Defense department program enshrines innovation into law

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On Aug. 28, Department of Defense (DoD) Deputy Secretary Kathleen Hicks announced a new, ambitious initiative that would leverage autonomous systems, such as drones and other unmanned vehicles, in all domains. The initiative, dubbed Replicator, aims to field "multiple thousands of autonomous systems across multiple domains, within the next 18-to-24 months." After acknowledging the cynics who will ultimately cast doubt on this ambitious plan, Deputy Secretary Hicks highlighted some of the obstacles to innovation that the DoD has already attempted to address.

The DoD has long sought to procure and foster the development of cutting-edge products from companies outside the traditional defense industry. While the lumbering and complex federal acquisition system can make it difficult for nontraditional companies to participate, the DoD has instituted numerous procurement programs in an attempt to remove obstacles. Other Transaction Authorities (OTAs), the Middle Tier of Acquisition pathway, Small Business Innovation Research (SBIR) grants, and entities like the Defense Innovation Unit Experimental and Strategic Capabilities Office form a host of programs aiming to procure innovative technologies from the commercial sector.

On Aug. 17, the DoD promulgated a final rule that would permanently enshrine another such contracting mechanism — Commercial Solutions Openings (CSOs). CSOs are agency announcements that seek innovative commercial technologies or services. These procurement mechanisms streamline solicitation, evaluation, and award procedures by evaluating proposals on their own merits and reducing the risks of protests. These simplified procedures should help lower acquisition costs and reduce the applicability of traditionally burdensome requirements associated with government procurement. At the same time, some compliance requirements remain, potentially making CSOs less attractive to commercial solutions providers.

What are CSOs and how do they work?

CSOs are another pathway for nontraditional technology companies to provide goods and services to the federal government. They are used "to obtain innovative solutions or potential capabilities that fulfill requirements; to close capability gaps, or provide potential innovative technological advancements; and when meaningful proposals with varying technical or scientific approaches can be reasonably anticipated." CSOs aim to "simplify[] solicitation, evaluation, and award procedures, which should decrease acquisition cost and, thus be less burdensome for all parties."

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The 2017 National Defense Authorization Act (NDAA) first implemented CSOs under a pilot program. Subsequently, the DoD issued a class deviation memo (https://bit.ly/3Zo5UOR) outlining the procedures for CSO acquisitions. The final rule (https://bit.ly/3PKhHUi) makes the pilot program permanent after incorporating the CSO process into the DoD Federal Acquisition Regulation Supplement (DFARS), enshrining the program into law.

Solicitation

A CSO starts with a general solicitation promulgated by the DoD or one of its affiliates. The solicitation (https://bit.ly/46ngveX), posted to the government-wide point of entry, will describe the government's interest in an individual program, or more broadly its interest in a full range of agency requirements; outline the criteria for proposal selection and the method for evaluation; specify the timetable for acceptable applications; and provide instructions on the preparation and submission of proposals.

Evaluation

The list of evaluation factors for Contracting Officers to take into consideration is short: 1) technical and 2) importance to agency programs. Notably, the final rule eliminates "the availability of funds" factor present in the DoD's 2022 class deviation memorandum. Under the final rule, "[p]rice shall be considered to the extent appropriate, but at a minimum, to determine that the price is fair and reasonable."

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definition of "new" uncertain. The only related guidance broadly defines "innovation" as "any technology, process, or method, including research and development, that is new as of the date of submission of a proposal; or any application that is new as of the date of submission of a proposal or a technology, process, or method existing as of such date."

In addition, proposals are evaluated on their own merits "since they are not submitted in response to a common performance work statement or statement of work." In other words, there is no requirement for Contracting Officers to compare proposals against each other. Rather, the agency's focus should be squarely trained on filling the requirements or capability gaps as stipulated in the original solicitation. (https://bit.ly/3t8SSIM)

Award

CSOs are awarded on a fixed-price basis and include fixed-price incentive contracts — a mechanism that adjusts profit based on "the relationship of total final negotiated cost to total target cost."

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CSOs are treated as commercial products or commercial services making them subject to Federal Acquisition Regulation (FAR) Part 12 requirements. The final rule states that, "[t]he use of commercial solutions offerings in conjunction with a FAR part 12 contract is also expected to . . . allow these entities to utilize existing commercial contracting procedures and operating systems, which decreases burden on both large and small entities."

FAR Part 12 procedures were implemented with the passage of the Federal Acquisition Streamlining Act of 1994 (FASA) — an attempted paradigm shift in the government's acquisition philosophy. FASA implemented a preference for commercial items and took steps to incentivize commercial suppliers to contract with the government aiming to tap into private sector innovation and efficiencies. FAR Part 12 seeks to streamline the federal procurement process and best mimic the commercial marketplace by limiting applicable terms and conditions, generally requiring performance on fixed-price contracts, and minimizing acquisition lead time.

Burdensome Regulatory Requirements

These purportedly simplified commercial requirements will include compliance with the forthcoming Cybersecurity Maturity Model Certification (CMMC) Program and, depending on the structure of the contract, potentially the Cost Accounting Standards (CAS), more onerous and complex obligations than typical commercial terms.

Originally announced in 2019, the CMMC Program aims to ensure controlled unclassified information (CUI) is protected. The program established three levels of cybersecurity protection. While level one is fairly easy to comply with, levels two and three may necessitate fairly comprehensive changes to a business's processes and practices. Coming into compliance can take time and result in unexpected costs.

CAS requirements are a set of standards that aim to create uniformity and consistency for how contractors measure and allocate costs to their government contracts. Firm-fixed-price and fixed-price with economic price adjustment contracts for the acquisition of commercial products or commercial services are exempted from CAS coverage. However, FAR 12.214 requires the inclusion of CAS requirements for "fixed-price with economic price adjustment contracts and subcontracts for commercial products or commercial services when the price adjustment is based on actual costs incurred." For fixed-price incentive contracts awarded under CSOs, the incentives can be based on actual costs.

The final rule states, "[n]otwithstanding FAR 12.207, contracting officers shall use fixed-price type contracts, including fixed-price incentive contract, see FAR 12.214 and subpart 16.4 for additional requirements." Therefore, it is possible that Contracting Officers will add the CAS requirements to fixed-price incentive contracts where the incentives are based on costs.

It is unlikely that strictly commercial suppliers would already be CAS compliant as conformity requires the implementation of a specific type of accounting system and practices. Developing a new compliance program in line with CAS can impose significant administrative and technical burdens on nontraditional contractors. For some, CAS compliance makes contracting with the government prohibitively expensive.

Decreased Protest Risk

CSO acquisitions are highly technical exercises as they normally involve advanced technologies and proposals that are reviewed by subject-matter experts. Until recently, it was unclear whether the U.S. Court of Federal Claims would even have jurisdiction over CSOs. In 2021, the court decided that it did, reasoning that "the solicitation had a direct effect on the award of a contract" and "[t]he CSO and the resulting technical evaluation were not 'separate and distinct' from the decision to procure."

In *Kinemetrics, Inc. v. United States* (155 Fed. Cl. 777 (2021)), Kinemetrics, the California-based disappointed offeror, protested the award of an Air Force contract to procure seismic monitoring equipment. In part, Kinemetrics argued that the Air Force's determination that its equipment would require changes to the local power infrastructure was incorrect, lacking a rational basis.

While the court limited its review to whether the government followed the stated criteria, ultimately dismissing the protest and "defer[ing] to the agency's expertise, especially in the context of a peer-review process regarding specialized, scientific equipment and available resources at a variety of locations," the fact that it

found it had jurisdiction to review the merits of the protest is helpful. Given the latitude the court offers to agency evaluations, protesting the award of CSOs will not be easy, helping further streamline the acquisition procedures for commercial companies without specific government contract expertise.

Protests are a key part of the federal procurement process. When a contractor is awarded a contract, the losing bidders may have an opportunity to protest the award decision based on the agency inconsistently or unreasonably applying its regulations. Defending against a protestor as a defendant-intervener is costly, and there is a chance the business opportunity is lost.

Going Forward

The DoD has diligently attempted to infuse innovation from the commercial sector into the defense industrial base. The procurement mechanisms simplify the pre-performance procedures by evaluating proposals on their own merits and reducing the risk of protests; however it is important to understand that FAR Part 12 requirements will likely apply. CMMC compliance burdens as well as potential CAS requirements would make CSOs less attractive to commercial solutions providers. Those contractors tempted to submit CSO proposals should keep these requirements in mind and begin preparations to comply.

About the authors

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