

## Recommendation 84: Direct DoD to communicate with the marketplace concerning acquisition from development of the need/requirement through contract closeout, final payment, and disposal.

### Problem

Despite attempts by governmentwide and DoD acquisition leaders since Congress passed the Federal Acquisition Streamlining Act of 1994 (FASA), DoD acquisition personnel and individuals in the marketplace have expressed concern about communicating with each other openly and frequently throughout the acquisition process, for fear of legal violations.<sup>1</sup> They report fear of being challenged by both oversight functions in government and through the protest processes, yet this fear is rooted in lore, rather than law. There are very few restrictions that apply to communication with the marketplace.

### Background

Congress has not explicitly directed the acquisition team to communicate with the marketplace but has *encouraged and permitted* communication with industry.<sup>2</sup> The difference between *directing* and *encouraging and permitting* is key in terms of DoD culture and behavior regarding communication with industry. Over time, the perceived risks that members of the acquisition team have attached to communication between government and the marketplace have created a perception that such communication is risky and may even be prohibited.

The Office of Federal Procurement Policy (OFPP), the FAR Council, the office of the Secretary of Defense, and the DAR Council have issued numerous policy documents directing and encouraging communications with the marketplace.<sup>3</sup> In a March 2018 policy memorandum to secretaries of the Military Services, then-Deputy Secretary of Defense Patrick Shanahan encouraged communication with the marketplace. Shanahan noted although operating within required ethical guidelines is essential,

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<sup>1</sup> Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103–355 (1994). There are very few restrictions that apply to communications with the marketplace. This recommendation is needed to affirmatively debunk the “lore.”

<sup>2</sup> FAR 1.102(c) states, “The Acquisition Team consists of all participants in Government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services.”

<sup>3</sup> OMB Memorandum, “Myth-Busting”: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process, February 2, 2011, accessed November 7, 2018, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/Myth-Busting.pdf>. OMB Memorandum, “Myth-Busting 2”: Addressing Misconceptions and Further Improving Communication During the Acquisition Process, May 7, 2012, accessed November 7, 2018, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/myth-busting-2-addressing-misconceptions-and-further-improving-communication-during-the-acquisition-process.pdf>. OMB Memorandum, “Myth-busting 3”: Further Improving Industry Communication with Effective Debriefings, January 5, 2017, accessed November 7, 2018, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/myth-busting-3-further-improving-industry-communications-with-effectiv....pdf>. Market Research, FAR Part 10. OSD Memorandum, *Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending*, September 14, 2010, accessed November 7, 2018, [https://www.acq.osd.mil/fo/docs/USD\\_ATL\\_Guidance\\_Memo\\_September\\_14\\_2010\\_FINAL.PDF](https://www.acq.osd.mil/fo/docs/USD_ATL_Guidance_Memo_September_14_2010_FINAL.PDF). OSD Memorandum, *Better Buying Power 2.0: Continuing the Pursuit for Greater Efficiency and Productivity in Defense Spending*, November 13, 2012, accessed November 7, 2018, [https://www.acq.osd.mil/fo/docs/USD\(ATL\)%20Signed%20Memo%20to%20Workforce%20BBP%202%200%20\(13%20Nov%202012\)%20with%20Attachments.pdf](https://www.acq.osd.mil/fo/docs/USD(ATL)%20Signed%20Memo%20to%20Workforce%20BBP%202%200%20(13%20Nov%202012)%20with%20Attachments.pdf). OSD Memorandum, *Implementation Directive for Better Buying Power 3.0 – Achieving Dominant Capabilities through Technical Excellence and Innovation*, April 9, 2015, accessed November 7, 2018, [https://www.acq.osd.mil/fo/docs/betterBuyingPower3.0\(9Apr15\).pdf](https://www.acq.osd.mil/fo/docs/betterBuyingPower3.0(9Apr15).pdf). Market Research, DFARS Part 210.

doing so must not preclude frequent communication with industry at all points in the acquisition process. He emphasized, “Conducting effective, responsible, and efficient procurement of supplies and services while properly managing the resultant contracts requires Department personnel to engage in early, frequent, and clear communications with suppliers.”<sup>4</sup> Even this clear direction from DoD leadership has not been sufficient to address the acquisition workforce’s reticence to communicate with industry, which leaves congressional direction as the only remaining avenue for promulgating this essential behavioral and cultural change.

## Discussion

Every aspect of the acquisition process is adversely affected by acquisition team members’ apprehensiveness when communicating with the marketplace. This apprehension is reinforced by legal advice provided by the various offices of general counsel, staff judge advocate’s offices, and fear of protests. It discourages communication between government and the private sector even when the related fear is unfounded. The potential costs of failing to communicate adequately with the private sector include added time to already inherently lengthy acquisitions processes and lost opportunities to access the innovative solutions accessible to nonstate actors and the nation’s near-peer competitors.

The acquisition team is defined in FAR Part 1 as “all participants in Government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services.” The perceived limitations on communication hinder team members’ ability to work together to identify and deliver capability to warfighters.

This fear of communicating with the marketplace extends to the formulation of policy applicable to the acquisition system, despite permissive language in the Office of Federal Procurement Policy Act, the Administrative Procedures Act, and policy statements by every administration for at least the last 20 years. The myriad rules that govern doing business with DoD present a great enough challenge. The fact that those rules often do not mirror how the private sector buys and sells further complicates the acquisition process. To foster successful procurement in the marketplace DoD must communicate with the private sector in the form of policy formulation and market research.

Market research should not be limited to contracting officers. It should include communication among acquisition team members as they discern what products or services are available. It should also include communication with industry such as identifying potential suppliers’ respective capabilities, considering the possible applications marketplace solutions might offer, and even exploring the disposal side of acquisition. Applications of a solution may evolve over time, necessitating continued communication throughout the acquisition process.

In 1994, Congress enacted FASA, which included landmark language in Title VIII regarding acquisition of commercial products and services, placing even greater emphasis on the need for and proper conduct of market research.<sup>5</sup> Section 8104, Preference for Acquisition of Commercial Items, included a

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<sup>4</sup> DoD Memorandum, *Engaging with Industry*, March 2, 2018, accessed October 23, 2108, [http://www.ndia.org/-/media/sites/press-releases/documents/dsd\\_letter\\_engaging\\_with\\_industry.ashx?la=en](http://www.ndia.org/-/media/sites/press-releases/documents/dsd_letter_engaging_with_industry.ashx?la=en).

<sup>5</sup> Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3390 (1994).

section on market research that was codified at 41 U.S.C. § 3307 and 10 U.S.C. § 2377 which state, in part, the following:<sup>6</sup>

*(d) MARKET RESEARCH. —*

*(1) WHEN TO BE USED. — The head of an executive agency shall conduct market research appropriate to the circumstances—*

- (A) before developing new specifications for a procurement by that executive agency; and*
- (B) before soliciting bids or proposals for a contract in excess of the simplified acquisition threshold.*

*(2) USE OF RESULTS. — The head of an executive agency shall use the results of market research to determine whether commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, non-developmental items other than commercial items are available that—*

- (A) meet the executive agency's requirements;*
- (B) could be modified to meet the executive agency's requirements; or*
- (C) could meet the executive agency's requirements if those requirements were modified to a reasonable extent.*

10 U.S.C. § 2377 includes a broad additional requirement for DoD personnel to receive training in conducting market research:

*(e) MARKET RESEARCH TRAINING REQUIRED. — The Secretary of Defense shall provide mandatory training for members of the armed forces and employees of the Department of Defense responsible for the conduct of market research required under subsections (c) and (d). Such mandatory training shall, at a minimum—*

- (1) provide comprehensive information on the subject of market research and the function of market research in the acquisition of commercial items;*
- (2) teach best practices for conducting and documenting market research; and*
- (3) provide methodologies for establishing standard processes and reports for collecting and sharing market research across the Department.*

Market research serves as the foundation for learning about many important procuring-activity decisions such as availability of commercial products or services to meet agency needs, as well as nondevelopmental products or services, the appropriate procurement method, the likelihood of competition, appropriate terms and conditions, pricing, and more.

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<sup>6</sup> The Panel believes that this applies equally to its proposal on readily available and readily available with customization. See Recommendation 35 in Section 1 of this *Volume 3 Report*.

Congress has continued to focus on market research through additional requirements in NDAs. For example, the FY 2008 NDAA required DoD to develop market research training focused primarily on contracting officers and prime contractors.<sup>7</sup> Section 855 of the FY 2016 NDAA addressed market research in a much more inclusive manner.<sup>8</sup> It makes clear the importance Congress places on the proper conduct of market research:

*(a) GUIDANCE REQUIRED. —Not later than 90 days after the date of the enactment of this Act, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall issue guidance to ensure that acquisition officials of the Department of Defense fully comply with the requirements of section 2377 of title 10, United States Code, regarding market research and commercial items. The guidance issued pursuant to this subsection shall, at a minimum —*

*(1) provide that the head of an agency may not enter into a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items unless the head of the agency determines in writing that no commercial items are suitable to meet the agency's needs as provided in subsection (c)(2) of such section; and*

*(2) ensure that market research conducted in accordance with subsection (c) of such section is used, where appropriate, to inform price reasonableness determinations.*

Section 855 included language that demonstrates Congress's intent that market research be conducted across the acquisition community and not solely by contracting officers:

*(b) REVIEW REQUIRED.—Not later than 180 days after the date of the enactment of this Act, the Chairman and the Vice Chairman of the Joint Chiefs of Staff, in consultation with the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall review Chairman of the Joint Chiefs of Staff Instruction 3170.01, the Manual for the Operation of the Joint Capabilities Integration and Development System, and other documents governing the requirements development process and revise these documents as necessary to ensure that the Department of Defense fully complies with the requirement in section 2377(c) of title 10, United States Code, and section 10.001 of the Federal Acquisition Regulation for Federal agencies to conduct appropriate market research before developing new requirements.*

Congress defined the term *market research* for purposes of Section 855 to include the exchange of information between "knowledgeable individuals in Government and industry." Section 855 states the following:

*(c) MARKET RESEARCH DEFINED. —For the purposes of this section, the term "market research" means a review of existing systems, subsystems, capabilities, and technologies that are available or could be made available to meet the needs of the Department of Defense in whole or in part. The review may include any of the techniques for conducting market research provided in section 10.002(b)(2) of the Federal Acquisition Regulation and shall include, at a minimum,*

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<sup>7</sup> FY 2008 NDAA, Pub. L. No. 110-181, div A, title VIII, § 826(b) (2008).

<sup>8</sup> FY 2015 NDAA, Pub. L. No. 114-92, div. A, title VIII, § 855 (2015).

*contacting knowledgeable individuals in Government and industry regarding existing market capabilities.*

This definition of market research in Section 855 is more detailed than the very generic definition currently found in FAR 2.101, Definitions:

*“Market research” means collecting and analyzing information about capabilities within the market to satisfy agency needs.*

The 2016 NDAA was even more specific on this question of the exchanges between government and industry personnel as part of market research. Section 887 encourages “responsible and constructive exchanges with industry.”

*Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall prescribe a regulation making clear that agency acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry, so long as those exchanges are consistent with existing law and regulation and do not promote an unfair competitive advantage to particular firms.*

The new definition and the congressional direction have not yet been adopted in the FAR or DFARS. The difficulty with this language is that it is permissive and not directive in nature. To change the current culture of apprehension and fear the language must be directive. In the absence of clear direction, there will always be advice to the effect, “you may communicate with the marketplace, but...” The *but*, though not prohibitive, clearly creates a risk to be avoided.

Communication between members of the acquisition team and industry is essential so that DoD customers who determine the requirements, program managers, contracting officers, contract managers, and sustainers can ensure warfighters benefit from the most innovative solutions available. It is apparent that a congressional mandate is the only condition that will convince government acquisition team members that they really are empowered to search the marketplace, ask questions about the products or services they believe meet their needs, negotiate for the purchase of that product or service, and continue a dialogue with the seller as they put the product in service or the seller performs the service.

There will be those who criticize the potential for corruption created by a direction to communicate with the marketplace without a caveat about various forms of prohibited activity from lack of competition to criminal conduct. Such critics should note the host of specific rules that already exist governing behavior set out in detail in the federal standards of conduct at 5 CFR 2635.101. Those standards provide that federal government employees must abide by a series of independent duties that make up the basic tenets of public service, including the duties of providing an honest effort in performing their functions and a duty to act impartially in dealing with nongovernmental entities. Federal agencies place additional obligations for fairness and honesty in supplemental agency ethics guidance.

Although there have been some isolated standards of conduct breaches, they are rare. Considering the huge number of interactions between federal employees and the public every year, the standards have proven to be an effective method of ensuring that fraud, waste, and abuse of the public trust rarely occur. Just in case those standards are not inherently enough to control bad behavior, Congress has enacted protections for *whistleblowers* embedded throughout the standards, such that if a breach occurs, institutional incentives support identifying and sanctioning those behaviors

Fundamentally, the cultural fear of ethics breaches, illegal, or bad behavior that has taken hold in agencies for the past 20 years has led to generalized fear of open communication. This fear is an irrational response to a disproportionately small number of standards breaches or abuses of the duty of fair dealings. It should not be a reason to limit communications related to acquisition on either procedural or substantive reasons.

In Recommendations 59-61, the Section 809 Panel addresses both the training and education members of the acquisition team require before they are authorized to act on behalf of warfighters and taxpayers. Private-sector firms also train their acquisition team members on the various requirements for doing business with the government. The vast majority have their own codes of conduct and educate their employees on the consequences of violating those codes.

Current law does not specifically clarify that communications with the marketplace are not only permitted, but most importantly, directed throughout the acquisition process. The current statutory construct does not make it clear that when there is a question about whether there should be a communication with the marketplace, members of the acquisition team should err in favor of that communication.

## Conclusions

To overcome the current cultural fear within DoD's acquisition team of communicating with the marketplace, Congress must direct that communications with the marketplace, at all stages of the procurement process, including policy making, sustainment, and disposal, are required.

Providing acquisition team members appropriate training and education before authorizing them to act on behalf of warfighters and taxpayers is key to supporting ethical behavior. It is important that Congress not caveat its direction to communicate with the marketplace with warnings about various forms of prohibited activity. This sort of qualified mandate will obscure the clear-cut break with current practice that is recommendation is intended to create.

Congress should express the sense that communications with the marketplace are not only authorized but encouraged throughout the acquisition process, to include policy development, facilitating an approach of *when in doubt, authorize communication*. Congress should also direct DoD, by statute, to communicate with the marketplace concerning acquisition from development of the need/requirement through contract closeout, final payment and disposal and submit an annual report for the 5 years following enactment of this statute articulating DoD's plans for communicating with industry and its accomplishments in implementing the direction to communicate with industry. Nothing in these recommendations eliminates the requirements governing ethical behavior by the acquisition team.

## Implementation

### ***Legislative Branch***

- Express the sense of Congress that communications with the marketplace are not only authorized but encouraged during every step of the process from development of the requirement through disposal. This communication specifically includes policy development and makes clear that when in doubt, DoD should authorize communication.
- Direct DoD, by statute, to communicate with the marketplace concerning acquisition from development of the need/requirement through contract closeout, final payment, and disposal.
- Direct DoD to submit an action plan to the congressional defense committees within 30 days of enactment that identifies barriers and restrictions and steps to remove them. Require DoD to submit annual updates.

### ***Executive Branch***

- There are no regulatory changes required for this recommendation.

### ***Implications for Other Agencies***

- These recommendations will affect all contracting agencies within the government if adopted as governmentwide policy. The FAR, as well as agency supplements, will require changes.