

Recommendation 92: Minimize the flowdown of government-unique terms in commercial buying by implementing the Section 809 Panel's Recommendation 2.

Problem

In its meetings with companies of various sizes over the past 2 years, and in particular commercial companies doing or considering doing business with DoD, the Section 809 Panel heard about the numerous barriers they experience when trying to enter the defense marketplace. A consistent theme in discussions with these stakeholders is the extensive number of terms and conditions unique to government business. Companies fear what they see as the hidden compliance traps in these terms and the administrative and overhead cost of establishing and maintaining compliance mechanisms that are not readily measurable. This barrier is not new: It was an important reason for the commercial buying reforms enacted in the Federal Acquisition Streamlining Act (FASA) of 1994.

In its *Volume 1*, Recommendation 2, Minimize government-unique terms applicable to commercial buying, the Section 809 Panel applauded Congress for establishing in FASA a unique statutory mechanism in 41 U.S.C. § 1906 for limiting the government-unique clauses applicable to commercial buying, but pointed out an important weakness in the mechanism that prevents it from fully achieving its intended goal. The panel made a bold recommendation to fix the weakness and truly minimize the government-unique terms applicable to commercial buying at the prime and subcontract tiers. Recent Congressional action has caused the panel some concern that the importance of adopting this recommendation is not fully appreciated.

Background

As discussed in *Volume 1* in more detail, Congress took comprehensive steps to reduce the government-unique terms applicable to commercial buying. First, FASA addressed the procurement-related laws applicable to commercial buying already in place as of October 1, 1994 by making a number of them inapplicable or partially inapplicable to commercial buying. Second, FASA established a unique statutory mechanism prescribing that going forward, no new procurement-related statute would be applicable to commercial buying unless the statute references 41 U.S.C. § 1906 and specifically states that notwithstanding § 1906, the statute would be applicable to commercial buying. This rather strict limitation on applying statutes to commercial buying was mitigated somewhat by another provision that allowed the Federal Acquisition Regulatory Council (FAR Council) to make a determination that it was in the best interests of the government to apply a procurement-related statute to commercial buying even though Congress had chosen not to make it applicable. Although not specifically applicable to DoD, this same determination process was generally followed by the Defense Acquisition Regulations Council (DAR Council) for DoD-unique procurement-related statutes, Executive Orders (EOs), and regulations. Section 874 of the FY 2017 National Defense Authorization Act (NDAA) formally established a similar mechanism for DoD.

When FASA was implemented in October 1995, there were a total of 57 Federal Acquisition Regulation (FAR) and Defense FAR Supplement (DFARS) clauses based on statutes applicable to commercial buying. Today, there are a total of 122 FAR and DFARS clauses based on statute applicable to commercial buying, with another 20 based on EOs and 23 based on DoD policy, and the numbers

continue to grow. Of these 122 clauses, only six are genuinely applicable under the extant statutory framework because Congress used the mechanism it established in FASA, citing 41 U.S.C. § 1906, and specifically made the underlying statutes applicable to commercial buying. The other 116 clauses are applicable because the FAR Council or DAR Council made a determination that it was in the best interests of the government to do so, or because no determination was made, but the clause was made applicable nonetheless.

The proliferation of clauses applicable to commercial buying at the prime contract level directly affects the flow down of government-unique clauses to subcontractors offering commercial products and services. In 1995, there were four clauses that flowed down to subcontractors offering commercial products or services; today there are 22.

On several occasions Congress expressed concern about the rapid growth in the government-unique clauses applicable to commercial buying. In an attempt to address the problem, Section 821 of the FY 2008 NDAA required the Office of the Secretary of Defense (OSD) to

develop and implement a plan to minimize the number of government-unique contract clauses used in commercial contracts by restricting the clauses to the following: (1) Government-unique clauses authorized by law or regulation, and (2) Any additional clauses that are relevant and necessary to a specific contract.

The Section 809 Panel was unable to identify any specific action taken to minimize these clauses as a result of Section 821.

Section 854 of the FY 2016 NDAA did not direct any change in policy, criteria, or process for determining which procurement-related statutes should be made applicable to commercial buying but did require a report to Congress on defense-unique laws applicable to the procurement of commercial and commercially available off-the-shelf items. That report was issued in June 2016. The Section 809 Panel is not aware of any specific action taken as a result of this report.

The structure envisioned in FASA to minimize the applicability of government-unique terms and conditions to commercial buying is not working as planned.

Discussion

Section 849 of the FY 2018 NDAA and Section 839 of the FY 2019 NDAA directed the FAR and DAR Councils to reconsider their determinations from the past 23 years that resulted in 122 procurement-related statutes and 23 regulations not otherwise applicable to commercial buying being made applicable. The statutes then require the councils to propose revisions to the FAR and DFARS that would provide an exemption from each law for commercial buying unless they *determine* there is a specific reason not to provide the exemption.

Although these two reviews are well intentioned, they are unlikely to address the problem of having 122 clauses and 23 regulations currently applicable to commercial buying or to the application of future procurement-related statutes to commercial buying. As noted above, this approach was used in 2008 with little to show for the work. Essentially, the councils have again been tasked to review their own work since 1995 that resulted in the applicability of this large number of statutes and regulations. The

councils have been given no criteria for these reviews but have been given the same authority to make a *determination* that a statute should apply to commercial buying even though Congress chose not to make it applicable. Asking the same entity to conduct a review of the same statutes using the same criteria is likely to have the same result.

Conclusions

The Section 809 Panel's *Volume 1* Recommendation 2 would leave with Congress the sole authority to determine that a procurement-related statute was so important that it should be applied to what would otherwise be a commercial transaction between the Federal Government and a commercial supplier. The Panel recommended in *Volume 1* that Congress rescind the authority granted in FASA for the FAR and DAR Councils to make a determination that a procurement-related statute, EO, or regulation should apply to commercial buying.

Congress has on many occasions expressed frustration with the proliferation of contract clauses applicable to the procurement of commercial products and services. Consequently, Congress should take the lead in minimizing the government-unique statutes applicable to commercial buying.

Implementation

Legislative Branch

- Rescind Section 849 of the FY 2018 NDAA.
- Rescind Section 839 of the FY 2019 NDAA.
- Implement Section 809 Panel *Volume 1*, Recommendation 2, Minimize government-unique terms applicable to commercial buying.

Executive Branch

- There are no regulatory changes required for this recommendation.

Implications for Other Agencies

- The panel recommends that Congress expand this recommendation to apply to all agencies subject to the FAR.