We opine, from time to time, on the Department of Defense's fascination with the "innovation" being pursued by technology companies in the private sector. We've asserted it's a love/hate relationship. Where the DoD loves the technology but hates having to woo the companies that have it. DoD loves the fact that the private sector is spending heavily on R&D on its own—without asking the taxpayers to fund those efforts. DoD hates that the "high tech" companies in the private sector largely disdain the government sales channel and will not accept the "standard" government acquisition model—instead making money hand-over-fist by selling to the public rather than to the DoD.

SECDEF Dr. Ash Carter said it in March, 2015—

With budgets tightening and technology and globalization revolutionizing how the world works, the Pentagon has an opportunity to open itself to new ways of operating, recruiting, buying, innovating and much more. America is home to the world's most dynamic businesses and universities. We have to think outside this five-sided box and be open to their best practices, ideas and technologies.

But not much has happened over the past 30+ months since then.

Apple, Google, and others continue to spend heavily on their R&D programs while traditional defense contractors such as Lockheed Martin spend but a small fraction of those amounts. Example: in 2014, Google spent just about 15% of sales on R&D; in that same period Lockheed Martin spent less than two percent of its sales on R&D. Meanwhile, despite POTUS direction to roll-back regulatory roadblocks and a Section 809 Panel that is supposed to recommend "bold" acquisition reforms and a DFARS team that's supposed to do the same thing, despite all the bureaucrats and outside experts and blog authors pointing out how *broken* it all is, the Department of Defense seemingly cannot actually streamline much of anything.

In fairness, different people have different ideas about how to fix the defense acquisition system. A **recent editorial** from the Executive Director of the National Contract Management Association (NCMA) seemingly blamed the top DoD leaders for the endemic acquisition problems. He wrote—

… as all involved can attest, it's the creation, coordination and validation process of the what and how (meaning the review and approval of acquisition decisions) that ensures delivery of systems that are almost technologically obsolete on Day One. The more leaders (both executive and legislative branch), executives, managers, reviewers (both civilian and military) involved, the longer everything takes. The more decision responsibility is diffused, the longer it takes. The more complicated the process is designed to be, the longer it takes. The more unstable or unknown the budget is, the longer it takes. The more users involved in deciding what it is they want, the longer it takes. Acquisition is a leadership, bureaucratic and people issue; not a contracting, statutory or regulatory one. …

Thus, a greatly reduced leader-to-doer percentage will increase progress. None of this is in the Federal Acquisition Regulation, but just as the *FAR* has grown, all the peripheral guidance and requirements has evolved over decades.

That can't be right, can it? The author asserts that it's not the statutes, or the complex regulations, that create the problems. It's not the lack of training or workforce demographics or the bizarre organizational structures or the inept policy implementations. No, *the problem is that DoD has too many leaders*
. You get rid of the leaders and let the average Contracting Officer do what they need to do, and it will all work out just fine. Superfast and super cheap.

Okay.

As Dalton said in the classic movie, Roadhouse, "opinions vary."

In April 2015, we presented to a group of folks just outside The Beltway, and we told them *DoD cannot achieve its goals of technological innovation unless it also disrupts its acquisition management and oversight regime*
. Unfortunately, the fact of the matter is that too many entrenched bureaucrats are unwilling to disrupt the
status quo
.

For example, consider the November, 2015, report entitled "Eliminating Requirements Imposed

on Industry Where Costs Exceed Benefits." The report, a culmination of a five-year effort by DoD, was—shall we say?—*disappointing*. See our article on the topic **here** .

Looking on the bright side, DoD just issued a **Class Deviation** intended to "streamline awards for innovative technology projects." The Class Deviation was issued to implement Section 873 of the National Defense Authorization Act …
of 2016
. That is literally three NDAAs ago. The DAR Council couldn't get the regulatory revision out the door in twenty-six months, even though Congress told them what to write, so finally DPAP got tired of waiting (or perhaps got tired of the embarrassing lack of action) and issued a Class Deviation.

The rapidity at which DoD operates is *mind-boggling*.

Anyway, the Class Deviation is nice. It does two things to address well-known barriers to entry into the DoD marketplace.

1.

It reduces the cost & pricing data requirements of FAR 15.401-1(b) by creating a new exemption for "contacts, subcontracts or modifications of contracts or subcontracts valued at less than $7.5 million" where those contract actions are to be awarded to a small business or to a "non-traditional defense contractor" pursuant to a "technical, merit-based selection procedure," or pursuant to a Small Business Innovative Research (SBIR) program, or pursuant to a Small Business Technology Transfer (SBTT) program. When those circumstances are encountered then no certified cost or pricing data will need to be submitted.

1.

It eliminates the government's right to audit (pursuant to the contract clause 52.215-2) in the circumstances described above—but *not* for contracts, subcontracts, and modifications thereto awarded under the SBTT program.

Which is nice, we suppose. If you are a small business participating in the SBIR or SBTT program or a "non-traditional" defense contractor—a term that is defined in the Class Deviation as an entity that is not currently performing any fully CAS-covered contracts or subcontracts for the DoD, nor has it performed any such contracts/subcontracts for the preceding year.

Of course, this is a relatively small step. The first thing we noticed is that, even if the requirements for "certified" cost or pricing data are relaxed, a contractor might still be required to submit "uncertified" cost or pricing data to the Contracting Officer and/or to the auditors. While it's nice to see the risk of "defective pricing" eliminated, the Class Deviation doesn't address the rather onerous burden of preparing cost or pricing data and supporting it through fact-finding/audit and negotiation.

Second, the Class Deviation expressly permits the Head of Contracting Activity (HCA) to impose the requirements waived by the language of the Deviation, when "past performance" or "other information" indicates that the requirements should be imposed. In another nice touch, when the requirements are imposed at HCA direction, then any "performance audits" (whatever those are) must be initiated within 18 months of contract completion. (No mandatory completion date for those audits was stated.)

And what if those audits are not initiated within 18 months of contract completion? Has the government waived those audit rights, or does the statutory and regulatory Statute of Limitations kick-in? We suspect it will be the latter and that the direction to start audits within 18 months of contract completion will be ignored.

What does this all mean?

It means that the DAR Council cannot follow Congressional direction, as we've asserted before in this blog. And thus a Class Deviation was required to substitute for formal rule-making.

With respect to the Class Deviation, it's a nice policy statement without much in the way of substance. It will apply to a small group of contractors and it is unlikely to sway the bigger high-tech players to enter into the defense marketplace. It has built-in loopholes that permit its intent to be ignored. It has internal policy contradictions that might conflict with existing statutes and regulations.

In the larger context of defense regulatory streamlining and acquisition reform, it's a very small step in the right direction.

But it *is* a start in the right direction….