



## Department of Defense Section 809 Panel

Presented to: Native Hawaiian Organization  
Association May 2019

**Holland & Knight**

# Your Presenter: Christine V. Williams

- Managing Partner and Founder Outlook Law, LLC
- Former Partner at Two International Law Firms
- Adjunct Law Professor
- Nationally Recognized as a Best Lawyer for 2018 and 2019 in Government Contacting



---

**Birch Horton Bittner & Cherot**  
*a professional corporation*

*Presented by*

Jon M. DeVore  
Birch Horton Bittner & Cherot, P.C.  
1100 Connecticut Ave., NW, Ste. 825  
Washington, DC 20036  
202.659.5800  
[jdevore@dc.bhb.com](mailto:jdevore@dc.bhb.com)

Mr. DeVore's practice concentrates on business transactions; government contracting; small business, Native American law; veteran and minority business development; 8(a) programs; natural resources; bankruptcy; transportation; administrative law; and legislative and administrative advocacy. He has extensive litigation, regulatory and legislative experience in Washington, D.C. and Alaska. He has served as an expert witness in SBA fraud cases and is a frequent presenter at SBA conferences.

## Robert K. Tompkins



Bob Tompkins is a partner in Holland & Knight's Washington, D.C., office and co-chair of the firm's National Government Contracts Group. Mr. Tompkins provides strategic advice and counsel to government contractors, their management and investors. He is experienced in government contract protests and disputes, government investigations and related proceedings, mergers and acquisitions, matters related to the U.S. Small Business Administration (SBA) government contracting programs and providing general counseling to clients.

- » **Robert K. Tompkins**
- » **Partner**
- » (202) 469-5111
- » [Robert.Tompkins@hklaw.com](mailto:Robert.Tompkins@hklaw.com)
- » Washington D.C.

### Practice

- Government Contracts
- False Claims Act Defense
- Indian Law
- Congressional Investigations
- Regulatory and Federal Litigation

### Education

- Washington and Lee University (J.D.)
- Washington and Lee University (B.A.)

### Bar Admission

- Virginia
- District of Columbia

Section 809  
Panel-  
Small  
Business



# Agenda

- **What is the 809 Panel?**
- **What has it done so far?**
- **What Recommendations have they made that would affect small businesses, including 8(a) companies?**
- **What is likely to happen and what can be done?**

# Section 809 Panel

The Section 809 Panel was established by Congress in the FY 2016 NDAA to address issues with the way DoD buys what it needs to equip its warfighters. Since its inception, the panel has published an Interim Report and three-volume Final Report, containing a total of 98 recommendations aimed at changing the overall structure and operations of defense acquisition both strategically and tactically. Some changes hold potential for immediate effect, such as those that remove unnecessary layers of approval in the many steps contracting officers and program managers must take and remove unnecessary and redundant reporting requirements. Other changes require a large shift in how the system operates, such as buying readily available products and services in a manner similar to the private sector and managing capabilities from a portfolio, rather than program, perspective. Such an array of proposed improvements offers short-term gains that will help inspire enthusiasm, as well as a commitment to achieving the long-term systemic changes and supporting continuous improvement.



©2018 LAW, LLC  
PROFESSIONAL AND CONFIDENTIAL. ATTORNEY-CLIENT PRIVILEGE.  
PAGE 7

# Breaking it Down



Interim Report



3 Volumes of Reports



Road Map for the Reports

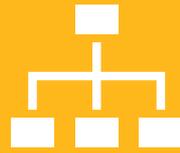


“Remove Unnecessary and Redundant Reporting Requirements”



“Other changes require a large shift” in how to buy, like the private sector

# What Did the Reports Contain?



98 recommendations aimed at changing the overall structure and operations of defense acquisition both strategically and tactically



Draft legislative, executive, and agency actions, that accompany those recommendations

# Overview of the 809 Panels Approach

- » Generally, the Panel has recommended stream-lining acquisition and re-focusing on Commercial practices.
- » Among other things the Panel has grouped acquisitions into “Lanes”
  - Lane 1: Readily available products and services
  - Lane 2: Products and services requiring minor customization
  - Lane 3: Products and services requiring major customization
  - Lane 4: DOD unique products and services



### Readily Available

- No customization
- Rapid delivery
- Mostly products, some services
- Transparent market-based pricing, terms, and competition
- Typically multiple sources
- Limited procurement laws/policies apply
- Simplified procedures

### Readily Available w/ Customization

- Customized using common, commercial processes
- Competitive solicitations may be needed
- Typically multiple sources
- Products, most DoD services
- Pricing from quotes
- Limited procurement laws/policies apply
- Simplified procedures
- No cost contracts

### Defense-Unique

- Development financed by DoD
- DoD can dictate terms
- Competition limited or nonexistent
- Pricing based on development costs
- Products, few services
- Reduced compliance burdens and process redundancies
- New rapid acquisition authorities fully implemented with empowered users

# How To Do It



Recommendations  
Proposed Regulations  
Proposed Legislation  
Every Branch

## The Panel's Approach to Engagement

- » Report states that the Panel met with 50 small businesses.
- » But see the list of meetings, Volume 3, Appendix B – it does not appear 50 small businesses are on this list; very, very limited ANC, Tribal or NHO outreach.
- » Panel members' backgrounds are heavily weighted toward large government contractors, and DOD.

# Recommendations Impacting Small Businesses

- » Many of these may be helpful to small business, including entity-owned businesses
- » Other recommendations may not and some certainly will not
- » At least three recommendations are particularly important, but not the only ones, impacting small business
  - Recommendation 21, “Small Business” (Vol. 1)
  - Recommendation 35, Commercial Items (Vol. 3)
  - Recommendation 80, Preference for Commercial Items (Vol. 3)

Specifically, certain recommendations have a negative impact on small business because they would :

- (1) circumvent SBA regulations;
- (2) allow DoD to "manage in-house" the SBA goals and contracts;
- (3) give a price preference in lieu of set-asides; and
- (4) change SBA regulations to release 8(a) contracts from the 8(a) program after if SBA does not respond within 15 days.

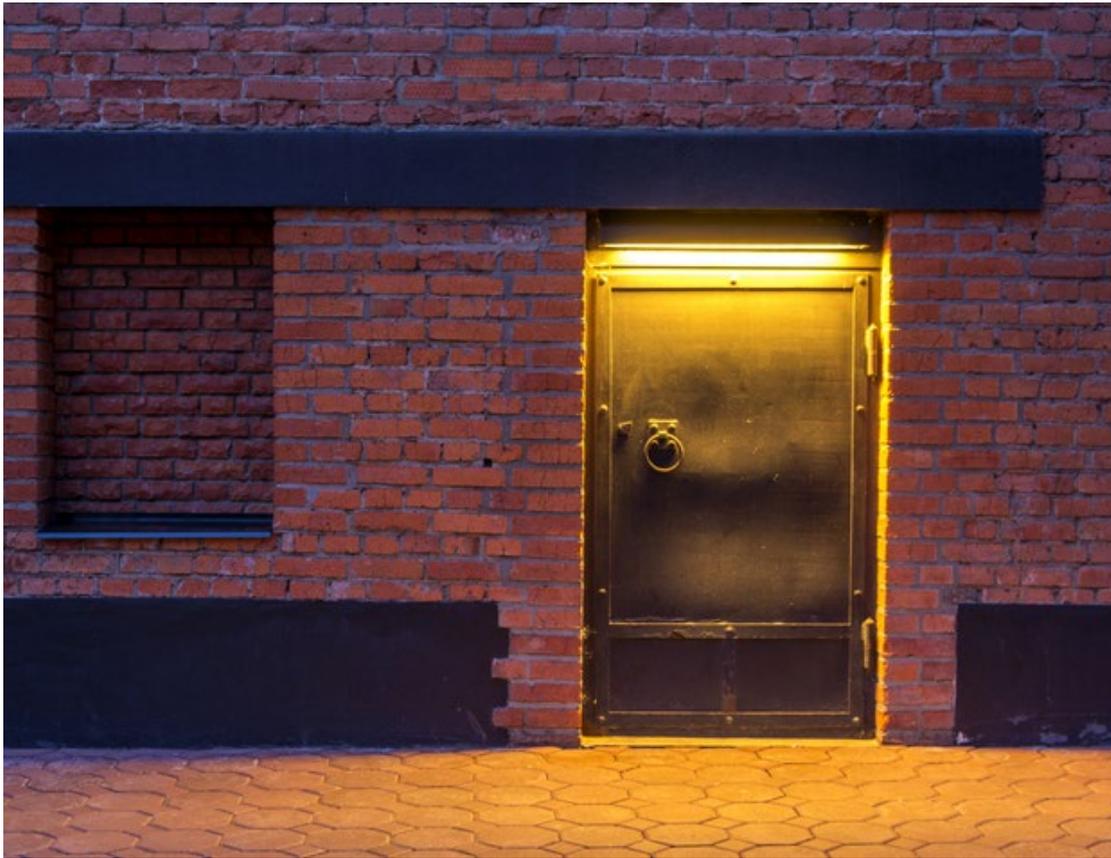
## Recommendation 21 – “Small Business”

Principal Parts to the Recommendation:

1. Establish the Infrastructure necessary to create and execute a DoD small business strategy, ensuring alignment of DoD’s small business programs with the agency’s critical needs.
2. Build on the Success of the SBIR/STTR and RIF programs.
3. Enable innovation in the acquisition system and among industry partners.
4. Give DOD sole authority for small business contracting programs at DOD.

# Meaningful Engagement

- DoD admits it has been wary of industry input in the past, but will make a concerted effort to include industry.
- It is unclear when such meaningful engagement will occur as the recommendations also contain draft legislative language, as if the recommendations are already set.
- "A principal challenge for DoD is establishing a coherent strategy and infrastructure for aligning small business programs and policies with DoD's mission-related needs. A number of previous advisory groups have identified challenges related to DoD's lack of a strategic approach to working with industry.
- For example, a 2012 report produced by the House Committee on Armed Services Panel on Business Challenges noted, "[T]he Panel found that DoD lacks a clearly articulated strategy that would provide a corporate vision of DoD's future technology needs."
- Page 171, Vol. I, Panel 809 Report.



# Small Business Contracting Actions

- "The number of small business contract actions dropped nearly 70 percent from FY 2011 to FY 2016, but during that same timeframe the value of DoD small business contracts rose approximately 290 percent.
- Small companies are receiving contracts of substantial value from the government, including DoD, but the decline in the number of small business contract actions indicates DoD's small business contracting is not promoting competition and fostering robustness in the defense market." Page 176, Vol. 1, Section 809 Panel Report.



# Not Managing Effectively-Pivot

- To achieve its mission first approach, the Section 809 Panel recommends DoD ***pivot from meeting small business goals unrelated to its mission*** to using small businesses to provide innovation in all aspects of delivering capability to warfighters. . .
- Other recommendations ***update or amend socioeconomic provisions to create flexibility*** needed to leverage the vast, innovative marketplace

# Recommendation 35

- » On its face this recommendation focuses on reforming commercial item acquisition
- » Contained an important recommendation specifically related to Small Business Set-Asides, reflecting current rules, “readily available” and “readily available with customization”

Small Business Set-Asides		
<ul style="list-style-type: none"><li>▪ All procurements below simplified acquisition threshold (SAT) are 100% set-aside for small business; <i>rule of two</i> still applies above the threshold</li></ul>	<ul style="list-style-type: none"><li>▪ No mandatory small business set-asides; small businesses will receive a 5% price preference</li><li>▪ DoD must still meet small business utilization goals</li></ul>	<ul style="list-style-type: none"><li>▪ The same 5% price preference will be used with no mandatory set-asides</li><li>▪ DoD must still meet small business utilization goals</li></ul>

- » This would eliminate the “Rule of 2” and replace it with a 5% price evaluation preference
- » It would make set-asides voluntary and take away small business’ ability to require an agency to set-aside work
- » Reaction is very negative among small business community and others



## DoD Needs Flexibility to Meet SBA Goals

- DoD needs flexibility to determine how it meets the goals established by the Small Business Administration (SBA).
- Consequently, DoD must be able to implement a deliberate strategy to meet its small business goals through investments in innovation to ensure a robust industrial base. Much of that investment could come in the form of procuring privately developed, readily available technology solutions. Set-asides do not create the proper incentives for DoD to procure readily available products, and these programs have the potential to stunt, rather than encourage, small business growth.



# Price Preference Anyone? 5%?

Using a price preference and requiring DoD to continue to meet the overarching small business use goal established by SBA will ensure the same amount of DoD dollars are invested in small business, while allowing capable small businesses to grow and compete for opportunities. Such a requirement could help achieve Congress’s direction to DoD to “create opportunities and a pathway for small businesses to grow and compete for future DoD contracts as larger entities” where set-asides fall short for one reason or another.





# Concrete Actions Recommended

- (e) Evaluation of Prices for Small Businesses.—
  - (1) A small business concern (within the meaning of section 3 of the Small Business Act (15 U.S.C. 632)) that offers a product or service that meets a requirement of the Department of Defense shall be provided a 5 percent price preference in the evaluation of offers or in comparing publicly available pricing from sources of readily 19 available products and services.
  - (2) In procuring readily available products and services, the Secretary of Defense shall apply the requirements of this section in preference to applying section 15(j) of the 22 Small Business Act (15 U.S.C. 644(j)).
- Panel 809 Report, Volume I, Recommendation 35



# Implementing: Legislative, Agency, Executive



# Legislative: Recommendation 35, Vol. III, Part 1 of 2, Beginning at page 47

---

- Amend Title 10 by creating a statutory authority for DoD to procure readily available products and services and readily available products and services with customization via the simplified readily available procedures outlined in this recommendation.
- Amend Title 10 Competition in Contracting Act provisions to include market-based competition as the preferred method for achieving competition when DoD is procuring readily available products and services and readily available products and services with customization.
- Amend Title 10 Competition in Contracting Act provisions to include merit-based selection as a means of satisfying competition requirements.
- Repeal Title 10 provisions related to procurement of commercial products and services.
- Revise Title 10 provisions to remove the terms commercial products, commercial services, and non-developmental items and replace them with readily available products and services and readily available products and services with customization.



# Executive Branch

Amend DFARS

# Other Agencies

- This proposal will likely reduce DoD reliance on GSA and other governmentwide contract vehicles to procure readily available products and services.
- The Director of OMB and the U.S. Trade Representative will need to renegotiate the public procurement portion of applicable trade agreements to include the concept of readily available products and services and the use of market-based competition for procuring readily available products and services.

- See DoD Panel 809, Vol. III, Part 1 of 2, pps. 47-48.



# Other Recommendations – Bad and Good

## » Not Helpful Recommendations:

- Recommendation 80: Preserve the preference for procuring commercial products and services when considering small business set-asides:
  - This would basically remove the Rule of Two from commercial item procurements (similar to Recommendation 35)
- Recommendation 75: Allows release from 8(a) program if SBA fails to respond within 15 days.

## » Other recommendations may be helpful to small businesses, including entity-owned businesses, such as:

- Recommendation 79: Advance payments to small business at the time of contract award (reduces the burden of start-up costs)

# Once 8(a) and then Gone after 15 Days?

- (d) Within 15 working days of the request, the SBA will inform the awarding agency contracting officer of its decisions to concur or non-concur. If the SBA does not inform the awarding agency within that period, release from the 8(a) program shall be presumed and the awarding agency is authorized to proceed with soliciting and award outside the 8(a) program.



# Some Telling Quotes

- Here are some telling quotes parsed through the thousands of pages recommending efficiency.
- "The statutory reservation of all contract awards under the current simplified acquisition threshold, and additional set-aside provisions in FAR Part 19, are inconsistent with the strategy proposed in the Volume 1 Report and directed by the FY 2019 NDAA.



# Some Telling Quotes

- For DoD to fully implement a strategy that focuses on investing in innovative small businesses and ensures DoD maintains technical dominance over near-peer competitors and emerging adversaries, DoD needs flexibility to determine how it meets the goals established by the Small Business Administration (SBA).“
- " Consequently, DoD must be able to implement a deliberate strategy to meet its small business goals through investments in innovation to ensure a robust industrial base. Much of that investment could come in the form of procuring privately developed, readily available technology solutions. Set-asides do not create the proper incentives. . . ."



## Other [Positive\*] Recommendations

---

- » Increasing training and professionalism of the acquisition workforce
- » Ensure stability of DoD funding . . . or hope to
- » Recommendations 66-69. Address Changes to the Protest process.
- » Recommendation 77. Encourages strengthened acquisition planning to avoid needless security clearance requirements (More small business opportunity?)
- » Recommendation 83. Raise accelerated/small claim procedure jurisdictional threshold at Board of Contract Appeals (\$100k→\$250k)

\*“Positive” depends on your perspective ...

# What will happen and what can be done?

- » Responses to the Small Business Recommendations have been understandably negative in the small business and legal community.
- » The ABA Public Contract Law Section (in which we are very involved) wrote the Panel to express disapproval of these recommendations in May 2018 (even before Recommendation 35):
  - » [https://www.americanbar.org/groups/public\\_contract\\_law/resources/prior\\_section\\_comments/](https://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments/)
- » The Panel's recommendations have gone to Congress (and others).
- » A strong rebuttal is needed.

## What's next?

“PANEL REPORT.—Not later than January 15, 2019, the panel shall transmit a final report to the Secretary of Defense and the **congressional defense committees.**”

*Sec 809, FY2016 NDAA (PL 114-92), amended by Sec 863(d) of FY17 NDAA (PL 114328), and Secs 803(c) & 883 of the FY 2019 NDAA (PL 115-91)*

**House and Senate Armed Services Committees now determines what is included in the FY20 NDAA!**

# What's next?

## Committee Schedules

### HOUSE

**HASC plans to mark their version  
June 12 (has been an open mark)**

**House wants to set their FY20  
defense spending before bringing  
the NDAA to a vote**

House goal to set defense spending by  
4<sup>th</sup> of July recess - \$733B topline  
expected

Potential to have NDAA vote by August  
recess

### SENATE

**SASC plans to mark their version  
May 20 (has been a closed mark)**

**Senate has not announced their  
FY20 defense spending mark up**

Senate topline is \$750B – consistent  
with Administration

Senate may vote on NDAA by the 4<sup>th</sup> of  
July recess

Conference likely in September/October; w/Report vote in November/December

*Historically, the NDAA is approved before the end of the Congressional Year*

# What's next?

## Engagement Opportunities

### HOUSE

**May 8 - June 12** Opportunity to impact the draft bill before the Full Committee Mark

**June 13 – July 26** Opportunity to propose amendments to the House Bill before it is brought to a full House vote

**July 29 – December 12** Once the House votes, there may be opportunities during the conference negotiations up to before the conference report is finalized for a vote

### SENATE

**May 8 – 20.** Opportunity to impact the draft bill before the Full Committee Mark (*closed mark*)

**June 3 – June 28.** Opportunity to propose amendments to the Senate Bill before it is brought to a full Senate vote

**July 8 – December 13.** Once the Senate votes, there may be opportunities during the conference negotiations up to before the conference report is finalized for a vote

# What's next?

## Other Potential Stakeholders?

American Bar Association

HUBZone Council

National 8(a) Association

National Association of Government Contractors

National Center for American Indian Economic Development

National Federation of Independent Businesses

Native American Contractors Association

Native Hawaiian Organizations Association

US Women's Chamber of Commerce

Veterans and Military Business Owners Association

*Are there other GovCon advocacy organizations?*



## Questions

Links to the Report and  
Recommendations