

ACCELERATING THE PACE OF ACQUISITION REFORM ACT OF 2018

DISCUSSION DRAFT OVERVIEW

In the committee report (H. Rept. 115-200) accompanying the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91), the committee noted that continued reform of the Department of Defense is needed to improve the military's agility and the speed at which it can address an increasingly complex security environment with unprecedented technological challenges. These requirements remain unchanged, and the need to ensure the effective and efficient use of taxpayer dollars remains an imperative. This legislation continues to improve the Department's acquisition approaches by accelerating the advance of prior reforms.

The committee believes that the body of positive law that establishes the acquisition code in title 10, United States Code, which the Department of Defense employs, has become cumbersome and incoherent. A focused effort is needed to rationalize the body of acquisition law provided to DOD. By creating a new Part V in subtitle A of title 10, all acquisition statutes will now be housed within a coherent framework which will assist both the defense acquisition professional as well as the private sector business owner attempting to enter and provide innovative solutions to the defense sector. The establishment of a new numbering convention for the other subtitles of title 10 will provide rational locations for future improvements to reorganize and streamline the statutes that direct the Department of Defense. The repeal of obsolete legislative notes, as well as the statutory requirements for select reports, positions, and offices, is intended to reduce the often overly prescriptive and cumbersome burdens placed upon the Secretary of Defense.

The committee has been dedicated to increasing DOD's acquisition agility. By clarifying the definitions of commercial items, subcontracts, and applicability of certain provisions of law to DOD commercial contracts, the committee intends to increase the availability of commercial goods and services to the defense customer. Likewise, by tasking DOD to report on the use of "Other Transaction Authorities" the committee intends to highlight the appropriate use of these non-traditional methods to rapidly develop and procure advanced capabilities for our warfighters. Lastly, the committee is concerned that there is significant delay in issuing rules to update the Defense Federal Acquisition Regulation Supplement (DFARS) after statutory enactment, and is asking the Comptroller General of the United States to conduct an assessment and deliver a report on how these rules can be issued in a more efficient fashion.

The committee continues to believe that greater private sector participation, especially by small businesses and non-traditional contractors, is needed to best leverage the American spirit of innovation for the defense sector. Modern procurement opportunities, like those offered by commercial e-commercial portals, continue to represent a streamlined channel for government procurement of commercial goods. GSA's continued maturation of the commercial e-commerce portal model that was enacted in the FY18 NDAA is supported through several provisions requested in the initial implementation plan GSA provided to Congress.

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DISCUSSION DRAFT SECTION-BY-SECTION DESCRIPTION

Title I – Statutory Streamlining

Subtitle A, Section 111. Consolidation of Defense Acquisition Statutes in New Part V of Subtitle A of Title 10, United States Code

This section in subtitle A establishes the initial step in the first phase of a comprehensive reorganization and optimization of acquisition-related statutes in title 10, United States Code. The committee recognizes that the structure for acquisition-related statutes in title 10 has become unwieldy and inadequate.

The committee notes that reorganizing defense acquisition statutes into a restructured, rationalized form would reflect more clearly the underlying organization of these statutes and provide a structure that is more intuitive and easier to navigate, as well as facilitate future growth within the Code's structure. In addition, the proposed reorganization would provide an opportunity to restore parallelism between the acquisition-related provisions of title 10 and the corresponding provisions of title 41 that are applicable to procurement by non-defense agencies, which would benefit the entirety of the federal contracting community.

This first section would create a “shell” for a new part V at the end of subtitle A of title 10, thus logically organizing all acquisition related statutes in one part in the Code. The committee expects that the actual shift of statutory language for the new part V would be established in a subsequent second phase of legislation, but not later than February 1, 2019.

Subtitle B, Sections 121-124. Redesignation of Sections and Chapters of Subtitles B, C, and D to Provide Room for New Part V of Subtitle A

These sections in subtitle B would include the re-designation of the chapter and section numbers for title 10 subtitles B, C, and D in order to create numerical space for the new part V at the end of subtitle A. This restructuring will also enable additional growth and potential future reorganization of title 10 statutes in other subject areas outside of the acquisition code.

The committee expects that this restructuring effort will be sustained. The second phase of restructuring will be enacted by follow-on legislation that will direct the more detailed chapter by chapter transfer into the final revised, rationalized structure of title 10 not later than February 1, 2019.

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Subtitle C, Section 131. Repeal of Certain Defense Acquisition Laws

This section would repeal approximately 100 outdated provisions of law related to defense acquisition. Three are sections of title 10, United States Code, while the remaining provisions appear in the United States Code as legislative “note” sections under various provisions of title 10. These out-of-date provisions either required the Department of Defense to issue regulations, have now expired by their own terms, or are otherwise obsolete.

The committee notes that, with respect to repeal of a statutory requirement for issuance of a regulation, it is not expressing a view on the merits of the policies covered by the regulation. Rather, in repealing the statutory requirement for a regulation, this section allows the Secretary of Defense to revise the regulation as circumstances warrant. Repealing the statutory requirement allows the Secretary to revise or rescind the regulation, but would not prescribe it. The decision to retain, or not retain, the regulation remains with the Secretary.

Subtitle C, Section 132. Repeal of Statutory Requirement for Certain Positions or Offices

This section would repeal 12 statutory requirements for certain Department of Defense positions or offices established or required by law, and establishes a sunset for one statutory designation. Six are sections of title 10, United States Code, while the remaining requirements are sections of national defense authorization Acts for previous fiscal years. The sunset for one statutory designation is an amendment to the National Defense Authorization Act for Fiscal Year 2017.

The committee notes that these repeals do not constitute an assessment of the offices’ or positions’ respective missions / roles in the acquisition process, but rather are an effort to remove needlessly prescriptive and obsolete requirements from the United States Code. Codifying the existence and structure of certain offices may unnecessarily restrict the Secretary of Defense’s ability to modify the Department’s organizational structure to improve efficiency and effectiveness in a way that is consistent with the reforms to the organization of the Office of the Secretary of Defense as required by section 901 of the National Defense Authorization Act for Fiscal Year 2017. Repeal of these statutory requirements would not directly abolish the affected positions, but would allow the Secretary to restructure those positions should such action be warranted. Removing statutory mandates would enhance the Secretary’s authority and ability to craft an agile acquisition organization.

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Subtitle C, Section 133. Repeal of Certain DOD Reporting Requirements

This section would repeal seven provisions of law that establish Department of Defense reporting requirements related to defense acquisition that otherwise terminate as of December 31, 2021. Three are amendments to title 10, United States Code, while the remaining provisions are amendments to national defense authorization Acts for previous fiscal years.

The committee notes that excessive reporting requirements can impose costs on the Department of Defense that outweigh the specific benefits of each individual report, and can potentially impede the Department's ability to effectively direct resources to core objectives. In the National Defense Authorization Act for Fiscal Year 2017, Congress identified a large group of reporting requirements that would terminate as of December 31, 2021. After analyzing the history, implementation, and individual merits of a number of these reporting requirements, the committee believes that seven should be immediately repealed. This step will strike a balance between the importance and value of reports from the Department as a key enabler of effective congressional oversight, and the need to reduce the burden placed on the Department by excessive requirements.

Title II – Acquisition Agility

Section 201. Revision of Definition of Commercial Item for Purposes of Federal Acquisition Statutes

This section would clarify the definition of commercial items. Specifically, it clarifies commercial items as commercial products or commercial services. The section applies this clarification throughout the United States Code. With this clarification, the definition of “Commercially Available Off-the Shelf Item” becomes superseded and can be deleted.

The committee notes the current definition of commercial items throughout statute is inconsistent with 40 disparate definitions of commercial items. Additionally, commercial item definitions do not appropriately take into account the differences between products and services. The separation of the definition of commercial items into commercial products and commercial services will simplify and streamline procurement. Consistency in application of definitions will assist the acquisition workforces as well as business entities seeking to participate in the defense sector.

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Section 202. Definition of Subcontract

This section creates a precise definition for subcontract in title 41 and incorporates this revised definition in title 10.

The committee notes there are multiple definitions of subcontract. Establishment of a unified definition for a subcontract provides clarification and consistency for the entirety of federal acquisition workforce.

Section 203. Limitation on Applicability to Department of Defense Commercial Contracts of Certain Provisions of Law and Certain Executive Orders and Regulations

This section updates sections 2375 and 2533(b) of title 10, United States Code, by placing certain limitations on the applicability of certain provisions of law, and certain executive orders and regulations, to Department of Defense commercial contracts.

The committee expects that these revisions will remove unnecessary obstacles from commercial transactions between DOD and commercial suppliers, and improve defense customers' access to the best commercial goods and services.

Section 204. Reporting on Projects Performed Through Transactions Other Than Contracts, Cooperative Agreements, and Grants

This section would direct the Secretary of Defense to submit, no later than December 31 of each year through 2021, a report on the Department's use of transactions other than contracts, cooperative agreements, and grants—known as other transaction authority—to perform projects. The report should contain, for transactions that provide for payments in a total amount in excess of \$5,000,000, information including the entities entering into the transaction, the amount of payment provided for, project goals and status, and key dates. The report should also address mechanisms established to ensure appropriate use of this authority, including policies, guidance, reporting, and limitations on use.

The committee remains committed to providing the Department of Defense the needed flexibility to acquire advanced capabilities through streamlined and expedited processes. The committee recognizes that other transaction authority has been an effective tool for research and development, particularly for execution of science, technology and prototyping programs. It provides needed flexibility in terms of adherence to select Federal acquisition regulations. While the benefits of this flexibility are clear, the committee believes that it is still necessary to exercise effective oversight both to understand the ways in which the Department is properly leveraging the use of this authority, as well as to prevent its abuse or misuse. The committee does not intend

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for this reporting requirement to cause the Department to seek additional approval for use of other transaction authority, beyond the congressional notification requirement already established in statute. Rather, it is designed to facilitate regular and consistent updates on use of this authority across the Department in order to facilitate proper assessment of effectiveness and success. The \$5,000,000 threshold for reporting is consistent with the amount established in statute for inclusion of a clause that provides for the Comptroller General of the United States to examine the records of any party to an agreement entered into using other transaction authority.

Section 205. Comptroller General Report on the Issuance of Regulations in the Defense Federal Acquisition Regulation Supplement

This section would direct the Comptroller General of the United States to submit a report to the congressional defense committees by March 1, 2019, on the issuance of regulations in the Defense Federal Acquisition Regulation Supplement (DFARS) as required under a statutory provision enacted in a national defense authorization Act, as well as a briefing to the committee by December 1, 2018, on preliminary findings. The report should describe the existing revision process and assess the status of statutory provisions enacted since fiscal year 2010. The report should assess the factors delaying revision to the DFARS, and provide recommendations for any changes that might accelerate such revisions.

The committee notes that recent congressional efforts to legislate acquisition reform has experienced delays of several years between statutory enactment and issuance of regulations in the DFARS. For example, a final rule on procurement of commercial items (issued in January, 2018) amended the Defense Federal Acquisition Regulation Supplement based upon requirements from as long ago as the National Defense Authorization Act for Fiscal Year 2013 (Public Law 114-328). As a result, the acquisition and contracting communities within and outside the Federal Government are unable to take full advantage of recent reforms and improvements to acquisition and contracting procedures. The committee is concerned that the momentum generated by congressional acquisition reform initiatives has been lost as a result of delayed—and potentially incomplete—revision of regulations, and seeks to identify and remedy the causes of such delays. According to the Department’s operating guidance for the DFARS, the standard timeline for issuance of a final rule is one year, including multiple layers of review within and outside the Department as well as time for public comment. The committee seeks recommendations on how to accelerate that timeline and ensure that previously enacted statutory provisions are not disregarded in regulation. The committee also encourages exploration of other ways to quickly implement provisions such as interim policy memoranda or other guidance, without the need for formal regulatory action.

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Title III – Private Sector Participation

Section 301. Department of Defense Small Business Strategy

This section would require the Department to develop and implement a small business strategy to better leverage small businesses as a means to enhance or support mission execution. This section specifies that such a strategy should include plans to integrate small businesses into a holistic view of industry; to realign the Department's small business programs with agency mission under a unified management structure; and to clarify points of entry into the defense market.

The committee expects that this unified strategy will create increased small business engagement in the defense sector by increasing entry-points for non-traditional and innovative companies.

Section 302. Modifications to Procurement Through Commercial E-Commerce Portals

This section would amend section 846 of the National Defense Authorization Act for Fiscal Year 2018 by increasing the micro-purchase threshold for procurement through a commercial e-commerce portal from \$10,000 to \$25,000. In addition, this section directs the General Services Administration to capture the data on all transactions in order to conduct analysis on the results from raising the threshold from \$10,000 to \$25,000 for procurements through commercial e-commerce portals and those procurements conducted outside of the commercial e-commerce portal.

The section would also allow the Administrator to develop detailed procedures for procurement through commercial e-commerce portals. These procedures shall satisfy the requirement of competitive procedures outlined in section 152 of title 41, United States Code. These procedures must be submitted to the appropriate congressional committees 30 days prior to implementation.

The committee notes that the intent for the use of commercial e-commerce portals is to simplify and streamline the defense acquisition process as well as provide better transparency. Last year, the Committee directed the Office of Management and Budget to develop a program managed by Government Services Administration to procure commercial items through e-commerce portals. In support of this effort, this year the Committee provides additional flexibility to ensure full and effective implementation of this new procurement methodology.