Overview of Approaches to Acquisition Management Reform and Digital Transformation

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Coalition for Government Procurement
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"The world is changed. I see it in the water. I feel it in the Earth. I smell it in the air."

--The Lord of the Rings: The Fellowship of the Rings, J.R.R. Tolkein

I. Introduction

The world is indeed changed. Gone are the days where our economic and military strength, and our global leadership, are undisputed. Near-peer and other adversaries around the globe have identified how best to undermine American military and economic strength, which may be summed up in one word: asymmetry.

Our adversaries are targeting companies, individuals, and government agencies and their partner organizations, waging their battle:

- in Cyberspace, attacking networks and embedding in communication systems,
- in Silicon Valley, investing in and acquiring critical technology companies, and
- on Wall Street, engaging in predatory economic practices.

This multidimensional threat is focused on theft and corruption of critical intellectual property—the underpinning of national innovation and our economic and military strength.

In 2018, the Mitre Center for Technology & National Security released its report, "DELIVER UNCOMPROMISED: A Strategy for Supply Chain Security and Resilience in Response to the Changing Character of War (Mitre Report),"[i] which also recognized the asymmetric nature of such attacks in the context of the changing nature of warfare. The Mitre Report emphasized the importance of combating these threats through the acquisition process:

> Through the acquisition process, DoD can influence and shape the conduct of its suppliers. It can define requirements to incorporate new security measures, reward superior security measures in the source selection process, include contract terms that impose security obligations, and use contractual oversight to monitor contractor accomplishments. … DoD spending is a principal source of business for thousands of companies. The Department can reward the achievement, demonstration, and sustainment of cyber and supply chain security. It will take time to establish workable, fair processes, but these efforts should be given high priority. … Adding more security measures to the 'acquisition toolkit,' and making better use of those measures, are ways DoD can exercise security leadership through use of its contractual leverage. …[ii]

Defense acquisition reform has been a staple of every administration since World War II, thematically revolving around the following approaches:

- Identification and increased use of best business practices
- Strong, coordinated management of acquisition
- Simplification/centralization of procurement laws and regulation

- Professional development of acquisition personnel
- Increased use of competition
- Increased use of commercial practices
- Increased use of commercial items
- Reduction in government-unique specifications

Over the years, these review efforts prompted the enactment of legislation, such as:

- The Competition in Contracting Act (1984)
- The Procurement Integrity Act (1988)
- The Federal Acquisition Streamlining Act (1994)
- The Clinger-Cohen Act (1996)
- The Services Acquisition Reform Act (2003)
- Federal Information Technology Acquisition Reform Act (2014)

These efforts have "generally focused on improving the same linear process for the acquisition of major systems,"[iii] and failed to stem the tide of even more growth in program costs, schedule delays, and an explosion of regulations.[iv] With the emergence of China as an adversary/competitor/supplier and the unprecedented speed of global technological development, improving acquisition improves national security. Indeed, system openness and agility are essential for the United States to maintain its technological edge over near-peer competitors.

This point is especially relevant to China. China represents the most challenging national security threat to the United States. It is a significant source of supply for our nation's healthcare supplies; it is the source of rare earth metals needed for our nation's advanced technology; and it is improving its capacity to increase its speed of innovation.

No longer can the United States view acquisition reform as an isolated exercise simply to improve the way it procures. As Lucyshyn and Rigilano note:

> In order to advance meaningful reform, it must be recognized that the existing linear process is ill-suited to delivering innovative and transformative products, the development of which is inherently non-linear. Long development cycles already guarantee that some systems enter into service for the first time with components that are obsolete. It therefore seems unlikely that the existing process will be able to capitalize on new developments in diverse fields including robotics, quantum computing, nanotechnology, biotechnology, additive manufacturing, and augmented reality.[v]

Markets run on incentives, and thus, the attractiveness of the government market is necessary to foster the growth of a domestic industrial base. Among the many incentives operating on government acquisition are such process-driven incentives emerging from:

- Oversight from the Legislative Branch and in the Executive Branch
- Mission of agency function
- Budget and the overarching appropriations process

We need to assess the extent to which these incentives align with general market incentives. To the extent that they do not, we need to consider focused approaches to such alignment while recognizing that alignment may not always be possible because of the politics of government procurement.

Coalition members believe that acquisition reform must focus on our new reality. We believe that emerging challenges can be addressed by:

- Improving the data upon which acquisition decisions are made, and leveraging data to measure the effectiveness of the system and the programs supported by it;
- Continuing the evolution of the acquisition system from a Cold War bureaucratic process to a more nimble, adaptable system that embraces change, tolerates risk and delivers scalable capabilities quickly to agencies and the warfighters; and
- Empowering the acquisition workforce.

These recommendations are addressed below.

II. Transformation Through Digital Technology and the Use of Data

There are many government-unique legal constraints that drive the operation of the acquisition process, such as the Buy American Act, the Trade Agreements Act, the Cost or Pricing Data Act (formerly the Truth in Negotiations Act), and others. These are boundary constants, like gravity, beyond the power of the Executive Branch to change. We focus on management recommendations that can be implemented without resorting to action by the Legislative Branch.

There exists an opportunity for the government to identify and leverage data to manage each program necessary to support the rapid innovation needed by government in the current environment. Such data-driven management can enhance program efficiency by providing performance indicators permitting early-stage course corrections, the reduction of cost waste, and the shortening of performance times.

Data-driven management requires an appropriate organizational approach to be effective. The government needs relevant performance benchmarks. Such benchmarks include:

- Expected process time
- Total Cost of Acquisition (TCA) to include all direct and indirect costs (solutions, alternatives, impacts) for the approach taken
- Transparency mechanisms and indicators, *e.g.*, dashboards, to keep stakeholders engaged and aware

As the programs for these measurements can be quite complex, they should not be developed by the government in isolation. Given the nature of the market and the rapid innovation of its solutions, the government must remove self-imposed barriers to vendor engagement at the start of a procurement planning process to permit vendors to participate in the development without forfeiting their opportunity to participate in a procurement implementing such a solution. Ethical or organizational conflict can be avoided by simply ensuring a level engagement playing field in a transparent fashion. Moreover, metrics must be value-based, *i.e.,* linked to efficient mission fulfillment. Metrics unconnected to value or otherwise linked simply to process compliance over performance are useless.

The government needs to leverage these metrics across the management spectrum. It should adhere to these metrics from program start through the program lifecycle. This adherence translates into three mandatory management commitments: (1) the metrics will be used to evaluate ongoing performance relative to program vision; (2) where a program fails to perform against these metrics, the agency is committed to value-based remediation; and 3) where value-based remediation is not achievable, the agency is committed to immediate program termination.

The benefits of data reliance are not limited to program management. General management benefits can be achieved through the digitization of critical government supply chain information. Digitization provides the government the opportunity to obtain immediate knowledge of its industrial base, including the identification and timely coordination of available skills and products sets. Such knowledge would afford the government rapid access to supply chain information for surveying and other communications purposes. This information would allow opportunities for creative expansion or development of the industrial base. For instance, the government could facilitate rapid "matchmaking" between small and large businesses.

Data and digitization afford the government the opportunity to automate and standardize its compliance and review processes. Automating and standardizing compliance and review processes can increase the speed of compliance and free knowledge-based employees to perform other complex tasks. It can also accelerate certifications to increase the available industrial base and access to innovation, as well as reduce process duplication, such as through certification reciprocity across agencies. By increasing industry players in the government space, the government increases its access to the benefits of competition.

The Federal Risk and Authorization Management Program (FedRAMP) provides a useful illustration. Established in 2011, the Office of Management and Budget's (OMB's) FedRAMP seeks to provide a cost-effective, risk-based approach for the adoption and use of cloud services. It was intended to provide a structured mechanism to onboard cloud services/providers in a manner aligned with a set of security practices consistently followed throughout government. Although envisioned to be a cost-effective, risk-based approach to the adoption of those solutions, FedRAMP encountered delays in the onboarding process, leaving vendors with significant administrative costs pursuing authorization to provide cloud to agencies.

In June 2019, the U.S. Federal Chief Information Security Officer (CIO) issued the "Federal Cloud Computing Strategy," announcing the Administration's "Cloud Smart" effort to accelerate agency adoption of cloud-based solutions, noting, in part:

> Although the FedRAMP program management office has drastically reduced the amount of time it takes to authorize a cloud service provider, there is still work to be done to address the underlying issues that contribute to the relatively slow pace of assessment. For example, a lack of reciprocity across agencies when adopting FedRAMP authorizations has led to significant duplication of effort when assessing security for product deployment. In addition, a large number of agency-specific processes has made it complicated for agencies to issue an Authorization to Operate (ATO) for solutions, even when using existing authorized cloud service providers. In fact, despite the reiterated importance of enterprise risk management, 13 agencies continue to cite major obstacles with their own policies and practices. To tackle these challenges, several

> initiatives aimed at overall process evolution as well as strategies for accelerating common ATO agreements are under development. These efforts intend to drive better and more automated control inheritance and monitoring, a prioritized approach to control implementation, and more normalized control use across the Federal enterprise. Advancements to cloud ATO development will be used to inform overall ATO reform, which will involve the revision of NIST special - publications. This will also reestablish FedRAMP's role in the risk assessment process as a verification check for agencies as they make informed decisions about the cloud solutions that they deploy, rather than a panacea for all matters related to the risk associated with any implementation of a cloud solution. 0MB and GSA will continue to promote alignment and reuse of ATO determinations and closely examine agency-identified obstacles in that effort.[vi]

A recently released report[vii] from the Center for Cybersecurity Policy and Law suggests that FedRAMP security authorization might be automated to support ongoing security assessment against common security standards that could be applied across government agencies. Against this backdrop, the government may be able to improve process cost by maximizing the opportunity for cloud authorization reciprocity across agencies.

III. Continued Procurement Evolution

In approaching acquisition improvement in the current environment, the polestar for any remediation is the support of a process that promotes the innovation and transformation necessary for the United States to maintain the technological edge that supports national security.[viii] At the outset, it would help the system to cull legacy regulations.

Generally, the government could drive to implement common procurement rules across agencies (yes, the Federal Acquisition Regulation (FAR) was supposed to be such a set of common rules, but, over the years, agencies have issued their own implementing rules). Agency-specific rules implementing these common rules should be restricted to specific mission requirements clearly not addressable by common rules. It is critical that a discipline regime exists to assure that any additional regulations/potential duplications are added only after careful consideration. For instance, if Congress were to get involved here, it could identify parameters whereby duplicative rules constituted a violation of the Anti-Deficiency Act. In addition, the Executive Branch could self-impose a regulatory review regime, under which, after a fixed time period, rules would be reviewed for their utility, and, based on that review, improved or removed.

The government also could target regulatory reform to enable the government to implement flexible regulatory regimes that facilitate information exchanges necessary to promote meaningful requirements analysis and rapid acquisition. Flexible rules could permit transparent collaboration between government and industry in such areas as market research.

One example is in the area of Organizational Conflict of Interest (OCI). Under FAR 9.5, where a vendor proposes innovation to an agency, and where that innovation finds its way into that agency's solicitation, the vendor may be foreclosed from competing based on its contribution to the requirements for which proposals are being solicited. This potential foreclosure from competition presents a significant disincentive for vendors to promote innovation to agencies.[ix] Rules mitigating OCI

in such circumstances, such as expanded firewalls, should be explored to enhance adoption of innovation.

Above all, regulatory reform should sustain stakeholder belief in the fairness of the acquisition system. Practices, such as timely notice of opportunities and consistent proposal evaluation practices should be maintained as standards, as should transparency in decision-making and rights to challenge award decisions against stated evaluation criteria. These elements of fairness exist in the system today, and though some of them, namely the right to challenge award decisions, are viewed differently by different stakeholders in the contracting community,[x] they have existed as mainstays reinforcing the credibility of the acquisition system. Indeed, regarding the right to challenge award decisions, the provision of a private attorney general function here arguably is a mechanism for efficiency, as it effectuates a level of oversight by those parties most informed about a given transaction without the deployment of audit resources, which could be administratively burdensome and prohibitively costly.[xi]

Finally, another area worthy of regulatory reform is audit practices. Unquestionably, audits play a critical role in uncovering fraud, waste, and abuse, sustaining the credibility of the acquisition system. The nature of an audit, however, can present challenges that bring unnecessary burdens on the government and contractors. For ongoing programs, the same individuals and activities being performed may by the subject of repeated review, impeding execution within cost and schedule.

Efficiency in the audit process is important to any effort at reform. Audit activity should not be unnecessarily duplicative. Audit rationale should be clear at the outset, and consideration should be given to identifying circumstances (*i.e.*, those where there exists no overriding national purpose, like national security) where audit activity can be value-based. Value-based auditing should include identification of the Total Cost of Audit, *i.e.*, the direct and indirect cost of audit activity, including the costs incurred by the entities and activities being audited, in an effort to understand and assess the net benefit of every audit.

IV. Acquisition Workforce Empowerment

Over the course of modern acquisition reform and its implementation, the acquisition workforce has figured prominently. 10 U.S.C. 2330(a)(1)(B) requires the Under Secretary of Defense for Acquisition and Sustainment:

> (i) to identify the critical skills and competencies needed to carry out the procurement of contract services on behalf of the Department of Defense;
> (ii) to develop a comprehensive strategy for recruiting, training, and deploying employees to meet the requirements for such skills and competencies; and
> (iii) to ensure that the military departments and Defense Agencies have staff and administrative support that are adequate to effectively perform their duties under this section… .

The Coalition supports such activity, but recognizing dynamic nature of, and need for, innovation in the current environment, we believe that the effort to support acquisition professionals should be expedited. At the outset, professionalization of the function should be continued, with KPIs and compensation, in addition to aligning with parallel positions in the private sector, tied to experience and mandatory continuing acquisition education. Such training certainly should be focused on the skill sets

being employed. For instance, in the case of IT procurement, mandatory background in IT systems and practices should be required and provided. Likewise, just as it is important for private sector contracting personnel to understand government business practices, so too is it important for government acquisition personnel to understand the business practices of their private sector partners. Although so-called "reverse industry days" can be helpful in this regard, it would be useful to understand how the steps taken by the private sector to approach the market, from regulatory compliance, to teaming, to proposal development, to award, to potential litigation, to performance, and to close-out. Expansion of the knowledge base here can facilitate bringing efficiency to procurement and program performance.

V. Conclusion/Suggested Approach

This overview has set forth recommendations for acquisition management reform and digital transformation. It focused on:

- Improving the data upon which acquisition decisions are made, and leveraging data to measure the effectiveness of the system and the programs supported by it;
- Continuing the evolution of the acquisition system from a Cold War bureaucratic process to a nimble, adaptable system that embraces change and tolerates risk; and
- Empowering the acquisition workforce.

We hasten to add that this overview does not recommend another commission, another panel, or another analysis of the acquisition system. To say that this subject has been studied to death is an insult to death. Most of the foregoing efforts to promote a frictionless procurement process can be effectuated without resorting to new legislation, and thus, if the Executive Branch concurs, it can embark on these improvements quickly by will of management.

To that end, it might be useful for the Executive Branch to provide structure and accountability to the reform process by appointing a senior official to address acquisition and IT reform. Appointed by the President to provide necessary gravitas for the effort, the leader would serve as a single point of contact for information on implementation and progress. This individual could direct activity with existing senior acquisition leadership of government, including the leadership of the Office of Management and Budget (as the locus of accountability for business case/budget approval). In addition, this official should have clear authority to pull staff detailees from the agencies to support the initiative. It is critical that the effort involve collaboration with industry partners to ensure that any reform moves beyond one-sided initiatives that fall short of foundational improvement.

This overview began with a recognition of the asymmetrical nature of the world challenges faced by our nation and the multidimensional threat those challenges are to our intelligence, our intellectual property, and our innovation that underpins our national security. We set forth ideas to improve acquisition as a means to facilitate innovation and support the mission of government. To that end, the Coalition stands ready to assist the government in any way possible.

[i] https://www.mitre.org/sites/default/files/publications/pr-18-2417-deliver-uncompromised-MITRE-study-26AUG2019.pdf

[ii] *Id.* at 14.
[iii] https://cpppe.umd.edu/sites/default/files/2020-05/UMD%2017006_Acquisition%20Reform%20to%20Enable%20Military%20Effectiveness_11.01.17.pdf, at 3.
[iv] *Id.*
[v] *Id.* at 4.
[vi] "Federal Cloud Computing Strategy," https://www.whitehouse.gov/wp-content/uploads/2019/06/Cloud-Strategy.pdf, at 8-9 (2019).
[vii] https://static1.squarespace.com/static/5acbb666f407b432519ab15e/t/5e4fd3bf54725e7ce0483940/1582289857151/20-120+Cybersecurity+-+FedRAMP+brochure.pdf
[viii] *See* n. v, *supra*.
[ix] For the purposes of this discussion, innovation achieved through the specific research, prototyping, and production activities via Other Transaction Authority (10 USC 2371b) are omitted.
[x] *Cf.* "Assessing Bid Protests of U.S. Department of Defense Procurements - Identifying Issues, Trends, and Drivers," Rand Corp. 2018, https://www.rand.org/pubs/research_reports/RR2356.html.
[xi] *Cf.*, however, "The Private Attorney General Meets Public Contract Law: Procurement Oversight By Protest," Marshall, Robert C., Meurer, Michael J., and Richard, Jean-Frangois, Hofstra L. Rev., Vol. 20, Fall 1991.