

## Recommendation 75: Revise regulations, instructions, or directives to eliminate non-value-added documentation or approvals.

### Problem

Within the DoD acquisition system, solicitation and precontract award processes are cumbersome and non-value-added, leading to substantial acquisition delays.

*Subrecommendation 75a: Repeal the requirement at DFARS 215.371-2 to resolicit for an additional 30 days when only one offer is received in response to a solicitation.*

### Background

The 1984 Competition in Contracting Act (CICA) was intended to achieve competitive prices by increasing competition. The law requires the government to compete acquisitions with few exceptions and includes advanced notification timeframes for imminent solicitations as well as minimum response times for contractors responding to solicitations. Nevertheless, in the 30 years since CICA enactment, there is growing concern that competition processes have not always met the desired goals for effective competition. Beginning in 2010, then Under Secretary of Defense for Acquisition, Technology, and Logistics (USD[AT&L]) Ashton Carter included promotion of competition in his Better Buying Power (BBP) initiatives.<sup>1</sup> Among other things, the BBP series of guidance documents issued from 2010 through 2015 included direction to DoD policy makers to streamline the competition process, but also identified that for services, where a single offer was received in response to a solicitation open for less than 30 days, the agency was to resolicit for an additional 30 days.

This direction led to a broader regulatory proposal to limit the ability of contracting officials to avail themselves of the standard for competition at FAR 15.403-1(c) to justify a fair and reasonable price that prohibits obtaining cost or pricing data where there was an expectation of competition from 2 or more offerors. That broader shift in policy did not require an additional 30-day resolicitation period, but in June 2012, DoD issued a final rule to the DFARS addressing competitive procedures when only one offer is received in response to a solicitation that requires resolicitation and revised requirements as needed. That rule was not limited to the acquisition of services. To date, overall increases in effective competition, which have ranged from 50 to 60 percent since 2010 and been the historic range for many years for DoD competition, have not been documented by DoD since the implementation of that policy, nor is data available to support its continuance.<sup>2</sup> The BBP memos do identify that more engagement with industry and other structural changes to the business relationships between the private sector and DoD, such as issuing better demand signals and enhancing knowledge about the value of Intellectual Property, are more important than minor process changes that delay the procurement cycle, but have negligible effect on the competitive process.

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<sup>1</sup> 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).

<sup>2</sup> "Contract Policy: Competition," Defense Pricing and Contracting, accessed November 29, 2018, <https://www.acq.osd.mil/dpap/cpic/cp/competition.html>.

## Discussion

DFARS 215.371-1 states, “It is DoD policy, if only one offer is received in response to a competitive solicitation ... To take the required actions to promote competition.” The contracting officer is required to conduct market research and engage in a variety of requirements outreach activities prior to developing the strategy and solicitation and is required to identify a list of potential offerors interested in the acquisition as well as scan the marketplace for new or unfamiliar sources.<sup>3</sup> Contracting officers have a good indication long before a solicitation closes, and throughout the presolicitation procurement cycles, even before developing the strategy or solicitation, if the acquisition circumstances will promote effective competition. This foresight includes knowing whether or not two or more offerors are likely to emerge, allowing for strategies to draw new offerors to the federal market, and acknowledging that contracting officers are required to solicit potential offerors and anyone else that expresses interest in a procurement (such a request itself is an indicator of interest in competition). If contracting officers believe competition is unlikely or a modification to the strategy is necessary to promote competition, the time to strategize about increased competition is when drafting the strategy, not after offers have been received. Thus, all the predicate steps to achieving effective competition are taken from the outset of any procurement and are subject to internal and external process outcome reviews by agency managers and several oversight organizations to assure that contracting officials have taken steps to maximize competition.

Interested parties also have multiple opportunities prior to the solicitation phase to be notified of the government’s requirement and intent to solicit. FAR 5.203 requires a proposed contract action be publicized 15 days prior to issuance of the solicitation. DFARS 215.371-2 (a)(2) requires contracting officers to “Resolicit, allowing an additional period of at least 30 days for receipt of proposals” in instances where solicitations were open for less than 30 days and only one offer was received. Resoliciting does not resolve a potentially flawed acquisition strategy that does not fully promote competition. Nor does it obviate the need for offerors to monitor acquisitions and respond to solicitations in a timely manner. The requirement at DFARS 215.371-2 to resolicit for an additional 30 days has proven itself unlikely to result in additional interest in an acquisition or increased competition and only delays acquisitions. That said, when only one offer is received, the contracting officer is required to “consult with the requiring activity as to whether the requirements document should be revised in order to promote more competition” and, further, seek post-award feedback from potential offerors. This feedback is to be documented and used in future acquisitions to promote competition.<sup>4</sup> The requirement to adopt lessons learned in any given procurement and to adapt the procurement strategy for the future, which force contracting officers and requiring activities to analyze their requirements and methods of fulfilling them, are more likely to promote competition than relying on resoliciting, which will likely only delay the acquisition.

## Conclusions

Interested parties have multiple opportunities prior to the solicitation closing to be notified of the government’s requirement and intent to solicit, e.g. market research, synopsis and to engage in the competitive process. The policy to resolicit adds time to the procurement process, has no direct nexus to any documented increase in competition in DoD and does not align with other internal and external

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<sup>3</sup> Procedures, Guidance and Information, DFARS 210.002.

<sup>4</sup> Source Selection: Promote Competition, DFARS 215.371-2 and DFARS PGI 215.371-2.

outreach activities conducted by contracting officials as a predicate to soliciting competitive offerors. The requirement at DFARS 215.371-2 for contracting officers to resolicit for an additional 30 days when only one offer is received in response to a solicitation should be repealed.

*Subrecommendation 75b: Eliminate the documentation approval process for DoD programs to use OMB-designated best-in class contract vehicles for direct acquisitions.*

## Background

OMB designates more than a dozen interagency contracts as best-in-class (BICs). Several of these contracts provide DoD and other agencies with access to IT services and solutions. The General Services Administration (GSA) publishes a regularly updated list of approved BICs via the agency's Acquisition Gateway web tool.<sup>5</sup> When DoD conducts acquisitions using non-DoD BIC contract vehicles, there are lengthy documentation approval processes. These approval processes can take several months and incentivizes contracting personnel to use or create agency-unique contract vehicles. Avoidance of already-established contract vehicles increases the amount of duplicative administrative work in DoD contracting offices and potentially decreases the government's negotiating power.<sup>6</sup>

## Discussion

Interagency contracting is an important part of DoD's acquisition system, particularly in IT and other areas that may require specialized technical or market knowledge on the part of contracting professionals. Interagency contracting can also be important when buying commoditized products. If the government, as a whole, purchases large amounts of something, a large, preexisting, nondefense contract may provide a faster and higher-quality solution than if contracting officers were to develop a brand-new contract. Statutory requirements on interagency contracts exist under 10 U.S.C. § 2304 and 31 U.S.C. § 1535 (commonly referred to as the Economy Act). The acquisition community implements these laws via FAR Part 17 and DFARS Part 217.<sup>7</sup>

10 U.S.C. § 2304(f) establishes restrictions on making a contract award using "other than competitive procedures," including the streamlined process of using a non-DoD BIC contract vehicle. The section creates thresholds above which senior officials must approve a written justification for the acquisition in question. For contracts valued at \$75 million or more, an agency-level senior procurement executive must provide approval.<sup>8</sup> DFARS 217.7 expands these requirements, adding special procedures for interagency contract acquisitions that exceed the simplified acquisition threshold. The subpart requires

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<sup>5</sup> Table lists all BICs identified as providing access to IT solutions in GSA Acquisition Gateway, "Best in Class (BIC) Consolidated List," accessed April 30, 2018, <https://hallways.cap.gsa.gov/app/#/gateway/best-class-bic/6243/best-in-class-bic-consolidated-list>.

<sup>6</sup> In order to use agency-unique solutions, a contracting office must in many cases spend time and resources putting a new contract vehicle in place (complete with a competition to establish an indefinite delivery, indefinite quantity vehicle as required under FAR Part 15). These same solutions might be obtained by competing a task order on an existing contract vehicle using the more streamlined FAR 16.5 procedures.

<sup>7</sup> Agency Agreements, 31 U.S.C. § 1535(a), states, "The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if (1) amounts are available; (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government; (3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise."

<sup>8</sup> Under Chief Acquisition Officers and Senior Procurement Executives, 41 U.S.C. § 1702(c), *senior procurement executive* refers to the person "responsible for management direction of the procurement system of the executive agency."

DoD components to conduct best-interest evaluations, scope determinations, funding reviews, and data collection and reporting.<sup>9</sup>

DoD interagency procurements are categorized as either direct or assisted. A direct acquisition is one for which a requiring agency places an order directly against another agency's existing contract vehicle—essentially placing a simple purchase order. An assisted acquisition is one for which the requiring agency sends requirements to the contracting agency, which then engages in acquisition processes on behalf of the requiring agency.<sup>10</sup>

Greater use of interagency OMB-designated BICs in DoD contracting should be encouraged. Using BICs may provide several benefits:

- Allowing for the development of common requirements.
- Reducing duplicate contracts (freeing up more of the contracting workforce for other priorities).
- Applying demand management practices; and
- Improving the government's negotiating power with vendors.<sup>11</sup>

Despite the clear benefits to using OMB-designated BICs for contracting, DoD creates mechanisms that discourage their use. Through an overabundance of unnecessary approval documents and signature-accumulation exercises, DoD incentivizes acquisition personnel to create new, duplicative, and overly expensive contract vehicles rather than rely on preexisting ones.

## Conclusion

Statutory requirements on interagency contracts exist under the Economy Act and additional documentation required of DoD when using best in class contract vehicles for direct acquisitions discourages use of these vehicles. The results are inefficient contracting strategies and loss of volume discounts and purchasing power. The documentation approval process for DoD programs to use best-in-class contract vehicles for direct acquisitions should be eliminated. The approval process for assisted acquisitions should remain unchanged to ensure greater visibility of offloading and control of contract terms and conditions.

*Subrecommendation 75c: Repeal regulatory requirement for preaward Equal Employment Opportunity (EEO) clearance, FAR 22.805(a).*

## Background

The 1965 Executive Order (EO) 11246, Equal Employment Opportunity, prohibits the discrimination of government or government contractor employees or applicants for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. Section 211 of the EO indicates,

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<sup>9</sup> Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense, DFARS 217.7.

<sup>10</sup> See Procedures, FAR 17.502-1(a). Definitions adapted in part from presentation by Steve Sizemore, *Interagency Acquisition*, GSA Federal Acquisition Service, April 25-26, 2017, 3, accessed May 11, 2018, [https://interact.gsa.gov/sites/default/files/Interagency%20Acquisition\\_2017\\_CLP.pdf](https://interact.gsa.gov/sites/default/files/Interagency%20Acquisition_2017_CLP.pdf).

<sup>11</sup> Adapted in part from presentation by Geri Haworth, *Best in Class Contracts*, GSA Professional Services & Human Capital Symposium, June 6-8, 2017, accessed April 23, 2018, <https://interact.gsa.gov/sites/default/files/PSHC%20Symp%20-%20Best%20in%20Class%20Contracts%20Final.pdf>.

*If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor.*

Although the EO does not describe a lengthy precontract award process to demonstrate compliance, the FAR's implementation of the EO does.

## Discussion

FAR 22.805(a) requires clearance from the Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (OFCCP) that contracts and subcontracts over \$10 million are compliant with one or more of the requirements of EO 11246. This requirement is duplicative with FAR 52.222-26 and leads to unnecessary delays.

This process can take up to 35 consecutive days prior to award of a contract for all contracts and subcontract awards over \$10 million. Contracting officers are required to submit a preaward clearance request 30 days before the proposed award date, once the awardee is known. On submitting the request to the OFCCP, contracting officers must wait up to 15 days for a response. The response may come in the form of granted clearance for award or a notification of intent to conduct a compliance evaluation, which can take an additional 20 days. In FY 2017, according to data retrieved from FPDS, there were 3,200 contracts awarded meeting this threshold.<sup>12</sup> These 3,200 contracts do not include subcontract awards or modifications to contracts that would constitute a contract award, both of which may also be subjected to this clearance process. In a worst-case scenario the potential result is a cumulative delay, in just one fiscal year, of up to 113,000 days waiting for this clearance, the equivalent of more than 300 years.<sup>13</sup>

### Case Study: Mission Vulnerability Caused by EEO Pre-Award Clearance

One contracting officer interviewed described an emergent requirement performed by a nontraditional contractor not previously cleared by the OFCCP for EEO compliance. The contracting officer submitted a request for preaward clearance to the OFCCP, waited the requisite 15 days and never received a response from the office. After considering this tacit approval of the contractor's compliance with the requirements of EO 11246, the contracting officer proceeded with award. The lack of response caused a 15 day vulnerability to a critical Army mission. The contracting officer indicated that even in instances of urgency, the regulations do not provide enough latitude for timely execution, as claims of urgency require coordination between the head of the contracting activity and OFCCP, which is an even more burdensome and lengthier process than coordinating with the OFCCP directly and waiting for a response.<sup>14</sup>

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<sup>12</sup> Based on Section 809 Panel staff analysis of FPDS query results for FY 2017 base and all options value of DoD modification-zero contract actions above \$10 million. Blanket purchase agreement, blanket order agreement, and indefinite delivery contract actions omitted from query. FPDS data extracted July 13, 2018 produced 3,221 results.

<sup>13</sup> Number of days based on calculation of number of contracts (about 3,200) multiplied by 35 days. Number of years based on number of days (about 113,000) divided by 365 days per year.

<sup>14</sup> Data collection interviews, conducted by Section 809 Panel Team 6: IT Acquisition, August 2018.

With few exceptions, all contracts over \$10 million must include FAR clause 52.222-26, Equal Opportunity, which requires the contractor to comply with EO 11246 and the rules, regulations, and orders of the Secretary of Labor.<sup>15</sup> The clause at 52.222-26 is required for use in all solicitations and contracts estimated over \$10,000 unless it fits one of the aforementioned exceptions for national security or under exceptional circumstances. The clause describes the contractual authority of the OFCCP to cancel, terminate or suspend the contract after issuance if the contractor is found not to be in compliance with the clause or any rule enforced by DOL relative to EO 11246. Among other things, the clause has substantive obligations for a contractor not to discriminate for employment purposes on the basis of a variety of factors, to take affirmative action to prevent discrimination in employment, to publicize and disseminate the remedies and protections for workers for any non-compliance, and to allow OFCCP to have access and enforce prescribed remedies for non-compliance. It is also required as a clause for use in the simplified acquisitions of commercial items. As such, the clause is one that is included in virtually all federal forms used to both solicit offers from industry and to award final contracts, and is typically included in the final form contracts in Section I as part of the general reference provisions, which then become part of the performance requirements of every contract, subject to remedies for breach, False Claims Act liability and specific OFCCP enforcement actions.

Prior to even being solicited, as a predicate to becoming eligible to receive a federal contract, offerors are also required to register their company in the System for Award Management (SAM), incorporated by reference in contracts at clause 52.204-7, which encompasses the data base for online representations and certifications (formerly ORCA). ORCA contains two related EEO compliance clauses at 52.222-22, Previous Contracts and Compliance Reports, and 52.222-25, Affirmative Action Compliance. Both clauses require an affirmative representation by any recognized federal contract offeror to their prior compliance with the Equal Opportunity clause at 52.222-26 and that they have an Affirmative Action program in place whose compliance is monitored by the OFCCP under EO 11246. Insofar as the pre-award process includes multiple ongoing representations as to EO compliance prior to receiving a solicitation, and any contract awarded contains the operative clause at 52.222-26 that provides for various remedies for non-compliance, including breach of contract, it is reasonable to conclude that when an offeror to a federal contract self-certifies their agreement to, and previous compliance with, the requirements of EO 11246 by signing their proposal/offer to the federal government, the government has ample protection from potential contractor noncompliance prior to the time of award. Thus, under contract formation principles and law, the contractor has both certified to their previous and ongoing compliance with EO 11246 and then promised their future compliance, subject to breach, on the specific contract.

The Pre-award Compliance Review Clearance form required under FAR 22.805 thus duplicates a series of electronic and paper oversight mechanisms that are already embedded in the procurement process in the FAR solicitation and contract clauses, SAM and ORCA representations and certification already and is unnecessary at the award stage to ensure that contractors are in compliance with EO 11246 or Equal Opportunity law generally. While we understand that DOL may object to eliminating the pre-award compliance clearance form, it is not true that eliminating it will create additional compliance or

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<sup>15</sup> Exceptions include national security contracts and those explicitly excluded by the Deputy Assistant Secretary for Federal Contract Compliance, U.S. Department of Labor.

performance risk or that oversight of the EO will be any less strictly construed under contract law provided the offeror has completed their mandatory SAM registration and signed their offer, but its elimination will allow for greater speed to award and one less duplicative procurement file document.”

Precedent exists in acquisition regulations for contractors to self-certify compliance in streamlined processes that avoid the delay of government validation. EO 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, for instance, simply requires the contractor to certify, prior to award, it has implemented a compliance plan to prevent prohibited activities. The same process should apply to EO 11246. Contractor certification prior to award should be sufficient, with ongoing compliance checks by OFCCP. Authority to take action against noncompliance would come from the EO authority. This reform would greatly reduce the procurement acquisition lead time and allow for speedier contract awards.

## Conclusion

Requirements for preaward EEO clearance are inconsistent with comparable labor laws and EOs, which rely on contractor certification and post-award enforcement using the terms of the contract and the EO. The preaward clearance process leads to substantial delays in contract awards and should be repealed.

*Subrecommendation 75d: Revise FAR 19.815 to allow for tacit release for non-8(a) competition by the Small Business Administration (SBA) if concurrence or rejection has not been received by the Small Business Administration after 15 working days.*

## Background

In the Small Business Act of July 30, 1953, Congress created the Small Business Administration (SBA), for which the function was to “aid, counsel, assist and protect, insofar as is possible, the interests of small business concerns.” The charter also stipulated that SBA would ensure small businesses a “fair proportion” of government contracts and sales of surplus property.<sup>16</sup> Section 8 of the act allows the SBA to enter into contract with the government and subsequently “arrange for the performance of such procumbent contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns.”<sup>17</sup> This program is commonly referred to as the 8(a) program, deriving its name from the section of the act itself. The 8(a) program allows or, in some cases, requires the limitation of competition for certain contracts to businesses that participate in the 8(a) Business Development Program. The program helps the government achieve its socioeconomic goal to award at least 5 percent of federal contracting dollars to small disadvantaged businesses each year.<sup>18</sup>

## Discussion

The FAR implements section 8(a) of the Small Business Act in subpart 19.8. The FAR offers detail on the process of contracting with SBA, including how to select acquisitions and determine eligibility as a

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<sup>16</sup> “About the SBA: History,” U.S. Small Business Administration, accessed November 8, 2018, <https://www.sba.gov/about-sba/what-we-do/history>.

<sup>17</sup> Small Business Act § 8(a)(1)(B).

<sup>18</sup> “8(a) Business Development Program,” U.S. Small Business Administration, accessed November 8, 2018, <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program>.

small business, the agency offering and SBA acceptance, and contract execution and administration processes. Unique to the 8(a) program and its requirements is the presumption of perpetual inclusion.

The FAR indicates that “once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements shall remain in the 8(a) program unless there is a mandatory source... or SBA agrees to release the requirement from the 8(a) program.”<sup>19</sup> The FAR briefly describes the process to release a procurement from the 8(a) program. Unlike the detailed process for determining whether to accept a requirement for the 8(a) program, which allows the SBA 10 working days to accept offers over the simplified acquisition threshold and 2 working days for those under the threshold, there is no prescribed timeframe when a request is made to release a requirement from the 8(a) program. This prevents contracting officers from soliciting performance outside the 8(a) program and causes unnecessary delays while waiting for the SBA’s response. One source indicated on several occasions his office requested release of a requirement, or portion of a requirement, and waited between 3 and 90 days while the SBA processed the request for release. He said, “The lack of predictability of the SBA in the release process is very detrimental to acquisition planning and our ability to adhere to schedule constraints for critical programs within the DoD.”<sup>20</sup>

## Conclusions

SBA should be allowed 15 working days after receipt of the contracting officer’s written request, described at FAR 19.815(b), to respond with a determination whether to release a requirement from the 8(a) program. If SBA does not provide the requesting contracting officer with a determination within that period, release from the 8(a) program should be presumed and the contracting officer should be authorized to proceed with award outside the 8(a) program.

## Implementation

### *Legislative Branch*

- Revise 10 U.S.C. 2304(f) to clarify and streamline the process of awarding DoD task orders under OMB-designated BIC contract vehicles. For assisted acquisitions, the current process may remain in place with higher-level approvals needed. For direct acquisitions, DoD contracting officers should execute the acquisition without explicit approval.

### *Executive Branch*

- Repeal requirement at DFARS 215.371-2 to resolicit for an additional 30 days when only one offer was received in response to a solicitation.
- Eliminate the documentation approval process required at DFARS 217.770 for DoD programs to use OMB-designated BIC contract vehicles for direct acquisitions.
- Repeal requirement for pre-award EEO clearance, FAR 22.805(a).

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<sup>19</sup> Release for Non-8(a) Procurement, FAR 19.815(a).

<sup>20</sup> Email to Section 809 Panel, September 2018.

- Revise FAR 19.815 to allow for tacit release for non-8(a) competition by the SBA if no response has been received by the SBA after 15 working days.

***Implications for Other Agencies***

- The recommended changes to the statutes and the FAR would apply to DoD and civilian agencies that use the FAR. Both DoD and civilian agencies will benefit from these recommendations.