

GOVERNMENT CONTRACTS

WILL PURCHASING BE STREAMLINED?



As government contractors know, past efforts to streamline the government's approaches to buying commercial items have often fallen short. But there is now renewed interest in such improvements, and they may be gaining some traction.

That interest has its roots in the Federal Acquisition Streamlining Act of 1994, which simplified commercial item acquisitions and tried to make them more like private-sector procurements. The Federal Acquisition Regulation implemented FASA the following year, but in the intervening decades, additional regulations and executive orders brought increased complexity. "In 1995, there were 17 contract clauses potentially applicable to commercial item procurements through FAR 52.212-5(b). By 2017, there were almost 60," says [Robert Burton](#), a partner with Crowell & Moring's [Government Contracts Group](#) and former acting and deputy administrator of the Office of Federal Procurement Policy. With that kind of growing complexity in commercial procurement, he says, "many commercial companies that are trying to do business with the government have become frustrated with the process."

That reality has prompted a range of responses from the government. For example, "agencies with other transaction authority have looked to use such authority because it provides agencies more flexibility to meet their needs and enhance mission effectiveness," says [Lorraine Campos](#), a partner in Crowell

BIG PLANS FOR BIG CHANGE

The Section 809 Panel, which was established by Congress to find ways to improve Pentagon procurement processes, has a wide-ranging mandate. To handle it all, the panel has set up 10 teams, each with a specific area of focus. At least three of those are working on simplifying or streamlining acquisition.

One group, known as Team 3, aims to simplify the Defense Department's commercial buying practices to improve access to companies and make acquisitions more adaptable and agile. Team 2 is exploring the streamlining of acquisitions involving less than \$15 million. And Team 4 is looking for ways to encourage companies that have not previously done business with the DoD to enter the federal marketplace—especially technology companies.

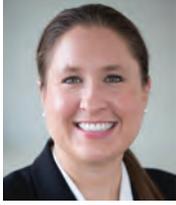
The panel intends to do more than produce yet another report on government red tape. "We anticipate there are going to be wholesale changes recommended by the panel," says [Olivia Lynch](#), a counsel in Crowell & Moring's Government Contracts Group. "People on the panel have said they are not just playing around the edges. They are looking to make bold changes, with recommendations to Congress not only to change and remove regulations, but also to implement those into statute."



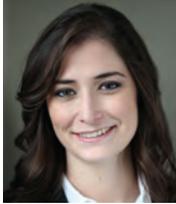
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& Moring’s Government Contracts Group.

Congress, too, has been looking at the issue of streamlining procurement. In December 2017, President Trump signed the National Defense Authorization Act providing a number of measures, including the creation of a government-wide e-commerce portal to streamline the purchase of commercial items. At the same time, says Campos, the NDAA requires “the secretary of defense to conduct a review of ‘certain contract clause requirements applicable to commercial item contracts’ and ‘commercially available off-the-shelf item subcontracts,’ while also requiring the Department of Defense to propose revisions to the Defense Federal Acquisition Regulation Supplement, which would eliminate regulations accordingly.”

Perhaps one of most far-reaching streamlining efforts is the Section 809 Panel, named after the section of the 2016 NDAA that created it. The 18-member panel is exploring ways to streamline and improve the DoD’s acquisition processes, and several of its initiatives focus on areas related to commercial item purchasing. The panel is expected to provide a comprehensive report to the House and Senate Armed Services Committees in early 2019 (see “Big Plans for Big Change,” opposite).

Altogether, these efforts “indicate that the government in general is looking for better ways to buy these products and services and increase efficiency in commercial procurement,” says [Elizabeth Buehler](#), a counsel in Crowell & Moring’s Government Contracts Group.

READY FOR REFORM

There are several reasons why those intentions may translate into meaningful change this time around. The government has made it clear that it wants to rely more on commercial items, especially when it comes to current and leading technologies. However, Buehler says, with the

complexity of the purchasing processes, a growing number of companies have decided not to compete in the federal market—which only limits the government’s ability to get what it needs.

The impact of that can be significant. In its May 2017 interim report, the Section 809 Panel noted that a convoluted acquisition process “makes DoD an unattractive customer to large and small firms with innovative, state-of-the-art solutions.” That, in turn, could cause the Defense Department to fall behind in rapidly evolving technology. “Essential equipment needed on the ground may be either unavailable to the department or egregiously tardy, leading to genuine threats to the nation’s security,” the report noted.

Overall, says Buehler, “there’s a theme that if the government wants more involvement from the private sector, the government needs to make it easier for companies to enter the federal marketplace.”

The current political landscape may also give streamlining efforts a boost. “The idea of simplifying commercial item procurement comports with the administration’s goal of simplifying regulations,” says Burton. In addition, the procurement process has been used to some extent as a way to push social and economic policies, which always have to be balanced with the need for efficiency—and today, the pendulum seems to be swinging toward efficiency. Finally, he says, “you have one party in control of the House, Senate, and White House, so there may be an opportunity to get some acquisition reform legislation passed.”

In this environment, government contractors are likely to have opportunities to weigh in on the issues. The Section 809 Panel, for example, is involving companies in meetings and seeking commentary from industry about process improvements. Says Campos, “The stars are somewhat aligned right now for industry to be much more vocal and to make contributions to improve government purchasing processes.”