

Recommendation 52: Permit the initiation of all new starts, provided Congress has appropriated sufficient funding.

Problem

Continued reliance on CRs prevents deployment of critical new capabilities to warfighters by preventing the initiation of program *new starts*.

Background

The *new start* restriction in CRs generally consists of language prohibiting the “new production of items not funded for production” in previous fiscal years.¹ This restriction prevents initiation of new programs until a regular *Department of Defense* appropriations bill is enacted. RDT&E programs are also affected by the new start restrictions.

With the uncertainty of multiple CRs, however, acquisition officials cannot plan to award contracts at specific points in the year. If they do make such plans and CRs continue beyond those points, they may have to restructure the contracts or programs in question.

Discussion

Senior officials report that the prohibition on new starts causes increased inefficiency in the defense acquisition system. When vendors believe there is a risk that a planned program may not begin on time, they will invariably price that risk into a contract. Then-Secretary of Defense James Mattis wrote in 2017,

*New start rules and funding constraints carried forward under each CR extension combine to increase the likelihood that costs of material and labor in the contracts themselves will also grow. To the vendors and manufacturers, the Government becomes a less reliable, higher-risk customer.*²

In the first 3 months of FY 2018, the Army had planned 18 new starts that were affected by the CRs enacted by Congress. One of the planned new starts was the Interim Combat Service Rifle program, which was canceled in November 2017 amidst a succession of CRs.³ Given 6 months of CRs in FY 2018, the Navy had seven procurement contracts and three R&D contracts the award of which would be delayed due to new start rules.⁴ The Air Force had six new starts that would be affected by 6 months of CRs, including multiple fighter aircraft upgrades and a joint space operations system.⁵

¹ For example, see Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-56 (2017).

² James Mattis, *Impacts of a Continuing Resolution Authority in Fiscal Year 2018* (letter to Senate Armed Services Committee), September 8, 2017.

³ “The Army’s Powerful New 7.62mm Service Rifle Is Officially Dead,” Jared Keller, Task and Purpose, November 30, 2017, accessed January 22, 2018, <https://taskandpurpose.com/army-interim-combat-service-rifle>.

⁴ James Mattis, “Impacts of a Continuing Resolution Authority in Fiscal Year 2018” (letter to Senate Armed Services Committee), September 8, 2017.

⁵ *Ibid.*

Case Study: New Start: Enhanced Polar System Recapitalization

In early 2018, the Air Force's Enhanced Polar System Recapitalization (EPS-R) was intended to maintain satellite coverage of polar regions, a critical function for certain U.S. Navy operations. By partnering with an allied country to launch multiple payloads, EPS-R had the opportunity to save approximately \$900 million.

The international partner, however, had a preexisting launch schedule that created an inflexible time constraint. Because of the urgency of the requirement, it had to be funded via a new start budget line item for which appropriations did not already exist.

This funding approach required submission of a congressional PA request to the four congressional defense committees. According to the acquisition authority, these requests take an average of 182 days to process.⁶ This would extend past the international partner's launch deadline.

At the time the Air Force began its request for EPS-R, Congress was still in the process of negotiating regular appropriations bills, working through additional CRs, and attempting unsuccessfully to avoid a government shutdown. Under some intelligence-related funding authorities, the EPS-R new start would have been automatically approved by default after 30 days.⁷ Due to the slowness of the approval process during a succession of CRs, however, the Air Force faced uncertainties in the delivery of critical capabilities to the warfighter and \$900 million in taxpayer savings.

Ultimately, program officials were able to partner with the international agency and obligate money on the required contract modification at the last minute, having obtained approval from all four congressional defense committees. Had the program not been sufficiently high-cost and high-profile, DoD likely would have been unable to obtain these approvals from all congressional stakeholders on such short notice. One senior program official stated, "we narrowly escaped disaster" and the acquisition system should not continue to rely on these types of "diving saves."⁸

Shortly before the beginning of FY 2018, DoD requested approval of some 75 new start anomalies in CRs for FY 2018.⁹ These requests were not included in the texts of the subsequently enacted CRs. There are signs that the urgency of DoD's new start needs may be increasing. DoD requested 36 new start anomalies in the FY 2015 CRs, a figure which had about doubled 3 years later.¹⁰ Defense acquisition officials report that the current process for requesting inclusion of anomalies in CRs is ineffective.¹¹

⁶ U.S. Air Force Space and Missile Systems Center, presentation to Section 809 Panel, January 24, 2018.

⁷ See 50 U.S.C. § 3038(c), under which the Defense Intelligence Agency may expend money on "objects of a confidential, extraordinary, or emergency nature" "without regard to the provisions of law or regulation relating to the expenditure of Government funds," provided the intelligence and defense committees have been notified and given 30 days to review the proposed expenditure.

⁸ U.S. Air Force Space and Missile Systems Center staff, follow-up discussion with Section 809 Panel, March 2018.

⁹ "What the Continuing Resolution Means for Defense Spending in FY 2018," Seamus Daniels and Todd Harrison, Center for Strategic and International Studies, September 27, 2017, accessed January 23, 2018, <https://www.csis.org/analysis/what-continuing-resolution-means-defense-spending-fy-2018>.

¹⁰ U.S. Air Force Space and Missile Systems Center, presentation to Section 809 Panel, January 24, 2018. As an alternative explanation for the growth in new start anomaly requests, the increase between FY 2015 and FY 2018 may reflect longer durations of individual CR bills. The increase may also reflect what one budgeting expert called "DoD's growing intolerance of CRs and willingness to ask for anomalies." Naval Postgraduate School professor, emails with Section 809 Panel, February 2018.

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Conclusions

The prohibition on the initiation of new starts under a CR results in increased contract costs and inefficient acquisition outcomes. It also potentially prevents deployment of needed capabilities to warfighters in a timely manner.

Well-intentioned reasons for the ban on new starts may exist. Impeding the defense acquisition system may create political incentives for Congress to enact regular appropriations, which might not exist otherwise. The current system, however, does not generate incentives for members of Congress as much as it negatively affects taxpayers and warfighters.

At the very least, Congress must allow DoD to initiate the acquisition of critically-needed capabilities, regardless of whether Congress has negotiated a funding bill. Determination of which needs are critical should be based on the expertise of DoD acquisition professionals and approved by Congress.

Implementation

Legislative Branch

- Consider the initiation of a DoD new start to be automatically approved provided that (a) a DoD regular appropriations bill has not been passed by both houses of Congress, (b) DoD has been temporarily funded by Congress, (c) the new start has not been marked negatively by any of the congressional defense committees in their committee reports, and (d) it is not funded above the lowest budget line item mark from among the four congressional defense committees.¹² This change would primarily fall within the jurisdiction of the appropriations committees.

Executive Branch

- Track all four congressional defense committee marks to ensure that new starts are not initiated in programs or projects that have been marked with prejudice. If a new start request has been marked by any of the congressional defense committees, only execute funds to the level of the lowest committee's mark.

Implications for Other Agencies

- If greater flexibility were granted to DoD than to other Executive Branch agencies under CRs, it could dilute the incentive for members of Congress to enact regular appropriations.

¹² The four congressional defense committees, when they approve a bill, release committee reports with long data tables detailing their recommended changes to the defense budget at the individual line-item level. To resolve potential difference between the House and Senate, these committee report data tables are consolidated into a conference report joint explanatory statement. Unlike the dollar figures referring to broad accounts in appropriations law, DoD is not directly bound by law to comply with these detailed budget line items. There is, however, an expectation that DoD will make every effort to abide by the recommendations in the appropriations committee's conference report joint explanatory statements (which are built from the committee reports). The committee reports, therefore, serve as de facto sets of instructions from the legislature to the Executive Branch.