

Commercial Items

If Only It Were So Easy

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The congressionally chartered Advisory Panel on Streamlining and Codifying Acquisition Regulations (the “Section 809 panel”) released its recommendations on commercial buying by the Department of Defense (DoD) earlier this year. The panel’s report noted that, despite the simplification of requirements for the purchase of commercial items in the Federal Acquisition Streamlining Act of 1994 (FASA) and the Federal Acquisition Reform Act of 1996 (FARA), “commercial buying has not become as widespread in DoD as Congress had hoped.”

The Section 809 panel’s objective of removing unnecessary impediments to the acquisition of commercial products and services is as sound today as it was when FASA and FARA were enacted more than 20 years ago. Moreover, the panel makes some interesting and potentially constructive recommendations—including

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the establishment of separate definitions for “commercial products” and “commercial services,” the creation of a new category of commercial buying, based on “commercial processes,” and a re-examination of government-unique laws and regulations applicable to commercial purchases.

As a principal drafter of the commercial item provisions in FASA, FARA and many of the acquisition laws that came after, I am, however, concerned that the Section 809 panel may have misread the legislative history of key provisions and, consequently, failed to identify some of the competing interests considered by Congress in drafting this legislation. While DoD should be able to meet military needs and protect the taxpayers without creating unreasonable barriers to commercial purchasing, a favorable outcome is unlikely to be achieved by overlooking competing interests and imagining that the problem is an easy one.

Three areas in the Section 809 panel’s report raise particular concern: the treatment of commercial, off-the-shelf (COTS) items, commercial items embedded in weapon systems, and contract clauses intended to implement statutory and regulatory requirements:

(1) COTS Items. The definition of COTS items was developed, the Section 809 panel notes, “to provide additional opportunities for the government to buy from the commercial market by providing for additional statutory exemptions for commercial items that satisfied the much narrower COTS definition.” In the panel’s view, however, “[t]he effect of creating these two classes is that much of the streamlining Congress intended for commercial products is being more narrowly applied to COTS items.” The implication is that Congress did not understand its own actions, and had the COTS definition not been written, the same streamlined treatment

provided for the purchase of paper clips would surely have been extended to the purchase of tanker aircraft. On this basis, the panel recommends the repeal of the COTS statute.

This view is historically inaccurate.

The definition of commercial items was adopted when FASA was enacted in 1994. At that time, Congress exempted commercial items from a number of burdensome requirements, but declined to provide relief from others. To keep the list of requirements from growing, Congress authorized the Executive Branch to exempt commercial-item procurements from procurement statutes enacted after the passage of FASA. It was only a year after Congress had determined the scope of the exemptions to be provided to commercial items that a separate provision was enacted to provide additional statutory relief for purchasing COTS items. The statutory streamlining provided for COTS items could not have been “intended for commercial products,” since Congress had defined the limits of the commercial product exemptions before the COTS provision was drafted.

The Section 809 panel asserts that the COTS provision is “a mirror image” of the commercial items provision. That is not the case. While the commercial items provision (now codified under *Inclusion in Federal Acquisition Regulation* [41 U.S. Code (U.S.C.) Section 1906]) authorizes the Executive Branch to grant relief only from statutory provisions enacted after the 1994 enactment of FASA, the COTS provision allows relief from statutory provisions without regard to the date of enactment. This is presumably why the Office of Federal Procurement Policy was able to exempt COTS items, but not commercial items, from the component test of the Buy American Act (which was first enacted in 1933).

Similarly, the statutory prohibition on purchasing specialty metals from other-than-American sources was first codified in 2006 without any exemption for either commercial items or COTS. It was only a year after the decision was made not to provide relief for any commercial items that Congress revisited the issue and added an exemption for COTS items. This was a hard-fought issue in conference between the House and Senate Armed Services Committees, and it is

fanciful to believe that in the absence of a COTS exemption, a full commercial item exemption would have been adopted.

The power of the COTS provision has never been fully used by the Executive Branch. No comprehensive review has ever been conducted to determine whether COTS items should be exempted from pre-1994 statutory requirements, and the Buy American Act appears to be the only such statute for which the authority has been used. As long as the authority remains on the books, however, it could be used by a future administration to further streamline the purchase of COTS items by exempting them from procurement statutes without regard to

when they were enacted. The repeal of the COTS provision would eliminate this powerful waiver authority, while leaving the narrower commercial items waiver authority unchanged.

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(2) Commercial Items Embedded in Weapon Systems. The Section 809 panel recommends the harmonization of a wide array of statutory provisions to incorporate the commercial item definitions adopted in FASA and FARA uniformly. I leave it to others to assess the impact of the panel’s proposal to modify the definition of commercial items used in the statutory provision on Core Logistics Support (10 U.S.C. Section 2464) on the balance between public and private sector depot maintenance work. However, the panel’s discussion

of a provision addressing the validation of rights in technical data appears to miss the purpose of the provision.

The statutory language addressing the validation of technical data rights for major weapon systems (*Validation of Proprietary Data Restrictions, Claims*, 10 U.S.C. Section 2321[h]), the Section 809 panel report states, “is actually a blending of the existing COTS definition ... and the commercial item definition ... with several key elements of the commercial item definition left out.” “It is problematic,” the panel said, “to have a unique definition of commercial product solely for the purpose of protecting proprietary data that is inconsistent with the standard definition of the term used throughout the U.S.C. and the FAR (Federal Acquisition Regulation).” Moreover, the panel said that it was unable to identify any rationale for the how the provision is cobbled together. “The legislative history,” the panel reported, “provides no rationale for this unique definition.”

The definition of commercial items is a red herring, however, because Section 2321 does not modify that definition. Rather, Congress recognized that some commercial

items might be developed with public funds, and wanted to protect the government's data rights in such cases. The issue was not whether these items were commercial but how to determine who paid for the development.

Section 2321(h) was initially enacted in the commercial items title of FASA, and was written to ensure that purchases of commercial items (as defined in the same title) would not be burdened by the inappropriate application of technical data requirements. The provision did not take the form of a full exemption, the conference report indicated, because "[t]he conferees were concerned that a blanket waiver from these statutes could prevent the federal government from obtaining technical data rights on items developed with public funds." For this reason, FASA precluded the government from seeking technical data on commercial items "unless the government can prove that an item was developed at government expense."

This provision worked as intended for most commercial items. Over time, however, the DoD began to find that it lacked sufficient technical data to provide for competition in the sustainment of major weapon systems developed primarily or exclusively at government expense. One factor was the insistence of some contractors that the military-unique spare parts they sold to the DoD were commercial items. This issue came to a head with a 2006 DoD Inspector General report finding that a major DoD contractor had insisted that every spare part it sold to the DoD was "of a type" sold to the general public. Most of the parts in question were specialized gear boxes, hydraulic motors, fuel controls, and similar components of the F-16, the B1B, and other military-unique aircraft that were developed pursuant to DoD contracts.

Congress responded to this problem by amending Section 2321(h) in 2007. The amendment did not modify the definition of commercial items, and it did not alter the rule that contractors retain the rights to technical data in items that are developed exclusively at private expense. Rather, it provided that in the case of items embedded in major weapon systems, the burden would be on the contractor, not the government, to prove that the items were developed at private expense, regardless of whether the contractor argued that they qualified as commercial items. This shift of burden was deemed appropriate, because the contractor, not the government, was likely to have the best access to information regarding what government or nongovernment money was spent on developing a particular item. As the conference report explained, the intent was to balance the DoD's need for data rights needed to maintain major weapon systems with contractors' right to withhold data on items developed exclusively at private expense.

Section 2321(h) was further modified over time, so that the presumption now favors the contractor in cases where the item at issue is a COTS item, a component of a commercial subsystem (like a commercial engine), or a component of a

weapon system that was developed on a commercial basis. However, the provision's basic purpose remains unchanged: the need to balance between two competing interests in a case where a product with some commercial characteristics and some military-unique characteristics is incorporated into a major weapon system. Congress may choose to change the balance again and restore the presumption that all commercial items are developed at private expense, but it should not do so in ignorance of the impact that such a change would have on the government's ability to sustain military-unique weapon systems.

(3) The Application of Statutory and Regulatory Requirements. The Section 809 panel reported that the number of government-unique contract clauses that may be applicable to commercial-item and COTS contracts continues to expand, despite provisions in FASA and FARA intended to limit such growth. In 1995, the panel reports, there were 57 provisions and clauses in the FAR and the Defense Federal Acquisition Regulation Supplement (DFARS) that were applicable to commercial items. Today, the number is 165.

The reason for this growth, in the Section 809 panel's view, is that the Executive Branch has overused its flexibility to determine that it is in the best interest of the government to impose a requirement on commercial items contracts. The panel report states:

DoD has frequently used its authority, with or without a formal written determination, to impose conditions on commercial and COTS contracts other than those mandated by Congress. The overuse of this flexibility has undermined the expansion of DoD access to the commercial marketplace and contradicts congressional intent to support implementation of commercial policies within DoD.

Accordingly, the panel recommended that the statute be amended to: (1) eliminate the flexibility of the Executive Branch to impose statutory terms on commercial contracts; and (2) exempt commercial purchases, even from statutes providing for civil and criminal penalties. Further, the panel recommended that the Executive Branch modify the FAR and the DFARS to make all existing government-unique clauses and conditions inapplicable to commercial contracts, except for the six that are specifically required by statutes that include special language overriding the requirements of FASA and FARA.

There are several problems with the Section 809 panel's recommendations.

First, the panel incorrectly concludes that of the 165 provisions and clauses made applicable to commercial item contracts under the FAR and the DFARS, only the six provisions containing special language were mandated by Congress. In fact, a substantial number of the provisions recommended by the panel for removal from the FAR and DFARS were mandated by statutes that preceded the 1994 enactment of FASA.

Congress reviewed these statutes when FASA was enacted and determined that they should continue to apply to commercial purchases. Congress may wish to re-examine these requirements, but the Executive Branch does not have the authority to limit the applicability of these statutes to commercial items without further action by Congress.

Second, the Section 809 panel provides no explanation for its recommendation that statutes imposing criminal or civil penalties should no longer apply to the purchase of commercial items. Congress declined to exempt commercial purchases from the application of such statutes out of concern that it might inadvertently excuse commercial contractors from penalties for fraud or other misconduct. Twenty years after the enactment of FASA and FARA, it may be appropriate to consider the impact of the provision and determine whether it is needed to address its original purpose. However, the panel report included no identification or assessment of provisions that may or may not be covered by the provision; instead, it assumed without evidence that whatever the provisions may be, they should not apply to commercial purchases. In the absence of a serious analysis, it is difficult to dismiss the concerns that led to the provision's enactment in the first place.

Finally, the fact that Executive Branch discretion appears to have been overused does not mean that it was misused in every case. For example, the Section 809 Panel questions the Executive Branch decision to apply statutory provisions designed to combat human trafficking to commercial purchases. "It is unclear," the panel says, "why a contractor selling supplies that meet the narrow definition of a COTS product should be exempt from the requirement to prepare and maintain a compliance plan, yet a contractor selling similar supplies that differ only in that they are not sold in substantial quantities should not also be exempt."

The Section 809 panel appears to have overlooked the fact that the statutory requirement for a human trafficking compliance plan applies to contracts for "services required to be performed ... outside the United States," excluding the vast majority of commercial items, which are purchased domestically. The provision was applied to commercial items because—at least under current law—the term "commercial items" includes services as well as products. Public concern about human trafficking on defense contracts was first aroused by allegations that some contractors brought third-country nationals to Iraq on the basis of false representations and then took away their passports, in effect forcing them to remain and work against their will. The services provided by third-country nationals in Iraq included construction work, cafeteria work, maintenance and repair work, and other activities that could meet the definition of commercial services.

Under these circumstances, the DoD decision to apply the human trafficking provision to commercial contracts to be performed outside the United States was not unreasonable. A similar case could be made for the DoD decision to apply

several other statutory requirements that are designed to protect United States interests in the world. These include provisions governing the conduct of contractors performing private security functions outside the United States, prohibiting the acquisition of commercial satellite services from foreign entities that might use their position to interfere with U.S. operations or collect intelligence against the United States, and authorizing the DoD to take action against foreign sources who could use their position in the supply chain for espionage or sabotage of military systems.

Concluding Thoughts

As tempting as it may be to remove all Executive Branch discretion in cases where it appears to have been overused, one-size-fits-all solutions tend to be problematic, and the elimination of flexibility can have adverse consequences. The members of the Section 809 panel are all experienced acquisition professionals for whom I have the greatest respect. They had a sound objective of streamlining the DoD acquisition system to make it easier for the DoD to access commercial companies and commercial technologies. Nonetheless, I cannot help but believe that their report would have been stronger had they been better informed on the history and purposes of the legislation that they recommend revising. &

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MDAP/MAIS Program Manager Changes

With the assistance of the Office of the Secretary of Defense, *Defense AT&L* magazine publishes the names of incoming and outgoing program managers for major defense acquisition programs (MDAPs) and major automated information system (MAIS) programs. This announcement lists recent such changes of leadership for both civilian and military program managers.

Air Force

Shelly A. Larson relieved **Col William T. Patrick** as program manager for the B-2 Extremely High Frequency Satellite Communications Program on March 1, 2018.

Edward M. Stanhouse relieved **James D. Schairbaum** as program manager for the Combat Rescue Helicopter Program on March 1.

Navy/Marine Corps

Col Eric Ropella relieved **Col Robert Pridgen** as program manager for the Executive Transport Helicopter Replacement (PMA-274) on March 1.

Claire Evans relieved **Patrick Fitzgerald** as program manager for the Sea Warrior Program (PMW-240) on April 15.