-type: none"> ▪ Publicly post each procurement expected to exceed \$25K and vendors submit proposals or quotes ▪ Limited use of simplified procedures like standing price quotes and oral solicitation ▪ Competition standard is maximum extent practicable under \$7M, “full and open” over \$7M | <ul style="list-style-type: none"> ▪ No public advertising required; preference for relying on market research and market-based competition ▪ Utilize standing price quotes and oral/direct solicitation ▪ Contracting officer may waive System of Award Management (SAM) requirement for small/nontraditional businesses | <ul style="list-style-type: none"> ▪ Written or electronic solicitations will usually be necessary; must be publicly posted for all actions above \$15M ▪ Under \$15M the contracting officer may rely on market-based competition ▪ Contracting officer may waive SAM registration requirements for small/nontraditional businesses |
| Contract/Transaction Method | | |
| <ul style="list-style-type: none"> ▪ Firm fixed price, fixed price with economic price adjustment (EPA), or time and materials contracts with up to 165 FAR and DFARS clauses ▪ Various FAR and DFARS clauses flow down to commercial subcontractors | <ul style="list-style-type: none"> ▪ Firm fixed price or fixed price with EPA purchase orders and Government Purchase Card (GPC) transactions | <ul style="list-style-type: none"> ▪ Firm fixed price, fixed price with EPA, or time and materials ▪ Purchase orders, GPC transactions, and contracts with minimal clauses ▪ Additional clauses must be approved by higher authority ▪ Supply chain and other technical risks should be mitigated via requirements generation process |
| Small Business Set-Asides | | |
| <ul style="list-style-type: none"> ▪ All procurements below simplified acquisition threshold (SAT) are 100% set-aside for small business; <i>rule of two</i> still applies above the threshold | <ul style="list-style-type: none"> ▪ No mandatory small business set-asides; small businesses will receive a 5% price preference ▪ DoD must still meet small business utilization goals | <ul style="list-style-type: none"> ▪ The same 5% price preference will be used with no mandatory set-asides ▪ DoD must still meet small business utilization goals |

| Current DoD Commercial Buying | Readily Available | Readily Available with Customization |
|---|---|---|
| Socioeconomic | | |
| <ul style="list-style-type: none"> ▪ BAA applies above the micro-purchase threshold (MPT); COTS are exempt ▪ Berry Amendment does not apply below the SAT ▪ Davis-Bacon (DBA) and Service Contract Act (SCA) labor rates apply, even below MPT | <ul style="list-style-type: none"> ▪ No BAA or Berry Amendment application due to established global supply chain/lack of tech advancement ▪ DBA and SCA rates do not apply | <ul style="list-style-type: none"> ▪ No Buy American Act or Berry Amendment application due to established global supply chain/lack of tech advancement ▪ DBA and SCA rates do not apply |
| Transparency/Accountability | | |
| <ul style="list-style-type: none"> ▪ Basic purchasing information posted to Federal Procurement Data System–Next Generation (FPDS-NG), notices of pre-solicitation, solicitation, and award published to FedBizOps ▪ Pre- and postaward protests may be filed at the agency, GAO, and/or COFC | <ul style="list-style-type: none"> ▪ All awards will be posted online; including market research, price comparison, and award decision basis if based on factors other than price ▪ Limited protests may be filed with agency | <ul style="list-style-type: none"> ▪ Awards made using market-based competition will be publicly posted ▪ When solicitations are publicly advertised; procurements will be subject to pre- and postaward protests |

Background

The Section 809 Panel’s June 2018, *Volume 2 Report* described operationalizing the Dynamic Marketplace as providing DoD with “a new set of simplified acquisition procedures to utilize when it is buying from the private sector, while also streamlining the way DoD develops and acquires everything else.”⁷ This section addresses the legal and regulatory changes necessary to effectively modernize and simplify DoD’s acquisition of readily available products and services consistent with the goal of behaving the way buyers in the private sector do. This recommendation is an effort to reduce barriers to doing business with DoD, to facilitate delivering capability and lethality to U.S. warfighters, and to out-pace near-peer competitors and nonstate actors.

DoD leadership, Congress, and stakeholders interviewed by the Section 809 Panel indicated that DoD must become a more agile player in an increasingly dynamic and competitive marketplace. The Center for New American Security’s *Future Foundry* paper, GAO’s July 2017 report on military acquisitions to the Senate Armed Services Committee, and the commercial buying and small business chapters of the Section 809 Panel’s *Volume 1* and *Volume 2 Reports* highlight challenges DoD faces in leveraging the private-sector marketplace.⁸ Challenges persist, in part, because decades of legislation and policy initiatives that governed, and often attempted to reform, the acquisition system continue to rely on

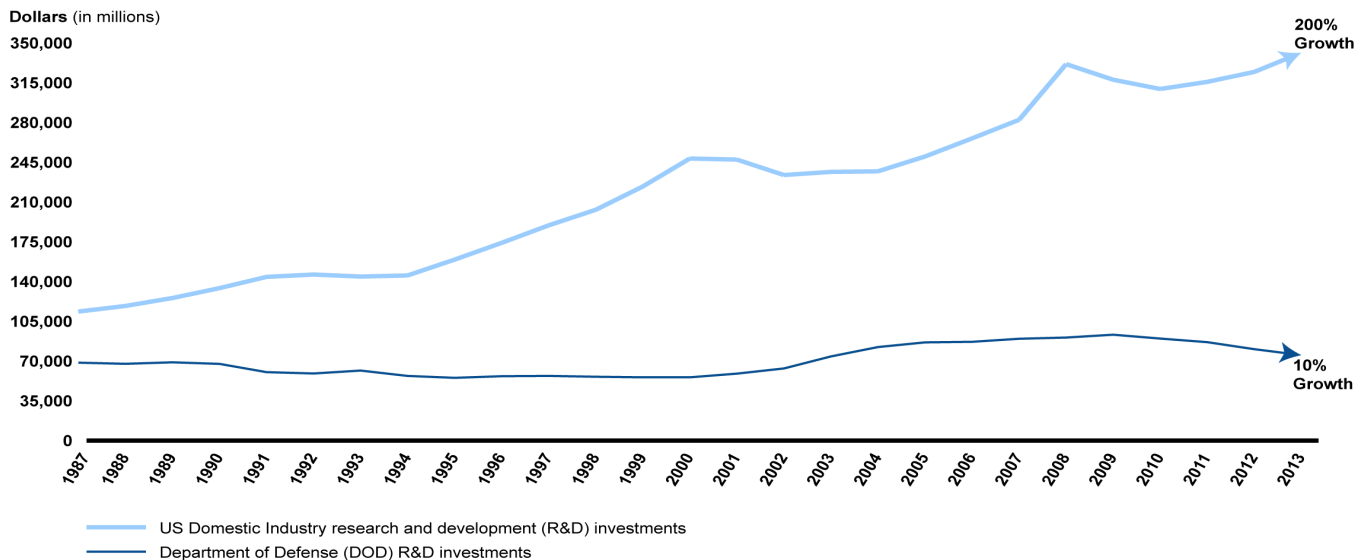
⁷ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 2 of 3*, 184 (2018).

⁸ Ben FitzGerald, Alexandra Sander, and Jacqueline Parziale, *Future Foundry: A New Strategic Approach to Military-Technical Advantage*, Center for New American Security, December 2016, accessed October 12, 2018, <https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report-FutureFoundry-final.pdf?mtime=20161213162640>. GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, July 2017, accessed October 31, 2018, <https://www.gao.gov/assets/690/686012.pdf>.

unique terms, conditions, and processes better suited to the industrial age, not the information age, much less the rapidly approaching artificial intelligence age. These industrial-age artifacts are not agile, do not value time, and serve as barriers to small and nontraditional businesses.

The Section 809 Panel’s vision of a future DoD acquisition system is one that is agile, efficient, and effective at procuring products and services offered for sale to the public or other government agencies, or are otherwise readily available in the marketplace. Figure 1-1 demonstrates the dramatic growth of private-sector research and development spending, compared to DoD. As a result of this investment, the progress of commercial technology has dramatically expanded over the last 2 decades, driving incredible growth in the public’s demand for technologies that at one time were limited to government or defense-specific applications. The fact that the computing power of a smart phone in the average American teenager’s pocket dwarfs that of the Apollo guidance computer used to navigate to the moon and back is a well-worn anecdote of the advancement in commercial technology.⁹ In addition to cutting-edge consumer electronics and software being readily available in the marketplace, the growth of a globally accessible marketplace and the rise of global corporations and supply chains drives private-sector demand for complex logistics, data analytics, and other specialized services.

Figure 1-2. DoD and Private-sector Research and Development Spending¹⁰



Source: GAO presentation of National Science Foundation and Office of Management and Budget data. | GAO-17-644

The Section 809 Panel has thus far recommended an important *evolution* in commercial buying to narrow the gap between how DoD behaves in today’s marketplace and how other buyers behave, but a *revolution* in the way DoD functions in the marketplace is necessary. How Congress and DoD think about competition, total procurement costs, pricing, value, and transparency must be further expanded to enable DoD to effectively leverage today’s, and more importantly tomorrow’s, marketplace to

⁹ “How the Computing Power in a Smartphone Compares to Supercomputers Past and Present,” infographic, Business Insider, accessed November 2, 2018, <http://www.businessinsider.com/infographic-how-computing-power-has-changed-over-time-2017-11>.

¹⁰ GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, 6, accessed October 31, 2018, <https://www.gao.gov/assets/690/686012.pdf>. The expenditures have been adjusted for inflation in accordance with DoD National Defense Budget Estimates for Fiscal Year 2017. Industry research and development spending may include funding provided by DoD for research performed by industry.

empower “the warfighter with the knowledge, equipment, and support systems to fight and win.”¹¹ It is time to abandon some of the more onerous and outdated concepts, as compared to private-sector practices, that create unnecessary friction in the acquisition system. This friction inhibits rapid fielding of readily available products and services that increase lethality, ensure technological dominance, and provide critical warfighter support. This section lays out a pathway for DoD to become a more sophisticated buyer in the increasingly Internet-based, globally interconnected, privately-funded, and innovation-rich marketplace.

Discussion: Readily Available

In the *Volume 1 Report* and the *Volume 2 Report*, the Section 809 Panel has recommended changes to the FAR’s commercial buying processes and procedures, which if implemented wholesale, will substantially improve DoD’s ability to rapidly and efficiently acquire those products and services that meet the statutory definition of commercial. Even with those proposed changes, the definition of what is commercial is far too narrow to provide access to today’s marketplace and is too complicated in its application. Inconsistent or stalled commercial determinations made by contracting officers as well as requirements for companies to produce supporting data to prove a product or service is commercial, are challenges that persist and will continue even if all of the Section 809 Panel’s earlier commercial recommendations are adopted.¹² Some industry stakeholders explained, in the context of their purchasing systems under government prime contracts, that they do not attempt to make a commercial determination and use the current simplified commercial buying procedures because of the scrutiny applied by DCMA to their determinations and a lack of certainty as to what DCMA might evaluate in a given case. This lack of certainty is exacerbated by the potential for reviews by various inspection regimes like the DoD Inspector General (DoD IG) and GAO and during audits conducted by DCAA. The effect is a culture of risk aversion that is characterized by a lack of agility and unnecessary delays in the procurement process.

Effectively accessing the full extent of the capabilities readily available in the private sector, necessitates abandoning the terms *commercial* and *commercial buying* for something simpler and more inclusive. This revolution is necessary to implement the simple and effective process for accessing the marketplace as envisioned by Congress when the Federal Acquisition Streamlining Act (FASA)¹³ was passed.

The concept of *readily available* products and services, is defined in the *Volume 2 Report* as

Any product or service that requires no customization by the vendor and can be put on order by customers.¹⁴ Optional priced features of products and services in a form that is offered for sale in the normal course of business, fall within the definition of readily available.

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

¹² USD(AT&L) Memorandum, *Guidance on Commercial Item Determinations and the Determination of Price Reasonableness for Commercial Items*, accessed July 23, 2018, <https://www.acq.osd.mil/dpap/policy/policyvault/USA003554-16-DPAP.pdf>.

¹³ The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 (1994).

¹⁴ This includes products and services that only governments buy or only governments can buy due to export controls or other legal limitations.

The terms *readily available* and *readily available with customization* subsume everything that would currently meet the *commercial product and services* definitions and also includes many products and services that would not. Nondevelopmental items and products and services that may only be sold or offered for sale to other defense departments and other federal or local government entities would also generally be considered readily available.¹⁵ These products or services are developed and paid for by private investment (not DoD or the U.S. government), have established supply chains, and are available for potential customers to put on order, although production lead times and available stock levels may delay delivery. DoD needs greater flexibility to procure these products and services in a manner that more closely resembles other consumers in the market and makes DoD a more attractive business partner.

Near-peer competitors and nonstate actors are not encumbered by the same bureaucracy in their purchasing systems as the U.S. government. A story, recounted at the signing ceremony of FASA, highlighted the issue of the U.S. government not being able to buy Motorola radios from the company's commercial line in support of Operation Desert Storm. The Japanese government ended up purchasing the radios for DoD. Such situations still exist, albeit at a different level of sophistication. DoD must be able to rapidly field existing technology that might be the 80 or 90 percent solution, and let its smart and talented operators innovatively use that technology to realize tomorrow's solutions today. Spending years developing and fielding yesterday's solution is the wrong strategy. The following are the key elements of this proposal:

- **Readily Available Procedures:** The readily available procedures (RAPs) and the authorities recommended in this section apply to procurement of readily available products and services below a \$15 million threshold. In many cases, the increased dollar value of readily available products and services does not result in increased procurement risk. In those cases, a contracting officer should request authorization to use these procedures for procurements in excess of the threshold. These procedures would replace existing Simplified Acquisition Procedures (SAPs) in FAR Part 13 for DoD, and readily available buying would replace FAR Part 12 commercial buying for DoD. In situations for which DoD requires capabilities not offered by the private-sector, RAPs would not be used.
- **Competition:** Competition would be achieved primarily through documented market research, recognizing that readily available products and services exist in the market and can be found through a variety of private-sector tools. Market forces set the prices that consumers pay for these products and services because they are publicly available for consumers to compare and evaluate. Even when a new product is only offered by one vendor, pricing and product quality are driven by what the market will bear. Issuing a competitive RFP for these products typically does not increase competition. In fact, soliciting the product or service using today's processes presents a barrier to entry for many companies, and likely increases the total procurement cost and delivery timelines.

¹⁵ Congress, for decades, to no avail, has tried to move the DoD to buy more non-developmental items. GAO, *Procurement: DoD Efforts Relating to Nondevelopmental Items*, GAO/NSIAD-89-51, February 1989, accessed August 23, 2018, <https://www.gao.gov/assets/220/210964.pdf>.

- **Applicable Laws:** The statutory relief that currently only applies to *commercially available off-the-shelf* (COTS) items would be expanded to apply to *all* readily available products and services. The current system of small business set-asides would be changed in favor of a small business price preference for evaluation purposes. The Military Services and Defense Agencies, through their contracting activities, would be required to use small-businesses strategically, as discussed in the small-business policy pivot described in the *Volume 1 Report* and directed by Section 851 of the FY 2019 NDAA.¹⁶
- **Price Reasonableness:** Contracting officers should, in most cases, be able to determine price reasonableness based on multiple offerings of similar products and services in the marketplace. When a new or substantially updated product is offered for sale, the end-user should be able to provide input into the price reasonableness determination by articulating whether the products or services provide value at a given price. Price should be the primary factor for making an award decision in many instances, but past performance, capability, warranties, and other similar factors may also be considered.
- **Transaction Methods:** Transactions for readily available products and services should be conducted using Government Purchase Cards (GPCs) and simple fixed-price purchase orders. The terms and conditions that would be included in a purchase order are a subset of what is left of the Contract Terms and Conditions – Commercial Items clause at FAR 52.212-4 after all of the Section 809 Panel’s commercial buying recommendations have been implemented.¹⁷ Prime contractors would not be required to flow down any DoD clauses when procuring readily available products and services from subcontractors in support of defense-unique development contracts. This recommendation includes authorizing contracting officers to make purchases with their GPCs up to their warrant or the \$15 million threshold, whichever is lower, without issuing a purchase order. This practice means accepting sellers’ terms and conditions and using terms and conditions included in DoD’s agreements with the financial institutions that issue the GPCs.
- **Transparency and Accountability:** To improve transparency and provide for public accountability, award information would be published for each award, to include the results of the contracting officer’s market research and a short award decision document when a decision was based on factors other than low price. Protests would be limited to agency-level protests with the grounds for a protest limited to situations for which the product or service that was procured using the readily available procedures was not readily available or the contracting officer did not conduct market research consistent with these procedures.

In general, procuring readily available products and services poses few risks that must be managed by government-unique contract terms and conditions. As a result, the process for procuring these

¹⁶ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 167-194 (2018).

¹⁷ See, Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 32-42 and Tables F-5, 6, and 7, A-39-67 (2018).

products and services should be very simple. When exceptions to this rule exist, additional terms and conditions should be applied only by exception and as required by the end-user.

To adequately streamline procurement of readily available products and services, the same statutory relief that is currently reserved for COTS products and services must be expanded to the broader universe of readily available. This recommendation would achieve what the Section 809 Panel argued for in the Commercial Buying section of the *Volume 1 Report*.¹⁸ DoD would be able to seek out “high-tech, cutting-edge solution(s), that...will likely not satisfy the *sold in substantial quantities*...criteria of the COTS definition,”¹⁹ and engage those vendors on their terms. This new construct must replace existing commercial buying and simplified acquisition procedures for DoD. Maintaining the current construct, as an alternative, would undermine the objectives of these recommendations by adding complexity and confusion to a process that needs to be more simple and straightforward.

Determining what is a readily available product or service should be much simpler than the current commercial item determination process, and the applicable implementing guidance must direct that any reviewing body, such as DCMA, DoD IG, or GAO, must presume the determination made by a contracting officer, or a DoD prime contractor, will not be subject to criticism unless it can affirmatively prove a product or service was not readily available at the time of the procurement. A readily available service that requires no customization is one for which the contracting officer can purchase the service exactly as it is offered by the vendor at prices advertised to the public. Examples of readily available services include subscription services like cable television, commercial Internet service, or cloud storage for which the contracting officer selects from priced options that are available. In addition, one-time services like maintenance service calls or short-term expert consultant services and simple transactional services like dry cleaning or an oil change may also be procured using these readily available procedures.

Most of the readily available products and services DoD procures are available from multiple reputable vendors meeting generally accepted quality standards with basic commercial terms and conditions. Not all products that meet the minimum requirements in a purchase request are created equal, and not all businesses offer the same policies regarding shipping, returns, or warranties. Contracting officers may generally be able to rely on price as the only factor in making an award decision, but they should consider reliable past performance information related to the vendor and the product to inform the award decision. There are also publicly available consumer and expert reviews of products and vendors that should be considered, in addition to the government’s past performance database and the experience of the contracting officer and the requiring activity. Favorable shipping or return policies and other considerations, like the length of a manufacturer- or vendor-offered warranty, should also be considered in making a best-value determination when appropriate. Market research and understanding the requiring activity’s need will enable the contracting officer to determine what factors should be considered in making an award decision.

¹⁸ Ibid, 20-21.

¹⁹ Ibid, 21.

Stakeholders interviewed by the Section 809 Panel indicated the intellectual property (IP) of private-sector companies will not be protected by DoD under existing policy.²⁰ The readily available procedures must clearly state that DoD receives no more IP from vendors than that which the vendors typically include in the sale of their products and services in the marketplace.

Stakeholders in industry and the government shared concerns about the desire of some acquisition programs and contracting officers in DoD to procure source code for commercial software products, even though they do not have capacity to do anything with that source code. In addition, a number of software companies, and the private investors many of the companies rely on, fear that if DoD partnered with the company to develop an innovative solution, it could lead to DoD taking the idea and turning it into an RFP to find someone who might be able to produce the solution at a cheaper price. It must be clear to the private sector that DoD values the intellectual capital companies invest in their products and services and that their IP and their solutions will be protected. DoD must be more strategically selective with decisions to pursue IP rights and technical data related to privately developed, readily available products and services.

The statutory changes needed to implement these readily available procedures are detailed in the subrecommendations at the end of this section. In addition, changes to the existing simplified acquisition procedures found in FAR Part 13 are also provided at the end of this section, with the intent being to heavily amend DFARS Part 213 to provide RAPs for DoD. These procedures would be applicable up to a threshold of \$15 million, which, according to Bloomberg analysis of Federal Procurement Data System (FPDS) data, could streamline as much as 90 percent of DoD's transactions, and up to 55 percent of the dollars spent based on FY 2017 spending.²¹ Understanding that the monetary value of a procurement does not necessarily translate into increased procurement risk, the authority to use these procedures may be granted to the contracting officer by the chief of the contracting office when the expected value of the procurement exceeds \$15 million.²² One of the fundamental changes that Congress and DoD must be willing to embrace in implementing these procedures is the manner in which effective competition is achieved for readily available products and services—competition that allows DoD access to the entire marketplace, not just those companies that have been able to navigate the complex and confusing government system.

Competition

The current universal standard for competition is the federal government's requirement for *full and open* competition. For simplified acquisitions, FASA recognized in 1994 that the competition standard should be exercised to the "maximum extent practicable."²³ In today's commercial marketplace, DoD-administered full and open competitions result in an artificial competition that is neither full nor open. Countless stakeholders have shared frustration with the barriers to entry that prevent them from being considered for a DoD contract and the full and open competition process is chief among them.

²⁰ Commercial Items, Components, or Processes, DFARS 227.7102(b).

²¹ Bloomberg provided analysis of FPDS-NG data. This data captures all DoD contract actions and therefore would include in the number of transactions valued below \$15 million a large number of contract modifications and actions for products and services that would not meet the definition of readily available.

²² For the definition of the Chief of the Contracting Office term, see, Definitions, FAR 2.1.

²³ Contracts: Competition Requirements, 10 U.S.C. § 2304. Promoting Competition, FAR 13.104.

To participate in a full and open competition, a company must monitor FedBizOps, register in the System for Award Management (SAM), and be willing and able to respond to an RFP laden with FAR/DFARS clauses and provisions. Most of the readily available products and services DoD contracting officers buy every day are available from multiple easily accessed sources, with prices transparently advertised online or through catalogues. These products and their prices are available to anyone, including the nation's near-peer competitors and nonstate actors, which also see them. These prices, along with product quality, shipping rates, warranties, and vendors' commercial business practices are subject to continuous competition and are transparent to the public. DoD should have the authority to leverage this continuous market-based competition, which constitutes true full and open, transparent, competition.

The private sector uses market-based competition in everyday transactions to buy readily available products and services. Companies that sell in the private sector do not need to see a publicly posted RFP to know that their products, prices, and related terms and conditions must be competitive, if they are going to succeed. To remain competitive, they constantly adjust their prices and terms and conditions.

For DoD purposes, market-based competition, as discussed in the *Volume 2 Report*, means:

The consideration of sources that offer readily available products and services at prices available to any potential buyer, resulting in competition being established through market forces.

Adopting the definition above would give contracting officers discretion to use standing price quotations as defined by recommendations in the *Volume 2 Report*, use oral solicitations, or send a short electronic solicitation that may be no more than an email or the completion of an online request for a quote.²⁴ If a contracting officer determines that a publicly posted solicitation is necessary, nothing would prevent posting one for a period determined by the contracting officer based on the nature of the requirement.

The contracting officer's market research must be thorough but does not need to be exhaustive. The requirement to post elements of the contract file on award provides information on whether the rules for market-based competition were followed and an opportunity to search for trends that indicate process corruption. The process would be more transparent to the taxpayers because pricing information for competitors in the market would be publicly available.

Online buying through individual vendor websites and e-marketplaces like Amazon, Grainger, and the Boeing Parts Page "is becoming the new normal for American businesses."²⁵ Congress has recognized this trend and directed the General Services Administration (GSA) to implement a program for procuring COTS products through commercial e-commerce portals.²⁶ GSA is considering how to implement this authorization by examining a mixture of e-commerce, e-marketplace, and e-portal

²⁴ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 2*, 9 (2019).

²⁵ "B2B E-Commerce Trends to Take Notice of in 2018," Jary Carter, *Forbes*, February 15, 2018, accessed July 25, 2018, <https://www.forbes.com/sites/theyec/2018/02/15/b2b-e-commerce-trends-to-take-notice-of-in-2018/#57a6500f7339>.

²⁶ FY 2018 NDAA, Pub. L. No. 115-91 (2017).

concepts, which could be extraordinarily useful in procuring readily available products and services.²⁷ Although the statute authorizes purchases through the portal up to the simplified acquisition threshold, the House of Representatives proposed increase of the micro-purchase threshold from \$10,000 to \$25,000 for purchases made through the e-commerce portal did not get enacted in the FY 2019 NDAA.²⁸ The e-commerce portal provisions are a step in the right direction, but will provide limited benefit because they will not provide access to the entire marketplace and will not accelerate DoD's ability to procure innovative, readily available products and technology solutions, other than COTS products valued at less than \$10,000. The existing e-commerce portal concept would provide a source contracting officers could use in doing market research for some readily available products. An e-commerce portal that provides a gateway to all the products and services offered for sale on the Internet could be the primary source from which DoD might acquire readily available products and services under the authorities provided in this proposal.

E-commerce portals could also provide DoD a tool for collecting data on spending patterns to "critically analyze an organization's spending and use the information to make better business decisions."²⁹ Such analysis is the goal of spend management, strategic sourcing, and category management—concepts that are gaining momentum within DoD.³⁰ Often strategic sourcing translates to awarding large indefinite-delivery/indefinite-quantity (IDIQ) contracts, with negotiated pricing. The practice of concentrating buying under a limited number of large-agency or governmentwide contracts has the potential to inhibit innovation and limit competition. Rather than creating a complex multiple award IDIQ, the Section 809 Panel's readily available proposal would enable DoD to bargain with vendors for enterprise or agencywide discounts when organizations place individual orders. The vendors would not need to decide which IDIQ vehicles to spend their bid and proposal costs on and incur operating costs to meet the compliance requirements associated with an IDIQ.³¹

Facilitating contracting officers' ability to make individual transactions with vendors in the open market has the potential to reduce reliance on multiple award IDIQs, the GSA schedules, and other governmentwide contracts that limit competition. More decentralized buying, relying on the open market, however, may increase the chances that contracting officers could procure counterfeit products or information technology products that present cybersecurity concerns. Approved product lists and qualified vendor lists—created when only certain products meet DoD's requirements or only certain vendors are qualified to provide certain products or services—would provide a means of mitigating this concern. An example would be the existing DoD Information Network (DoDIN) Approved

²⁷ GSA, *Procurement Through E-Commerce Portals: Implementation Plan*, March 2018, accessed August 30, 2018, <https://interact.gsa.gov/sites/default/files/Commercial%20Platform%20Implementation%20Plan.pdf>.

²⁸ FY 2019 NDAA, Pub. L. 115-232, Conference Report, H. Rept. 115-874, 905.

²⁹ "Category Management and Strategic Sourcing Defined," Defense Pricing and Contracting (DPC), accessed November 6, 2018, <https://www.acq.osd.mil/dpap/ss/index.html>.

³⁰ "AF Aims to Save \$2B, Improve Lethality with New Acquisition Approach," Debbie Aragon, U.S. Air Force, April 26, 2018, accessed August 7, 2018, <https://www.af.mil/News/Article-Display/Article/1504349/af-aims-to-save-2b-improve-lethality-with-new-acquisition-approach/>. "Category Management and Strategic Sourcing Defined," Defense Pricing and Contracting (DPC), accessed November 6, 2018, <https://www.acq.osd.mil/dpap/ss/index.html>.

³¹ See, "An Excess of Multiple-Award Contracts is Creating New Problems for Government," Brian Freil, Government Executive, April 20, 2016, accessed August 7, 2018, <https://www.govexec.com/excellence/promising-practices/2016/04/excess-multiple-award-contracts-creating-new-problems-government/127645/>.

Products List (APL) managed by DISA.³² The DoDIN APL provides “a consolidated list of products that have complete interoperability and cybersecurity certification” and DISA has established procedures for testing and certifying products to be added to the APL.³³ The e-commerce portal being developed by GSA could provide simultaneous access to all products and services advertised and searchable on the Internet, while only allowing buyers to purchase approved products. Some have advanced the theory that by not advertising upcoming purchases to the world, individual DoD procurement actions for readily available products will facilitate hiding in plain sight and make sabotage and fraud against the purchasing process less likely.

Some of the basic tenants of public procurement, like publicly posting RFPs for readily available products and services, have become outdated and create barriers to entry for nontraditional companies and barriers to innovation for DoD. Continued use of complicated RFPs poses challenges for DoD in maintaining its edge over near-peer competitors. To resolve this issue, the United States must reshape public procurement provisions in trade agreements to which it is a party. The following, describing the North American Free Trade Agreement’s public procurement chapter, is true regarding other trade agreements, including the foundational World Trade Organization Agreement on Government Procurement (GPA):

NAFTA’s current government procurement chapter was written before digital technologies changed not only the products and services being purchased but also how the purchases are made in the procurement market both in the U.S. and with our key trading partners.³⁴

These trade agreements apply to most of the products and services that are readily available in the marketplace. The GPA, for instance, provides very specific requirements for publicly advertising RFPs for any covered procurement.³⁵ All covered procurements must follow these rules. For commercial buying, each procurement must be publicly advertised for a minimum of 10 days.³⁶ The concept of readily available will need to be incorporated into these trade agreements. As a whole, the concept should be agreeable to the international community, as it recognizes the global nature of supply chains and should further open the United States defense market to responsible foreign sources of supply.

Practices like BAAs and the newly implemented CSO push the boundaries of the advertising requirements found in these trade agreements.³⁷ CSO is a step in the right direction for contracting officers to have greater flexibility to access innovative commercial solutions, including research and

³² “Approved Product List Integrated Tracking System,” DISA, accessed November 2, 2018, <https://aplits.disa.mil/processAPList.action>.

³³ Ibid.

³⁴ “Government Procurement Moves to Center Stage in NAFTA Renegotiations,” Eminence Griffin, TechWonk Blog, January 23, 2018, accessed July 28, 2018, <https://www.itic.org/news-events/techwonk-blog/government-procurement-moves-to-center-stage-in-nafta-renegotiations>.

³⁵ See, World Trade Organization, *Revised Agreement on Government Procurement*, Articles VII and XI, accessed July 25, 2018, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf.

³⁶ Ibid.

³⁷ Section 879 of FY 2017 NDAA, Pub. L. 114-328 (2016). USD(A&S) Memorandum, *Class Deviation—Defense Commercial Solutions Opening Pilot Program*, June 26, 2018, accessed November 6, 2018, <https://www.acq.osd.mil/dpap/policy/policyvault/USA001228-18-DPAP.pdf>.

development, and authorizes competition requirements to be met through technical analysis.³⁸ Other than the fact that CSO is only a pilot program, and is not a permanent authority, there is a single, large, problem with the statutory definition of *innovative*. The commercial solution opening may only be used to acquire “innovative commercial items, technologies, and services” with innovative being defined as

- (1) any technology, process, or method, including research and development, that is new as of the date of submission of a proposal; or
- (2) any application that is new as of the date of submission of a proposal of a technology, process, or method existing as of such date.³⁹

How the term *new* in the definition is interpreted could be problematic and will likely be inconsistent across DoD, if not across individual contracting offices. It is unclear whether the term means new to DoD or new to the private sector. It is also unclear what happens if a solution is not considered new, but the concept is evaluated and the program office or operator wants to procure it and field it quickly. Broader authority to compete solutions and negotiate the business arrangement after the technical competition is necessary for DoD to adequately leverage industry expertise and commercial technology advancement. Such authority should not be limited by how an acquisition official or agency attorney might interpret the term *new*.

Maximizing competition and access to innovation requires that contracting officers have authority to waive SAM registration requirements for vendors offering readily available products and services when doing so is in DoD’s best interest. Contracting officers should encourage companies to register in SAM if the companies are seeking to do business with DoD on a regular basis.

Under the proposed readily available procedures, contracting offices would need to periodically publish notices of anticipated procurements on FedBizOps and other online media likely to reach small and nontraditional businesses in a given industry. These notices would be published by individual contracting activities and indicate that they only apply to the specific contracting activity issuing the notice. In addition to the list of readily available products and services the buying activity expects to procure, the notice would explain that contracting officers will rely on publicly available product information and pricing to conduct market research and make award decisions in procuring those products and services.

Applicable Laws

In addition to applying the same statutory relief to readily available products and services as is currently provided for COTS items, the proposed new system should allow for eliminating domestic purchasing preferences and certain labor rate protections. BAA and the Berry Amendment undermine DoD’s ability to acquire the most innovative products at reasonable prices due to their restriction on non-U.S. components.⁴⁰ BAA and Berry Amendment provisions are increasingly out of step with

³⁸ USD(A&S) Memorandum, *Class Deviation—Defense Commercial Solutions Opening Pilot Program*, June 26, 2018, accessed November 6, 2018, <https://www.acq.osd.mil/dpap/policy/policyvault/USA001228-18-DPAP.pdf>.

³⁹ Section 879 of FY 2017 NDAA, Pub. L. 114-328 (2016).

⁴⁰ Requirement to Buy Certain Articles from American Sources; Exceptions, 10 U.S.C. § 2533a.

commercial practices and global supply chains across most product categories. Domestic sourcing needs should be addressed by DoD's Industrial Base office and the Commerce Department in identifying critical needs and allocating resources to stimulate cutting-edge domestic capacity. The labor rate protections of the Service Contract Act, Davis–Bacon Act, and Public Contracts Act (formerly Walsh–Healey Act) are both inflationary and duplicative of regulations like the Occupational Safety and Health Act (OSHA) and the Fair Labor Standards Act (FLSA).⁴¹ The challenges these statutes pose to DoD's effective use of precious resources are more fully discussed in Recommendations 64 and 65 of this report. Implementation of these recommendations will dramatically improve how the vast majority of DoD procurements are made, but will only remove the application of these laws from a small portion of the dollars spent.⁴²

Removing application of BAA and the Berry Amendment to readily available products and services will likely have a more substantial effect. Much of the textiles, clothing, and footwear currently subject to the Berry Amendment would generally meet the definition of readily available, as would many product categories currently under BAA restrictions. The limits BAA and the Berry Amendment place on accessing cutting-edge products produced outside of the United States are antithetical to efficiently procuring the most advanced readily available products and solutions.⁴³ Removing the requirement to apply these provisions to readily available products may also remove barriers to entry into the defense marketplace caused by supply chain restrictions. Small and nontraditional businesses unable to source U.S.-made components for readily available products now would be able to compete for DoD business under the proposed system.

Removing the federal government-unique labor rate requirements would have little to no effect on the service, construction, or manufacturing industries, especially considering the fairly limited scope of service contracts and construction projects that could be considered readily available without any customization. The safety and wage standards required by OSHA and the FLSA would continue to apply without including them as specific terms and conditions—they are laws of general applicability.

The statutory reservation of all contract awards under the current simplified acquisition threshold, and additional set-aside provisions in FAR Part 19, are inconsistent with the strategy proposed in the *Volume 1 Report* and directed by the FY 2019 NDAA.⁴⁴ For DoD to fully implement a strategy that focuses on investing in innovative small businesses and ensures DoD maintains technical dominance over near-peer competitors and emerging adversaries, DoD needs flexibility to determine how it meets the goals established by the Small Business Administration (SBA). Consequently, DoD must be able to implement a deliberate strategy to meet its small business goals through investments in innovation to ensure a robust industrial base. Much of that investment could come in the form of procuring privately developed, readily available technology solutions. Set-asides do not create the proper incentives for

⁴¹ Service Contract Labor Standards, 41 U.S.C. §§ 6701-6707. Rate of Wages for Laborers and Mechanics, 41 U.S.C. § 3142. Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$10,000, 41 U.S.C. §§ 6501-6511.

⁴² Based on FY 2017 FPDS-NG data collected and analyzed by Bloomberg and the Section 809 Panel staff.

⁴³ "Berry Amendment FAQ," Defense Pricing and Contracting (DPC), accessed November 6, 2018, https://www.acq.osd.mil/dpap/cpic/ic/berry_amendment_faq.html.

⁴⁴ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 167-194 (2018). FY 2019 NDAA, Pub. L. No. 115-262, 130 Stat. 2139 (2018).

DoD to procure readily available products, and these programs have the potential to stunt, rather than encourage, small business growth.

As discussed in the *Volume 1 Report*, set-asides and other small business programs incent small businesses to make extraordinary efforts to remain small.⁴⁵ Setting-aside all procurements under a certain dollar threshold does not encourage a small business to grow beyond that threshold, especially if that business relies on competing for procurements that are currently set aside for small business. Outgrowing the size standard makes those businesses ineligible to compete for the same contracts that, in many cases, were critical to the success of the small business. Using a price preference and requiring DoD to continue to meet the overarching small business use goal established by SBA will ensure the same amount of DoD dollars are invested in small business, while allowing capable small businesses to grow and compete for opportunities. Such a requirement could help achieve Congress's direction to DoD to "create opportunities and a pathway for small businesses to grow and compete for future DoD contracts as larger entities" where set-asides fall short for one reason or another.⁴⁶

The Section 809 Panel is not recommending that readily available products and services be exempt from mandatory sourcing required by FAR Part 8; however, prime contractors would not be required to procure from mandatory sources any products or services that may be included in the readily available solution that is being provided to DoD.⁴⁷ Readily available products and services have established supply chains and DoD should not be requiring contractors to develop unique supply chains, unless there is a national security-related basis for the requirement, which could necessitate customization or development that would make using these procedures inappropriate.

Pricing and Value

Most of the readily available products and services that DoD acquires are available from multiple sources, with publicly posted prices. In those cases, contracting officers would be able to compare available pricing and seek quantity or preferred-buyer discounts to determine price reasonableness. The existing FAR Part 13 procedures for determining price reasonableness are available to contracting officers in the proposed readily available procedures. In addition to those factors, contracting officers need to be able to rely on input from the requirement owner and consider value to the end user when existing pricing information may not be adequate to make a timely price reasonableness determination.

Value relative to price, not cost, is what matters in the private sector. Many companies that sell products that are expected to perform a certain function at a high standard invest substantial amounts of time, energy, and money in research, design, and the development of their intellectual capital. Technology companies like Apple, Microsoft, and Samsung price their products based on the capabilities their products provide and the value those capabilities provide to the consumer. If DoD wanted to buy an iPhone in 2006, a contracting officer would not have had a similar product, previous purchases, or earlier iterations of the iPhone against which to compare the price. In the case of a *first-mover*, like Apple in the touchscreen smartphone arena, contracting officers should seek input from end

⁴⁵ Section 809 Panel, *Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 176-177 (2018).

⁴⁶ FY 2017 NDAA, Senate Armed Services Committee Report, S. Rept. 114-255, May 18, 2016, accessed August 30, 2018, <https://www.congress.gov/congressional-report/114th-congress/senate-report/255/1>.

⁴⁷ See, Contract Clause, FAR 8.005. Contractor Qualifications Provisions and Clauses, FAR 52.208-9.

users or requirements owners as to whether a product or service represents value to the mission at the price being offered. This determination by the requirement owner could be a critical component of contracting officers' price reasonableness determination. Even in the case of emerging technologies, cost or pricing data and *other-than* cost or pricing data, should not be requested from vendors. Pricing of readily available products and services will need to be emphasized in training curriculum for DoD acquisition professionals when implementing this recommendation.

Contracting officers should contact vendors found through market research and bargain for quantity discounts, preferred customer discounts, or other benefits such as free shipping and extended warranties. In the consumer and business-to-business e-commerce world, vendors use unique discount or customer codes that provide better pricing or other benefits for recurring and high-volume customers. For example, Home Depot negotiated a standard discount for DoD which is automatically captured at the point of sale when the GPC is used.⁴⁸

Transaction Methods

The transaction methods and terms and conditions used by DoD were often cited by stakeholders as the most challenging part of doing business with DoD. The example provided in the Vern Edwards quote at the beginning of this section is typical of many federal government commercial procurements. Time, energy, and cost are expended across the system unnecessarily—time is not valued. It is difficult to understand how 47 pages of documentation, with 500 more pages incorporated by reference, are really necessary for the federal government to manage the risk associated with purchasing \$18,000 in sleeper sofas.⁴⁹ Most of the content in those 47 pages likely comprised boilerplate clauses, provisions, and terms and conditions, but it still took man-hours to assemble, review, and publish. This drill provides little benefit to the agency or the tax payer and deters new entrants from doing business with the government.

A phone call to a number of local sources, or an Internet search could have identified multiple potential sources willing to sell the needed product at a reasonable price. A simple credit card transaction would have saved time and resources, returned a rebate to the agency, and achieved the desired results.⁵⁰ The competitive nature of the market place and the terms and conditions offered by sellers in the readily available marketplace adequately mitigate most risks associated with buying these products. This recommendation would provide agencies with the authority to issue GPCs to contracting officers with a credit limit up to their warrant or the \$15 million threshold, if the contracting officer's warrant exceeds that threshold.

This proposal leaves the micro-purchase threshold and procedures in place so that contracting officers may continue to issue purchase cards and delegate the authority to make purchases that fall below the

⁴⁸ See, "Solutions for Government Buyers," Home Depot, accessed August 27, 2018, https://www.homedepot.com/c/Government_Customers.

⁴⁹ "This is What is Wrong with Government Contracting," Vern Edwards, Wifcon Forums and Blogs, September 3, 2016, accessed July 23, 2018, <http://www.wifcon.com/discussion/index.php?/topic/3712-this-is-what-is-wrong-with-government-contracting/&tab=comments#comment-33249>.

⁵⁰ In FY 2012 alone, the GPC rebates totaled \$306 million, which would increase dramatically if GPC use was expanded to purchase readily available products and services up to \$15 million. See, "SmartPay Benefits," GSA, accessed August 7, 2018, <https://smartpay.gsa.gov/content/about-gsa-smartpay#sa26>.

micro-purchase threshold to operators and end users outside of the contracting office.⁵¹ The vast majority of DoD's transactions fall below the recently increased micro-purchase threshold.⁵² Maintaining the capability for cardholders in a military unit to procure needed supplies and services that fall below the micro-purchase threshold is an effective force multiplier and efficient means of quickly acquiring capabilities.

The contracting officer would be able to execute transactions using the GPC, without the need for an underlying purchase order or existing contract vehicle. This situation is an obvious expansion of the traditional use of the GPC as a way of delegating buying authority for purchases under the micro-purchase threshold to cardholders within operational units outside of the contracting office. The U.S. Air Force instruction governing the use of the GPC currently states that the GPC is also the preferred payment method for placing task and delivery orders against prepriced contracts if authorized in the contract or agreement, and for contract payments on fully funded contracts for which it is advantageous to the government and the contractor accepts the GPC.⁵³ Air Force contracting officers are also authorized to make purchases from non-DoD contract vehicles with the GPC up to the Simplified Acquisition Threshold.⁵⁴ Using the GPC to make purchases of readily available products and services would maximize rebates to the agency, provide immediate payment to vendors, and would provide additional risk mitigation in the form of dispute resolution through the financial institution that issues the purchase cards.

In some cases, such as commercial software licensing agreements, there may need to be some standard government terms and conditions developed through the Office of Federal Procurement Policy Act rule-making process that would apply to all readily available transactions, but these terms and conditions must be kept to a minimum.⁵⁵ There also may be cases for which it is advantageous to DoD, and consistent with industry practices, to issue an RFP or purchase order with a DFARS 252.213-1 clause similar to the reduced FAR 52-212-4 clause described in the *Volume 1 Report*.⁵⁶ None of these clauses would be required to flow down to vendors' supply chains, which are likely made up of existing, often long-term, agreements. The contracting officer would have the flexibility to issue the RFP directly to the sources identified during market research, or post it publicly for a period of time that the contracting officer determines to be reasonable. DoD prime contractors subcontracting for readily available products and services in support of a FAR Part 15 defense-unique development contract would not be required to flow-down any clauses. Requirements the prime contractor needs to meet and any vendor within the supply chain needs to meet, must be treated as requirements and included in the requirements documents.⁵⁷

⁵¹ Actions At or Below the Micro-Purchase Threshold, FAR 13.2.

⁵² Per Section 829, FY 2019 NDAA, Pub. L. 115-262, 130 Stat. 2139 (2018), the MTP is now \$10,000.

⁵³ AFI 64-117, *Government Purchase Card Program*, June 22, 2018, 8, accessed November 2, 2018, http://static.e-publishing.af.mil/production/1/saf_aq/publication/afi64-117/afi64-117.pdf.

⁵⁴ *Ibid.*

⁵⁵ Office of Federal Procurement Policy Act of 1974, Pub. L. No. 93-400 (1974).

⁵⁶ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 32-42 (2018).

⁵⁷ This is an extension of Recommendations 62 and 63.

Transparency and Accountability

Transparency in federal procurement is currently achieved by posting opportunities on FedBizOps and post-procurement data in the Federal Procurement Data System-Next Generation (FPDS-NG), USAspending.gov, and through protests. Currently, only through protest litigation does that transparency include information regarding the extent to which officials followed the procurement rules established by statute and regulation. FedBizOps, FPDS-NG, and USAspending.gov data do not provide any insight into why a specific contract award was made. In the existing system, only *interested parties* may file either preaward or postaward protests to elucidate the decision-making process to ensure that the appropriate statutes and regulations were followed. Protests come at a cost to the interested parties who file protests, the agency, and the procurement system.

To achieve transparency and accountability in this recommendation, contracting officers would be required to post to a centralized public website, within 3 business days, each award made. FPDS-NG or FedBizOps could be modified to receive and display this data or a separate website could be created. Postings would include the products or services procured and the price paid. They would also include the results of contracting officers' market research efforts and a short award decision document when the award was based on factors other than price. When the award was based entirely on price, an abstract of the pricing found during market research would be sufficient to document how the award decision was made. If posting each procurement presents an operational security risk, the contracting officer could delay publishing for up to 60 days. The minimal documentation required should already be stored electronically and would only require uploading to a web-accessible database. This process would provide public access to much more DoD procurement information than is currently available. Industry and government oversight groups would be able to examine DoD and individual contracting activity compliance with these procedures and call out instances of bad behavior to appropriate officials.

This recommendation would eliminate the opportunity for preaward protests in cases for which contracting officers select a source based on market research or direct solicitation. Because solicitations or RFPs would not be publicly posted, there would be nothing to protest. This proposal would limit postaward protests to complaints filed with the competition advocate for the contracting activity. There would be only two bases for protests or complaints: the product or service procured was not readily available or the contracting officer failed to conduct market research in accordance with the readily available procedures. Competition advocates would be given authority, through the chief of the contracting office, to direct contracting officers to cancel purchases and return products, if they have been delivered but not consumed, or cancel services when doing so is in the best interest of the government. Contracting officers would be required to redo the procurement through proper market-based competition. Competition advocates should play a role in ensuring adequate market research is being accomplished and contracting officers are seeking the best products and services that provide the best value to DoD. All contracting personnel (including the competition advocate) responsible for procuring readily available products and services would require enhanced market research and private-sector pricing training.

Conclusions: Readily Available

Aligning DoD's procurement policies and practices with the state of today's marketplace is the overarching goal of this recommendation, and to do so requires changes that are revolutionary,

compared to today's processes, in how DoD thinks about competition, pricing, market research, and transparency. Small business policies, which are focused on meeting quotas through indiscriminate set-asides and reservations, are not benefiting DoD or small businesses in a way that ensures DoD has access to a robust, innovative, and globally competitive small business vendor-base. The example of a 47-page solicitation for a simple commercial buy further demonstrates the extent to which the existing system fails to keep pace with a dynamic marketplace, makes DoD an unappealing business partner, and requires Congress to create work-arounds for DoD acquisition to remain relevant. Rather than continuing to determine how to circumvent the acquisition system, it is time to overhaul the acquisition system, especially for procuring those products and services that are readily available in the marketplace. This substantially streamlined approach to procuring these products and services requires statutory changes, regulatory changes, and a culture shift away from buyers perfecting a process to buyers delivering the right capabilities to warfighters inside the turn of near-peer competitors and nonstate actors.

Some of the readily available products DoD requires must meet flight safety, cybersecurity, and other standards peculiar to that product or class of products and the systems of which they ultimately become a part. These standards may be addressed by qualifying vendors, creating approved product lists, and incorporating them into the requirements package. It is the requirement owner that understands what assurances are necessary for a given product. The commercial airline industry maintains fleets of aircraft at a very high reliability rate with airlines procuring and installing parts on a regular basis. DoD requirements, even when it comes to sustaining weapon systems, are no longer unique, and reliable business practices exist in the private sector that DoD could learn from and must seek to emulate if it is going to maintain sufficient access to those markets. This proposal seeks to move DoD and federal procurement in that direction.

Discussion: Readily Available with Customization

Updating DoD procurement practices will be the difference between a U.S. military that benefits from commercial innovation and one that is superseded by it.

- Ben Fitzgerald and Katrina Timlin, War on the Rocks⁵⁸

CNAS's *Future Foundry* paper, the foundation for the Dynamic Marketplace concept, argues that DoD "does not possess a viable, standardized method to acquire commercial technologies, adapt them for military purposes, and incorporate them into CONOPs, doctrine, and training at scale."⁵⁹

This general indictment of the acquisition system focuses on DoD's inability to acquire customized commercial or private-sector technologies and services, and this recommendation proposes a necessary step in filling that gap. As explained in the *Volume 1 Report*, increased use of streamlined commercial buying procedures and commercial-specific terms and conditions has been a priority for Congress and

⁵⁸ "Time for a Private-Sector Pivot on Military Technology," Ben FitzGerald and Katrina Timlin, War on the Rocks, May 14, 2015, accessed August 8, 2018, <https://warontherocks.com/2015/05/time-for-a-private-sector-pivot-on-military-technology/>.

⁵⁹ Ben FitzGerald, Alexandra Sander, and Jacqueline Parziale, *Future Foundry: A New Strategic Approach to Military-Technical Advantage*, Center for New American Security, December 2016, 22, accessed October 12, 2018, <https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report-FutureFoundry-final.pdf?mtime=20161213162640>.

DoD since the passage of FASA in 1994. Despite this focus by Congress and DoD, commercial-item spending declined by 29 percent between FY 2012 and FY 2017.⁶⁰ This decline is attributable to the expansion of commercial contract terms and conditions, confusing definitions and policies, and criticism of DoD's navigation of this complex web by DoD IG and GAO.⁶¹ The Section 809 Panel's proposal for procuring readily available products and services eliminates complex commercial product and service definitions in favor of the terms *readily available* and *readily available with customization*. The intent is to simplify even the concept of customization, so that a formal *determination* is not necessary for contracting officers and prime contractors to use the simplified procedures included in this section to purchase readily available products and services and readily available products and services that are customized for DoD.

The Section 809 Panel proposes that a product or service is readily available unless DoD is funding the development and the product or service is something that only defense entities would procure. Challenges to whether a product or service is readily available or readily available with customization would require the challenger to prove the product or service does not fit into these two categories. If a contracting officer or prime contractor followed a rational and reasonable process for determining a product or service is readily available, reviewers, whether they be from DCMA, DCAA, or the IG, may not substitute their judgement for that of the contracting officer or prime contractor.⁶² These fundamental shifts in how DoD does business are essential in changing the acquisition system so warfighters benefit from commercial innovation, rather than become casualties of it.

The Section 809 Panel defined customization in the *Volume 2 Report*. The definition of customization is bifurcated into customization for products and customization for services, based on a similar rationale for the panel's recommendation to bifurcate the commercial item definition.⁶³ For products customization means

*Changes, beyond optional, priced product features, made to a readily available product to meet a DoD need using commercial processes and equipment; or the manufacturing of a product based on a specification using only commercial processes and equipment.*⁶⁴

Services are considered customized when

*A performance work statement, statement of objectives, or other form of direction about how to perform the services is necessary to identify the services to be performed.*⁶⁵

Although the category of services that meets the definition of readily available, discussed above, may be small, nearly all of the services DoD procures should meet the definition of readily available with customization. Everything from janitorial services to engineering services and even armed security

⁶⁰ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 16-17 (2018).

⁶¹ *Ibid*, 17.

⁶² See Recommendations 62 and 63 regarding the existing commercial item determinations made by prime contractors.

⁶³ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 19-20 (2018).

⁶⁴ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 2 of 3*, 181 (2018).

⁶⁵ *Ibid*, 181-182.

services, are regularly contracted for in the private sector with vendors providing customization based on specific customer needs. DoD's need for customization is most often the same or similar to what other customers require. The mere fact of a DoD application of a service does not change the nature of the service. For instance, additively manufactured parts *printed* to meet a military specification, whether procured as a service or as a product, are a prime example of how DoD should be taking advantage of an established private-sector process in an efficient and expedient manner.

There are two circumstances under which DoD requires customization that may be DoD-unique: when services are provided in a combat zone, and in the business arrangement for which DoD acquires services under a cost reimbursable contract. Stakeholders explained that DoD's version of a cost reimbursable contract is inconsistent with private-sector practices. The private-sector application of cost reimbursable contracts does not provide customers with access to a service provider's accounting system to the same extent as DoD. Cost reimbursable contracts in the private sector more closely resemble what DoD would consider time and materials contracts. Despite time and materials contracts being the standard in the industry when fixed price contracts are not appropriate, DoD describes time and materials contracts as the least favorable contract type.⁶⁶ If DoD is going to gain access to a broader market of knowledge-based services, especially those offered by experts not affiliated with CAS compliant defense contractors, it must contract in ways that are more consistent with the private sector. The private sector does not track and report costs to customers consistent with what DoD requires under CAS. Their systems comply with generally accepted accounting practices, but more importantly it is extremely rare for a seller of goods and services in the private sector to give the buyer access to their financial systems, much less give them the right to dictate how those systems function.

Even when services are to be performed in a combat zone, which certainly adds risk and cost, the services being performed are typically logistical or base operating support services that are similar to those procured in the private sector. Procuring customized readily available products and, especially, services, will often result in longer-term contractual relationships rather than the more transactional buys characterized by procuring readily available products and services. These different procedures and contract types are aimed at addressing the differences in how the private sector buys and sells. The following are the key elements of this recommendation, and are intended to enable rapid acquisition and, in-turn, rapid fielding of existing private-sector innovation regularly *customized* in the private sector and tailored to DoD's needs.

- **Readily Available Procedures:** Expand the use of a slightly modified version of existing FAR 12 and FAR 13.5 simplified commercial buying procedures to be used when procuring readily available with customization. Additional flexibility to use market-based competition under certain circumstances would also be included, as discussed below. The procedures would be part of the new DFARS Part 213 discussed above.⁶⁷ Similar to the existing FAR Part 12

⁶⁶ USD(AT&L) Memorandum, *Guidance on Using Incentive and Other Contract Types*, April 1, 2016, 40, accessed November 6, 2018, <https://www.acq.osd.mil/dpap/policy/policyvault/USA001270-16-DPAP.pdf>.

⁶⁷ The Panel has already recommended moving simplified commercial buying procedures into Part 13. This recommendation expands that concept by putting all the simplified readily available procedures in one consolidated and organized location.

limitation, the use of cost reimbursement contracts requiring certified cost or pricing data are prohibited when procuring readily available products and services with customization.

- **Competition:** Market-based competition is still the primary driver of product or service quality and price as well as availability of sources for customized readily available products and services. Publicly posted RFPs or requests for quote (RFQs) would only be required when the value of a procurement is expected to exceed \$15 million or the period of performance for a service or requirements contract would exceed 12 months. An RFP or RFQ would typically be necessary to communicate between the buyer and seller so the seller understands the buyer's requirement and the buyer understands how the seller proposes to meet that requirement. When the expected value of the procurement does not exceed \$15 million or the contract period of performance is less than 12 months, the contracting officer has the discretion to directly solicit sources found as a result of market research. In many cases, even above this threshold, a publicly posted RFP or RFQ would not increase the competition that already exists in the marketplace and would not add value to the procurement. Where those circumstances exist, the Chief of the Contracting Office could authorize a contracting officer to rely solely on market-based competition despite the value of the procurement exceeding the threshold.
- **Applicable Laws:** The statutory relief that currently only applies to simplified commercial acquisition procedures for commercial buying below the threshold (\$7 million) should be expanded to apply to all readily available products and services with customization. In addition, relief from the labor standards of the Davis–Bacon Act, Service Contract Act, and Public Contracts Act as well as domestic preference statutes, BAA and the Berry Amendment, is necessary to leverage the entire marketplace and allow DoD to behave like other buyers. As with buying readily available products and services, a small business price preference for evaluation purposes would be used instead of a small business set-aside program. DoD contracting activities would be required to use small businesses consistent with the small business policy pivot described in the *Volume 1 Report*⁶⁸ and directed by the FY 2019 NDAA.⁶⁹
- **Price Reasonableness:** Contracting officers should be able to determine price reasonableness based on competitive quotes or proposals, but prices paid by other DoD buyers for similar products and services and an understanding of private-sector pricing, among other methods, may be necessary. Pricing would not be based on information not available in the marketplace or not normally communicated between buyers and sellers. Specifically, this would mean pricing would not be based on certified cost or pricing data, or other than certified cost or pricing data, that is outside of private-sector norms. Similar to the readily available proposal, contracting officers would be permitted to rely on value determinations by the requirement owner to assist in determining if a price being offered is reasonable.
- **Transaction Methods:** Customized readily available products and services would be contracted for using contract types that do not require contractors to have DoD-approved accounting systems, which are inconsistent with private-sector accounting methods. Contracts consistent

⁶⁸ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 167-194 (2018).

⁶⁹ Section 851, FY 2019 NDAA, Pub. L. 115-232, 130 Stat. 2139 (2018).

with private-sector practices provide adequate risk management for every consumer including DoD. The terms and conditions should be limited, to the maximum extent practicable, to the Contract Terms and Conditions—Commercial Items clause at FAR 52.212-4 as modified by the Section 809 Panel’s commercial buying recommendations in the *Volume 1 Report*.⁷⁰ Because customized readily available products and services encompass almost all the services, including construction, that DoD buys, additional clauses may be necessary. To add such additional clauses, the contracting officer must obtain approval from the Chief of the Contracting Office, and any such clauses must be limited to what is actually necessary for a specific procurement. Such clauses must closely approximate standard private-sector terms and conditions to the maximum extent practicable.

- **Transparency and Accountability:** Transparency and accountability are no less important when it comes to procuring customized readily available products and services. The reformed bid protest process recommended by the Section 809 Panel could be used to ensure transparency and accountability continue to be achieved when a publicly posted RFP or RFQ is used.⁷¹ In those cases, the process for procuring customized readily available products and services remains conducive to both preaward and postaward protests to identify situations in which DoD did not follow the law or federal acquisition rules. In situations when a publicly posted RFP or RFQ is not used, market research documentation, a redacted source selection decision document (SSDD), and a copy of the contract would be posted to the public-facing website where readily available procurements are posted.

The new DFARS Part 213 included in this recommendation would consolidate all of the policy guidance necessary for procuring readily available products and services, and customization of those products and services. Architect and engineering contracts would be the one exception. These contracts are solicited and competed through a unique process that the Section 809 Panel does not intend to upset, even though these services neatly fit into the definition of readily available with customization.⁷² The intent is to provide contracting officers and other acquisition professionals with an organized and consistent set of procedures for procuring almost all readily available products and services, with or without customization. Some references to other parts of the FAR are inevitable, but should be minimized to avoid the complexity-creep the panel has identified in the trend toward using complex FAR Part 15 procedures where FAR Part 12, 13, or 16.5 procedures are appropriate.⁷³ In fact, this proposal would require use of RAPs when procuring readily available products and services and readily available products and services with customization. A contracting officer would obtain approval to use other procedures available in the FAR/DFARS. A streamlined process for acquiring customized readily available products and services as defined by this recommendation would enable

⁷⁰ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 1 of 3*, 32-42 (2018).

⁷¹ See Recommendations 66–69.

⁷² Construction and Architect – Engineer Contracts, FAR 36.

⁷³ For example, Contract Clauses, FAR 36.5.

DoD to leverage, for example, 3-D printing and additive manufacturing that does not meet the current definition of commercial products or services.⁷⁴

Competition

Conducting more traditional full and open competitions for readily available products and services with customization may be viewed as more advantageous to the government and competition in general. Yet, conducting traditional full and open competitions not only results in participation by a limited number of competitors, it also creates an environment in which market research and market intelligence are not valued. This approach deprives warfighters access to innovation available in the marketplace. The current full and open competition standard is achieved by simply posting an RFP to FedBizOps and waiting for potential sources that are actively seeking opportunities with the government and understand how to do so, to respond. Instead, DoD needs competition standards that incentivize contracting officers to obtain market intelligence, so they can leverage the continuous competition that exists in the marketplace and provide warfighters with cutting-edge, readily available capabilities tailored for DoD that represent the best value for the dollar. The current full and open competition standard is not effective at achieving this end state.

There are a number of products and services that DoD procures for which there is a limited market and buyers are fully aware of the universe of suppliers that exist. In these cases, publicly posting an RFP or RFQ and waiting 20 or 30 days for quotes or proposals is not going to increase competition or the potential supply sources. Publishing a justification and approval would not increase competition either. An RFP sent directly to each of the known, through market research, suppliers would ensure each is aware of the opportunity to submit a proposal. The same holds true, for example, when only prequalified vendors or original equipment manufacturers (OEMs) may supply a product or provide repair services.

This recommendation establishes a \$15 million threshold under which contracting officers may determine when a public solicitation is advantageous to an acquisition or when market-based competition and direct solicitation is most advantageous. The threshold also includes a time factor. The contract's period of performance must not exceed 12 months, for the contracting officer to have discretion in publicly posting the requirement. A chief of a contracting office may authorize a contracting officer to use direct solicitation and market-based competition for procurements that exceed this threshold, when doing so is justified by the nature of the acquisition.

Empowering contracting officers to determine whether publicly posting a solicitation is in the best interests of the government and in the best interest of competition would eliminate process, where process does not add value. It would also make the contracting officers and the requirement owners responsible for seeking out the best solutions from the most capable sources, thus creating a demand for the acquisition workforce to develop the requisite market research and market intelligence skills. These skills are necessary for DoD's acquisition workforce to ensure DoD is benefitting from the most

⁷⁴ See Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 2 of 3*, 20 (2018). This recommendation would expand the commercial products and services definition to enable DoD to utilize commercial additive manufacturing much more efficiently.

effective form of competition, obtaining greater access to the marketplace, and getting the best value for the taxpayer.

Applicable Laws

Readily available products and services should be included under the umbrella of statutory relief currently provided for COTS items, and readily available with customization needs the same statutory relief or at a minimum the same statutory relief currently afforded to commercial products and services. This statutory relief is necessary to conform the way DoD buys with the way the private sector sells. The domestic preferences found in BAA and the Berry Amendment threaten DoD's access to innovative products at reasonable prices due to the prevalence of private-sector reliance on non-U.S., or mixed U.S.–foreign supply chains by much of the private sector, even with customized products or services.⁷⁵ The labor rate protections of the Service Contract Act, Davis–Bacon Act, and Public Contracts Act (formerly Walsh–Healey Act) pose the same problems as well, and actually have minimal effect on labor rates in today's market as compared to the market when they were enacted.⁷⁶ Today unemployment is at a historical low and there is a shortage nationwide of skilled labor.

It may be even more critical in the world of customized readily available products and services, for small and nontraditional businesses, unable to source U.S.-made components for readily available products, to be able to compete for DoD contracts. DoD has a number of legacy systems with electronic, and other types of parts, that OEMs no longer produce or are willing to repair at a competitive price, yet they could be replaced or repaired by a larger pool of available small and nontraditional sources in the marketplace. To take advantage of this opportunity, DoD would need to assess which parts, for strategic national security or industrial base purposes, require certain elements to be sourced domestically, rather than a blanket application of the domestic sourcing statutes, alleviating the need to pursue waivers when the products are not available domestically. This would shorten the time it takes to get capability to warfighters.

Because almost all services DoD procures, to include construction, would meet the definition of customized readily available products and services, this recommendation would effectively relieve DoD of enforcing compliance with the Davis–Bacon and Service Contract Acts through government contracts/transactions. Yet, as noted above, the safety and wage standards required by OSHA and FLSA would continue to apply without including them as specific terms and conditions in each transaction. Using the readily available with customization buying vehicle should also expand opportunities for small businesses to compete for projects for which Davis–Bacon or Service Contract Act wages are out of synch with actual private-sector rates.⁷⁷ Maintaining accurate wage rate determinations has proven almost impossible for the Department of Labor; the last DoD IG review found that 46 percent of nonunion-provided data used in establishing Davis–Bacon wage

⁷⁵ Buy American Act, 41 U.S.C. §§ 8301-8305. Requirement to Buy Certain Articles from American Sources; Exceptions, 10 U.S.C. § 2533a.

⁷⁶ Service Contract Labor Standards, 41 U.S.C. §§ 6701-6707. Rate of Wages for Laborers and Mechanics, 41 U.S.C. § 3142. Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$10,000, 41 U.S.C. §§ 6501–6511.

⁷⁷ GAO also found that in 2010, about 63 percent of DOL's published wage rates were effectively the union-prevailing rate, but only 14 percent of construction workers nationwide were represented by unions. See, GAO, *Davis–Bacon Act: Methodological Change Needed to Improve Wage Survey*, GAO-11-152, March 22, 2011, 18, accessed November 2, 2018, www.gao.gov/products/GAO-11-152.

determinations were decades old.⁷⁸ It is difficult for small businesses to pay wages competitive in a private-sector market on private-sector projects, while also paying, tracking, and reporting inflated wages on public projects.

Small business reservations and set-asides pose the same problems for DoD and the market regardless of whether DoD is procuring readily available or readily available with customization products and services. There are no data to evaluate the price preference DoD pays due to reservations or set-asides, making it impossible to compare the effect of the 5 percent price preference recommended by the Section 809 Panel. The current set-aside practice limits competition to only those vendors who qualify for the set-aside; therefore, DoD has no reference as to what a large or midsize company might have proposed for a given procurement.

The Section 809 Panel is not recommending readily available products and services be exempt from mandatory sourcing required by FAR Part 8. This recommendation would not affect the government's requirement to use sources of supply like AbilityOne and Federal Prison Industries.

Pricing and Value

Many stakeholders inside and outside of DoD observed that DoD has never developed expertise in how the public sector determines pricing. The absence of expertise in the government results in requests for certified cost or pricing data, and information other than cost or pricing data that closely resembles certified cost or pricing data. The desire for cost or pricing data to help justify a price reasonableness determination appears to be one of the factors contributing to reduced use of commercial buying procedures. This recommendation would prohibit requesting any cost or pricing data from suppliers of readily available products and services, including those being customized for DoD. Successful implementation would require improved pricing, market research, and market intelligence training for acquisition personnel in the contracting and program management communities.

Elements that contracting officers should consider when pricing readily available and customized readily available products and services are included in the recommended DFARS 213. These elements are very similar to those listed in the existing FAR Part 13, and approximate commercial or private-sector means for accomplishing price analysis. Rather than relying on suppliers to validate their price for a product or service with cost, pricing, or sales data, DoD is capable of using available market intelligence, technical analysis provided by the requirement owner, and data collected from similar previous procurement actions to make price reasonableness determinations. Requirement owners must be involved with contracting officers in determining at what price certain capabilities represent value to the mission. Understanding the value and capability provided by a customized, readily available product or service is more determinative of a fair and reasonable price than a cost build-up. Cost build-ups required by cost reimbursement contracts are complex and expensive, and those costs are passed on to DoD and taxpayers. Given DoD's general inability to determine whether direct costs and indirect costs are fair, these exercises devolve to a determination of whether the profit being earned is appropriate. In the world of readily available, the government should not expect to tell a seller that its

⁷⁸ GAO, *Davis–Bacon Act: Methodological Change Needed to Improve Wage Survey*, GAO-11-152, March 22, 2011, 18, accessed November 2, 2018, www.gao.gov/products/GAO-11-152.

profit is too high. DoD's focus on limiting profit margins—an odd focus in a capitalist society—creates a barrier to doing business with DoD according to many of the companies with which the Section 809 Panel spoke.

Across the DoD acquisition enterprise, there are organizations that have implemented advanced market intelligence practices in procuring readily available products and services, with or without customization. The Air Force Installation Contracting Agency (AFICA), for example, has invested in commercially available market intelligence reports and developed the Air Force Business Intelligence Tool to better understand private-sector markets and the government's buying practices.⁷⁹ Using market intelligence and understanding of the Air Force's existing buying practices to inform AFICA's category management project, AFICA claims to have saved more than \$1 billion.⁸⁰ The savings that could be realized across DoD with the expansion of market-intelligence-driven initiatives like AFICA's, combined with the streamlined procedures in this proposal, would not only improve DoD's ability to access customized private-sector technology, but also free up resources for allocation to more complex weapon systems.

Under these simplified procedures, contracting officers would be encouraged to bargain with vendors for a better price, additional features, more favorable delivery terms, or for other terms that provide value to the acquisition. DoD may be more interested in obtaining or bargaining for IP and data rights for products and services customized for a DoD purpose than for readily available products and services that are purchased as offered. In the July 2017 GAO report on military acquisition, nine of 12 nontraditional companies identified IP rights as a barrier to seeking business opportunities with DoD.⁸¹ DoD must better understand the value of IP associated with readily available products and services and the customization DoD might require and develop greater sophistication in how it contracts for and intends to use that IP.

Transaction Methods

Expanding on the transaction methods prescribed for readily available products and services, customized products and services would more often than not require written RFPs or RFQs to articulate requirements and terms and conditions. A contract or possibly a simple purchase order would document the transaction. This practice is not inconsistent with the private sector. Private-sector buying practices deviate from DoD's in the selection of sources. Companies only solicit from the sources they choose to solicit. This proposal expands the use of direct solicitation and reliance on market-based competition to ensure that DoD considers the entire marketplace, not just those who already understand how to do business with DoD. Procurements above \$15 million dollars, or when

⁷⁹ "The AFICA Business Intelligence Competency Cell: 'Bringing Life' to Mission Innovation," Brian Ripple, Wright-Patterson AFB, January 9, 2017, accessed September 14, 2018, <https://www.wpafb.af.mil/News/Article-Display/Article/1044960/the-afica-business-intelligence-competency-cell-bringing-life-to-mission-innova/>.

⁸⁰ "AFICA Hosts 2018 Enterprise Sourcing Summit, Aims to Save \$2B," John Herrington, Wright-Patterson AFB, July 19, 2018, accessed September 14, 2018, <https://www.wpafb.af.mil/News/Article-Display/Article/1579241/afica-hosts-2018-enterprise-sourcing-summit-aims-to-save-2b/>.

⁸¹ GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, July 2017, 18, accessed October 31, 2018, <https://www.gao.gov/assets/690/686012.pdf>.

the period of performance exceeds 12 months, contracting activities would be required to publicly post RFPs and RFQs for a minimum of 10 days.

Many procurements that do not exceed this threshold would also result in publicly posted solicitations, when contracting officers determine that doing so is in the best interest of the government. These RFPs must be simpler and more straightforward than what DoD currently employs. The Section 809 Panel's efforts in the *Volume 1 Report* to minimize the commercial terms and conditions included in commercial solicitations and the resulting contracts are being expanded for use in procuring readily available products and services with customization. No clauses included in contracts for readily available products and services should be flowed down to the private-sector supply chains these vendors rely on, otherwise DoD will remain excluded from accessing certain companies and the capabilities they offer. For instance, one company that participated in the 2017 GAO study stated that a supplier turned down a \$20 million performance-based logistics contract because of the difficulty in managing all the unique federal contract clauses.⁸²

Even though the products and services are customized for DoD, the customization is being accomplished using private-sector equipment and processes, and the products or services being customized are readily available in the market. Customization of these products and services is contracted for daily in the marketplace and buyers and sellers are able to sufficiently manage risk, agree on price, and ensure delivery of the agreed on outcome without some of the unique hurdles presented by DoD's acquisition process. As discussed above, DoD does not need cost reimbursement contracts to determine price reasonableness, and there are other contracting options available for those situations for which a requirement is not well defined.

When buying readily available products and services, like the current commercial buying policies, the preferred contract type is a firm-fixed-price contract or fixed-price with economic price adjustment contract.⁸³ The FAR allows for use of a time and materials contract for procuring certain commercial services.⁸⁴ This recommendation would apply similar limits on the contract types that may be used to procure customized readily available products and services. The available contract types are firm-fixed price; fixed-price with economic price adjustment; firm-fixed price level-of-effort; and time and materials.⁸⁵ DoD procures a substantial portion of its services as noncommercial, outside of FAR Part 12, and uses cost-reimbursement contracts. To behave more like the private sector, eliminate additional costs and complexity, and to ultimately reduce barriers to entry, DoD must shift its preference for cost reimbursement contracts to a preference for time and materials contracts for which fixed-price contracts are not possible.⁸⁶ Time and materials contracts may also be appropriate when a readily available product requires further development that is of a commercial, not defense-unique, nature.

⁸² Ibid, 16.

⁸³ See, Acquisition of Commercial Items – Contract Types, FAR 12.207(a).

⁸⁴ Ibid.

⁸⁵ See, Types of Contract, FAR Part 16.

⁸⁶ Most of the 12 non-traditional companies interviewed by GAO for its July 2017 report, stated that DoD had expressed interest in further developing a commercial product they offered for sale, but they did not enter into contract with DoD to do so. They cited to unique government accounting systems as one of the primary reasons for making that decision. GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, July 2017, 16, accessed October 31, 2018, <https://www.gao.gov/assets/690/686012.pdf>.

There is flexibility within these contract types that would allow contracting officers to incorporate performance incentives that do not involve complex equations and cost reporting, and this recommendation does not prevent awarding indefinite-quantity contracts or blanket purchase agreements in cases for which they would be advantageous.⁸⁷

The GPC should also be considered as a flexible method for procuring customized readily available products and services. The Undersecretary of the Air Force for Acquisition, Technology, and Logistics, Dr. William Roper, has recognized that the GPC presents DoD with the unique ability to contract for products and services while providing immediate payment, which is critical for transacting with start-ups that may offer innovative solutions to DoD problems but have immediate cash flow requirements.⁸⁸ This initiative is an attempt to solve the same problems the Section 809 Panel identified with the existing commercial buying structure and problems this proposal would solve on a broader scale. In many cases, contracting officers should have the discretion to use their GPC, up to their warrant, or other administrative threshold provided by the agency, to procure customized products and services after issuing an RFP or an RFQ and selecting the proposal or quote that represents the best value to the government. Along with the streamlining of terms and conditions and broader outreach as a result of market research, providing notice in the RFP or RFQ that the contracting officer intends to use a GPC to complete the transaction and provide immediate payment, may incentivize vendors to submit an offer.

Transparency and Accountability

Although the simplified procedures do not allow for protests to GAO or the Court of Federal Claims, the simplified procedures for acquiring readily available with customization provides for transparency either through the protest process or as a result of publicly posting the results of a procurement. In situations for which the contracting officer would publicly post an RFP or RFQ, GAO and the Court would have jurisdiction over any preaward protest that might be filed, and any postaward protest as a result of the contract award.⁸⁹ The process described above for readily available procurements would apply in situations for which the contracting officer is authorized to use market-based competition. In addition, if the contracting officer issues an RFP or RFQ, even directly to a limited number of vendors, those in receipt of the solicitation maintain a right as an interested party to file a postaward protest.

The postaward publication of the contract award, the market research documentation, and a redacted SSDD would be required any time a solicitation is not publicly posted. This process would ensure adequate transparency into the government's actions in situations for which time is a critical factor or a publicly posted solicitation adds no value to the procurement, and the contracting officer is authorized to use market-based competition. Procurement actions that are not adequately supported by the publicly posted documentation, would undoubtedly draw scrutiny from industry, public interest

⁸⁷ The complicated fixed-price incentive contracts found in FAR 16.403 are not what is contemplated here. Instead, contracting officers should be able to offer and negotiate performance or delivery incentives where certain performance characteristics or delivery timelines would provide added value, but there is also added risk for the contractor.

⁸⁸ "Air Force Busts Out Credit Cards to Buy High Tech Gear," Paul Mcleary, Breaking Defense, September 19, 2018, accessed September 21, 2018, https://breakingdefense.com/2018/09/air-force-busts-out-credit-cards-to-buy-high-tech-gear/?utm_source=Sailthru&utm_medium=email&utm_campaign=ebb%2009.20.18&utm_term=Editorial%20-%20Early%20Bird%20Brief.

⁸⁹ Recommendations 66–69 are critical to ensuring protests meet their intended purpose, and is how the Panel envisions protests being adjudicated in this framework.

groups, the agencies, and Congress. This proposal would allow for greater transparency than is present in the existing acquisition system, while also providing DoD the discretion necessary to rapidly acquire and field customized private-sector products and services that fill DoD capability gaps.

Conclusions: Readily Available With Customization

The ability to effectively procure readily available products and services and leverage actual market-based competition will thrust DoD procurement into the information age and have it poised to make the next leap into the artificial intelligence age. If DoD's procurement system is going to achieve the outcomes required of it by the national security challenges the nation faces, certain long-held institutional perceptions of public procurement must be completely reimagined. This proposal reduces or eliminates barriers to entry, provides for flexibility and agility, values time, and eliminates processes that do not add value to the system. These are bold changes, which will not be welcomed by those who benefit from the idiosyncrasies of the existing system and those who view this proposed approach as an abandonment of socioeconomic and domestic preference programs. But defense acquisition is the business of providing lethality to a Joint force responsible for conducting full-spectrum combat and noncombat operations.

These changes are necessary to ensure DoD is able to efficiently access the extraordinary advances in technology and innovation present in the private sector that is led by small businesses and nontraditional sources and enables DoD to shift resources to its more complex procurements. These recommendations would achieve the goal of allowing DoD to behave the way buyers in the private sector behave, increasing access to and speeding delivery of readily available capabilities, and improving the lethality of the Joint force. A revolution of this scale is necessary to remain at the cutting edge of technology and innovation. The Section 809 Panel's recommendations would allow DoD to employ innovation in defense instead of being the victim of that innovation employed by others.

Implementation

Legislative Branch

- Amend Title 10 by creating a statutory authority for DoD to procure readily available products and services and readily available products and services with customization via the simplified readily available procedures outlined in this recommendation.
- Amend Title 10 Competition in Contracting Act provisions to include market-based competition as the preferred method for achieving competition when DoD is procuring readily available products and services and readily available products and services with customization.
- Amend Title 10 Competition in Contracting Act provisions to include merit-based selection as a means of satisfying competition requirements.
- Repeal Title 10 provisions related to procurement of commercial products and services.
- Revise Title 10 provisions to remove the terms commercial products, commercial services, and nondevelopmental items and replace them with readily available products and services and readily available products and services with customization.

Executive Branch

- Amend DFARS Part 205 to implement procedures for market-based competition.
- Amend DFARS Part 213 and repeal DFARS Part 212 to implement procedures for acquiring readily available products and services and readily available products and services with customization.
- Publish a DFARS clause for use as the standard terms and conditions for procuring readily available products and services.

Implications for Other Agencies

- This proposal will likely reduce DoD reliance on GSA and other governmentwide contract vehicles to procure readily available products and services.
- The Director of OMB and the U.S. Trade Representative will need to renegotiate the public procurement portion of applicable trade agreements to include the concept of readily available products and services and the use of market-based competition for procuring readily available products and services.