PROCUREMENT ROUND TABLE

www.procurementroundtable.org

September 10, 2014

The Honorable Mac Thornberry
Vice Chairman, House Armed Services Committee
US House of Representatives
2329 Rayburn House Office Building
Washington, D.C. 20515-4313

The Honorable Jim Langevin
Member, House Armed Services Committee
US House of Representatives
109 Cannon HOB
Washington, DC 20515

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510

The Honorable James Inhofe
Ranking Member
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Subject: Acquisition Reform

Dear Members of Congress:

Thank you for your letter requesting the views of The Procurement Round Table (PRT) on issues relating to acquisition reform. The PRT is a nonprofit organization chartered in 1984 by former Federal acquisition officials. Our Directors, who are private citizens and serve pro bono, are concerned about economy, efficiency, and effectiveness and seek to promote a Federal acquisition system that delivers best value to the government. We write today to offer our help as you consider reforms and to suggest a "Top Ten" Roadmap to assist in your review of the acquisition laws and regulations affecting the Department of Defense (DOD).

Background:

A host of studies have assessed the DoD acquisition process since the end of World War II,[1] with the last thorough review completed in January 1993. This review was established by Section 800 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 1991 (Pub. L. 101-510) and its report is generally referred to as that of the Section 800 Panel.

In Section 800, Congress directed the Under Secretary of Defense for Acquisition, now the Under Secretary of Defense for Acquisition, Technology and Logistics or USD(AT&L), to establish an advisory panel with a view to streamlining the defense acquisition process. The Panel appointed by the USD(AT&L) consisted of 13 members representing government, industry and academia. I was a member of that Panel, as were several other current Directors of the PRT. We initially "identified 889 statutory provisions that appeared to have some relationship to DoD acquisition"[2] but after further review winnowed those down to some 600 DoD related provisions.

The Panel used the following 10 objectives in addressing how acquisition laws should be structured, stating that these laws should:

1. Identify broad policy objectives and the fundamental requirements to be achieved but leave detailed implementing methodology to acquisition regulations.
2. Promote financial and ethical integrity in ways that:
    a. are simple and understandable;
    b. are not unduly burdensome; and
    c. encourage sound and efficient procurement practices.
3. Establish a balance between an efficient process and full and open access to the procurement system; and socio-economic policies.
4. Without alteration of commercial accounting or business practices, facilitate:
    a. Government access to commercial technologies; and
    b. Government access to skills available in the commercial marketplace to develop new technologies.
5. Without requiring contractors to incur additional costs, facilitate the purchase by DoD or its contractors of commercial or modified commercial products and services at or based on commercial market prices.

---

[1] 1949 The Hoover Commission
1960 McNamara Initiatives
1969 Commission on Government Procurement (1969-1972)
1970 Fitzhugh ("Blue Ribbon Panel") Commission
1977 Steadman Review
1978 DeLauer Panel
1981 Carlucci Initiatives
1982 E.O. 12352 on procurement reform
1983 Grace Commission
1986 Packard Commission
1989 Defense Management Review
1993 Section 800 Panel
1993 National Performance Review
1994 Acquisition Reform – A Mandate for Change
1995 "Last Supper"
2007 SARA Panel Report
2010 Defense Efficiency Initiatives

[2] Pg I-10, Section 800 Panel Report

6. Enable companies (contractors or subcontractors) to integrate the production of both commercial and Government-unique products into a single business unit without altering their commercial accounting or business practices.
7. Promote the development and preservation of an industrial base and commercial access to Government developed technologies.
8. Provide the means for expeditious and fair resolution of procurement disputes through uniform interpretation of laws and implementing regulations.
9. Encourage acquisition personnel to exercise sound judgment.
10. When generating reporting requirements, permit as much as possible the use of data that already exists and is already collected without imposing additional administrative burdens.[3]

We commend these objectives to you for your use in reviewing existing statutory provisions and as a guideline for creating new ones.

The Panel Report grouped the statutory provisions it identified into the following functional areas: Contract Formation; Contract Administration; Service-Specific and Major Systems Statutes; Socioeconomic Laws, Small Business, and Simplified Acquisition Threshold; Standards of Conduct; Intellectual Property; Commercial Procurement; and Defense Trade and Cooperation. With its dedicated staff and extensive input from the private sector and academia, the Panel took over 16 months to compile its recommendations and complete its report. Panel members, in carrying out their charge, also were mindful of the effect their recommendations would have on acquisition government-wide and sought where possible to suggest changes to acquisition provisions that would benefit both Defense and civilian agencies.

The Panel report, along with Vice President Gore's 1993 National Performance Review (NPR), formed the basis of what became the Federal Acquisition Streamlining Act of 1994 (FASA). FASA was the last stand-alone, government-wide procurement bill passed by Congress and represented a bipartisan agreement for making fundamental changes to the DoD, and government-wide, procurement process. It repealed or substantially modified over 225 provisions of law.

DoD recently compiled a list of Defense Acquisition Regulation Supplement (DFARS) provisions and the statutes that drive them. While not an exhaustive list, and limited in scope compared to the review done by the Section 800 Panel, DoD identified 468 DFARS provisions driven by at least as many statutory provisions. Many are not found in Title 10 and some have not been codified into permanent law. Many of these provisions have been put in place subsequent to FASA. In our view, any efforts to weigh their benefits and eliminate those that are no longer needed can only improve how the Department conducts its business.

Given the importance of eliminating no longer needed laws or regulations, and recognizing that no new Section 800 Panel-like approach is on the horizon, we propose that you focus your attention on the recommendations listed below. We see real potential benefit to the Nation and the taxpayer from these suggestions, even though it may be difficult in all cases to fully and objectively quantify the savings to be achieved.

[3] Pgs I-8 -9, Section 800 Panel Report

PRT's Recommendations:

1. **Codification of Acquisition Provisions**

The Section 800 Panel pointed out, and it is still true today, that statutory provisions that affect Federal and DoD acquisitions are not codified in a single location in the US Code, a goal recommended by the Packard Commission.[4] These statutory provisions are spread throughout the US Code or not codified at all and found only in the "Statutes At Large." Moreover, the jurisdiction for these provisions rests with a variety of committees in the House and Senate. Codification of at least some of these provisions would be a significant step towards the ultimate goal of a consolidation and codification of all DoD acquisition provisions.[5]

In addition, in order to limit the unintentional effect of future laws, Congress in FASA required that for any new statute to apply to commercial items, the proposed legislation must contain a specific reference to the FASA Commercial Item language. If not, the Administrator of OFPP is charged with determining whether or not the statute should be applied to a commercial item pursuant to detailed criteria contained in (now) 41 USC §1907. Regrettably, this legislative proscription has not always been effective.

Congress should also consider other practical ways of reducing the number of statutes and regulations that affect the Federal Acquisition System while ensuring that important principles continue to be upheld. One such approach might be to add cascading sunset clauses to laws, regulations and policies governing the Federal Acquisition System. Such provisions would force the Congress and Federal departments and agencies to systematically review and affirmatively renew acquisition rules and authorities on a reasonably periodic basis. Cascading sunset clauses would do away with generational deregulatory efforts in favor of annual, bite-sized reviews that invite improvements for the sake of efficiency or to leverage technological advances.[6]

2. **The Appropriations Process**

The current Congressional process for appropriating funds also has a significant effect on the acquisition system, specifically with regard to the timing of the availability of appropriations. Agencies' not having the authority to obligate funds in a timely, predictable manner has a significant negative impact on Federal acquisition. These funding delays cause many of the anomalies that often appear to be inexplicable and that result from "shortcuts" being taken to get work on contract. The resulting reduced contracting cycle-times increase the opportunities for mistakes in the process. The shortened contracting period also makes it harder for companies not familiar with the government contracting process to break into this new Federal market. Finally the delays result in increased costs to the government forced by extensions of existing contracts pending the availability of appropriations to conduct new procurements. Improved predictability and regularity of funding will also promote a contracting process that permits pre-planning, market research, communications with industry, time for well thought out responses, and meaningful negotiations, and will result in fewer anomalies, better value for the taxpayer, and greater

[4] Page I-19, Section 800 Panel Report

[5] In 2011, Congress passed and the President signed a bill "To enact certain laws relating to public contracts as title 41, United States Code, "Public Contracts," Public Law 111-350 (Jan 4, 2011), without substantive change. The last significant re-codification of provisions in title 10, applicable to the Department of Defense, was in 1988 through Public Law 100-370 (July 19, 1988).

[6] See pgs 6 – 7, Testimony of Jon Etherton before the Senate Armed Services Committee, April 30, 2014, http://www.armed-services.senate.gov/imo/media/doc/Etherton_04-30-14.pdf. Mr. Etherton is a PRT director.

confidence in the Federal Acquisition System.

3. The Rulemaking Process

Section 22 of the Office of Federal Procurement Policy (OFPP) Act (Pub. L. No. 93-400, Aug 30, 1974), as amended, now codified in 41 USC §1707, establishes a rulemaking process expressly for the implementation of acquisition statutory provisions. This rulemaking process is different from that provided by the Administrative Procedure Act (APA) (5 USC Subchapter II), and justifiably so. However, over time this process has become very pro forma, takes too long and does not reflect the robust conversation between Government and the public that was anticipated by Congress prior to the Government's issuing rules that have significant impact on costs (both to the government and industry) and government access to the marketplace.

Further, the rules often do not accurately reflect the full costs of implementation. Often the analysis of the costs of implementation as required by the Paperwork Reduction Act (44 USC §3501 et seq.) is limited only to the costs incurred by the person who enters the data. Regardless of the source of the rule (statute, executive order, or internal agency policy), the costs of gathering the data required, not just reporting it, and the costs of the process creation/changes required by the rules, both within the government and industry, should be identified in the proposed, interim and final rules and aggregated periodically for the information of the agency, Congress, and the public.

In the same vein, the rules do not evaluate the costs and benefits of the rules themselves. We fully recognize that some rules are necessary as a matter of principle to avoid corruption and to maintain the public trust and should be adopted no matter what the cost. Having said that, the public should still know what the cost of all rules are, such as the costs to the system, the impact on price to the government, and the lost opportunity costs for both the government and industry in complying with them and not just the administrative costs.

The PRT does not recommend the elimination of the OFPP rulemaking process in favor of that of the APA. The procurement process needs the flexibility authorized by the OFPP Act language. The PRT, however, does recommend minor modifications to the OFPP Act that will make clear the Government's obligation to engage in a robust conversation with the public before implementing acquisition statutory provisions, except in unusual and compelling circumstances. The reasons for this may not be obvious.

Once a rule is promulgated and is in effect, industry must begin to comply. The use of interim rules that allow for comment after-the-fact do not avoid costs of implementation which later may be determined to be unnecessary. Further, once industry begins to incur costs to implement an interim rule, they are often loath to incur additional costs to revise/replace actions unless there is a significant benefit from changes made by any final rule. Regrettably, as is often the case, government regulators do not have a full appreciation of the cost of a particular method of implementation until that information is provided to them by the public.

4. Acquisition Workforce

Many of the studies that have addressed the acquisition system have focused on the acquisition workforce that supports the system and, one might argue, makes it work in spite of itself on a daily basis around the world. The last, most comprehensive review of the acquisition workforce was conducted by the Service Acquisition Reform Act Panel (SARA

Panel).[7] Again, several other PRT Directors and I were members of this Panel. The SARA Panel's report[8] found, among other things, that:

> "The federal acquisition workforce is an essential key to success in achieving the government's missions. Procurement is an increasingly central part of the government's activities. Without a workforce that is qualitatively and quantitatively adequate and adapted to its mission, the procurement reforms of the last decade cannot achieve their potential, and successful federal procurement cannot be achieved."[9]

We believe that the Panel's findings remain valid today and that a number of intervening events have only made the situation worse, not measurably better, since the Panel's report. As a result, we believe that the Committees should focus their attention on recognizing the role of the acquisition workforce and ensuring that a comprehensive plan is adopted by the government on identifying requirements, securing resources, providing training and tools, and retaining an adequate, qualified acquisition workforce.

5. Acquisition Tools

The Department of Defense does not have an end-to-end acquisition tool that covers the acquisition process from the development of requirements through the disposal of excess property and contract closeout. The result is lost opportunity for the government acquisition system. The absence of such a tool creates a large administrative burden and increased risk of introducing unintentional errors from rekeying large amounts of data into multiple databases. It also denies the government and the public greater transparency into the government's procurements. Not having such a tool can result in inefficiencies in the buying process with multiple contracts being awarded for purchases of the same, or essentially the same, products or services. It also makes it more difficult for agencies to manage their procurements to ensure compliance with the various acquisition provisions, executive orders, regulations, and policies. There are a growing number of countries around the world that have such tools. Congress has not directed DoD to develop such a tool, although it has addressed subsets of such a tool relating to Wide-Area Work Flow for processing payments and contract writing systems. Such an acquisition tool could serve as a multiplier for its acquisition workforce, improve compliance with acquisition provisions, and reduce the cost of the acquisition process for the taxpayer.

The following are more specific examples of lost opportunities:

- *Reuse of existing government property* – The current process requires the end item user to check to see if there is excess government property available to meet their needs/requirements. This information is obtained manually. There is no real check in the system to make sure that an end item user has fully explored availability and thus avoided the cost to the government of acquiring new property.
- *Required Sources of Supply* – The current process does not give contracting officers a means to identify all of the current required sources of supply, forcing them to rely on their knowledge to ensure that they have checked them all. Failure to do so violates specific Congressional and Executive socio-economic programs.
- *Use of existing government contracts* – The current process does not provide the contracting officer any visibility from their desktops into what government contracts

[7] Services Acquisition Reform Act, Section 1423, Pub. L. No. 108-136 (2003)
[8] Report of the Acquisition Advisory to the Office of Federal Procurement Policy and the United States Congress, January 2007, https://www.acquisition.gov/comp/aap/24102_GSA.pdf
[9] Pg 330, ibid

are currently available for their use, causing them to miss an opportunity to avoid extra administrative costs.

- *Ability to obtain accurate pricing information from across the government* – The current process does not provide to the contracting officer visibility into what the government has paid most recently for various items of supply or services.

6. Requirements

Notably, not within the Section 800 Panel's nor the SARA Panel's mission and therefore not addressed in their Reports, is the issue of requirements. Currently, within DoD's acquisition structure, the USD(AT&L) does not control requirements. Neither the Federal Acquisition Regulation (FAR), nor the DFARS address requirements. The personnel responsible for requirements are not "regulated" by the FAR/DFARS or other DoD procurement guidance. The individuals responsible for requirements are located, structurally, in the various DoD Components, Military Departments and combatant commands. There is a review of major system requirements at the Joint Requirements Oversight Council (JROC) chaired by the Vice Chairman of the Joint Chiefs of Staff. However, the JROC's mission is to prioritize requirements submitted for their review and not to challenge the requirements for either completeness or content.

Inherent in too many procurement actions is the failure of the user activity to adequately describe their requirements from the outset. That single failure creates more delays and subsequent program cost increases than any other activity in federal procurement transactions. FAR Part 7 – Acquisition Planning (a direct result of the Packard Commission Report) – mandates acquisition planning for all requirements, yet there is no accountability for this consistent failure. Accountability is an area that must be addressed.

7. Oversight

Congress and the departments and agencies have increased their oversight of the Federal Acquisition System over the past decade to the point where many in the system and in industry believe that there is a chilling effect on acquisition and the ability of government and industry officials to exercise judgment in making acquisition decisions. Whether this concern is merited or not, it is perceived by almost all in the Federal Acquisition System and industry. There are numerous reports of the fear that many have of being second guessed. This fear is only amplified by the metrics various oversight bodies use to measure their performance. Further, there is little evidence that the metrics used by these oversight bodies actually result in reductions of prices or return of costs to the government.

In addition, the extent to which the oversight bodies go in some cases clearly exceeds that required by the private sector or established by Congress for the public sector, as, for example, in Sarbanes-Oxley.[10] It is reported by industry acquisition officials that the concept of materiality has been lost and that protection of internal audit functions is no longer provided. This has engendered a hostile/antagonistic environment.

Oversight of the Federal Acquisition System is an essential element of the system. However, such oversight must be balanced. Companies doing business with the Federal government should not by entering into a contract give up their rights to protect internal information or, for that matter, their proprietary rights. Oversight, whether of the government or industry side of the system, should focus on materiality. Congress needs to

[10] Sarbanes-Oxley Act of 2002, Pub. L. 107-204 (July 30, 2002)

ensure that the oversight bodies find the middle ground in this area to attract and retain both government acquisition professionals and quality companies with the bleeding edge the government, and in particular DoD, needs to perform its missions.

8. Industrial Base (Marketplace)

Often, an acquisition statutory provision directly affects the marketplace available to support the requirements of the provision. While some efforts are being made to analyze the marketplace impacts of some of these provisions,[11] there is no overall marketplace analysis performed on the impact of statutory provisions. This type of analysis is essential to inform Congress and the DoD so that subsequent steps can be taken to mitigate any negative effects and so that positive impacts can be understood and shared with the acquisition community.

9. Commercial Items

Congress was very specific in its desire to promote, wherever appropriate, the use of commercial items to reduce the cost to the government of conducting its own R&D and to take advantage of technology's bleeding edge. As mentioned above, to ensure that subsequent laws and regulations did not thwart this effort, except where the government's best interests were at risk, Congress created in FASA the requirement that, before a new law could be applied to commercial items, it had to specifically override the FASA provision. The only exception is where the OFPP Administrator makes a determination to apply the new statutory provision to commercial items based on the criteria in (now) 41 USC §1907.

The intent of the drafters of FASA, and of its FAR implementation, was that it should be the exception and not the rule, that an after-enacted statute would be applied to commercial items. Over the past decade, however, the application of after-enacted statutes to commercial items has become the rule, not the exception. The impact of this change in direction is keeping new companies away from the Federal marketplace and forcing companies already in the marketplace to rethink their relationship to the government. In both cases it is making it more difficult and more expensive for the government to access the commercial marketplace.

Further, while FASA clearly authorizes the OFPP Administrator to make a determination on whether to apply an after-enacted statute to commercial items, OFPP has determined that this action does not require it to make this determination through the rulemaking process or to publish the basis of its determination.

10. Systemic review of the DoD Acquisition Statutory and Regulatory Provisions

The difficulty with any list for addressing concerns with the Federal Acquisition System is that, by its very nature, it must be at the 50,000 foot level and misses the opportunity to fully evaluate what else should be added, modified, or eliminated. As noted above, the Federal Acquisition System accounts for the expenditure of over $450 billion annually, even though spending has been declining over the past several years. Defense spending also covers a highly diversified range of products and services, from major weapons systems platforms, to information technology, to construction, and to research and development. No one set of

[11] See DoD PARCA 2014 initiative (to update some of the Coopers & Lybrand work) in response to a 2013 PRT recommendation to the Under Secretary of Defense.

recommendations will have a uniform effect on all of these sectors.

Nevertheless, notwithstanding the significantly constrained resource environment, we believe that a modest expenditure of funds to comprehensively study the statutes, regulations and processes that impact the Federal Acquisition System would be a wise investment and will potentially result in significant cost savings to the taxpayer and improve the ability of the DoD's acquisition process to serve the warfighter, while applying existing resources available to the department more effectively and efficiently. Makeshift efforts to do this will not result in significant savings nor a systemic solution.

We recommend that you consider convening a new Section 800-type panel, focused on the Federal Acquisition System, with a mandate to identify opportunities to reduce the statutory/regulatory/policy framework governing the Federal Acquisition System. While the focus of the Panel may be DoD, it should be mindful of the need to maintain as much as possible a uniform government-wide acquisition system. The report of such a panel would provide Congress a discreet, holistic and systemic roadmap for future legislative action to reform the DoD acquisition process, reducing its costs and complexity and lowering the barriers to access the marketplace.

Conclusion

While the tone of this response may make it appear that our Federal Acquisition System is broken, it is not. It is the example against which most countries in the world measure their systems. The Federal Acquisition System has delivered the goods, services and solutions that this country has needed to respond to threats to the country's existence and to disasters that have affected our citizens and it has responded spectacularly. Each day it successfully delivers goods, services and solutions to support our citizenry and as well citizens of countries around the world in times of disaster/need.

The Federal Acquisition System does require improvements. These improvements will reduce costs and improve the delivery of the goods, services and solutions it procures. We hope that our "Top Ten" recommendations will be useful to you as you review potential reforms. We also offer our services to your Committees to provide the benefit of the experience and expertise of our Directors, some of whom you have already had testify before you on this very subject. The PRT is committed to the common goal of ensuring that the Federal Acquisition System allows our government to obtain the best outcomes possible in acquiring its goods, services and solutions. Our members are listed on the front page of this letter. Please feel free to call on any of us if we can be help.

Sincerely,

Allan V. Burman, PhD
Chairman, Procurement Round Table
1401 K St. NW Suite 900
Washington, DC 20005