



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

April 30, 2019

The Honorable Michael R. Pence  
President of the Senate  
United States Senate  
Washington, DC 20510

Dear Mr. President:

The Administration is transmitting to Congress the enclosed set of legislative proposals to help streamline and improve the agility and efficiency of federal acquisition processes. We seek their enactment as part of the acquisition title of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 or as part of other appropriate Congressional bills.

The President's Management Agenda is driving integrated, bold change to create a twenty-first century government that improves mission outcomes, service to the public, and stewardship of taxpayer dollars for the American people. A critical success factor is a high functioning acquisition system supported by leading edge technologies, expert information networks, and a skilled workforce.


The enclosed proposal on acquisition innovation is designed to help the Administration achieve its goal of a more nimble and responsive acquisition system. The proposal would transform a statutory framework for government-wide acquisition testing that has remained unchanged for more than 40 years and fails to adequately support an environment where continual and timely process improvement is an imperative. To address this shortcoming, the proposal would establish an Acquisition Modernization Test Board to accelerate work on a contemporary acquisition state through testing, feedback, re-testing, and scaling of ideas that have been shown to work. The Administrator of Federal Procurement Policy would be empowered – on an as-needed basis supported by a reasoned business case and within prescribed constraints – to authorize tailored pilot programs involving waiver of one or more acquisition or procurement laws to evaluate how changing the statutory requirement might facilitate more efficient achievement of the purpose underlying the law.

Two additional proposals would ease the burden associated with Cost Accounting Standards, addressing recommendation made by the Advisory Panel on Streamlining and Codifying Acquisition Regulations established by section 809 of the FY 2016 NDAA.

Other enclosed proposals would reduce contractor reporting burdens, bring unity in procurement thresholds serving a similar purpose, and standardize authorities between defense and civilian agencies to achieve greater consistency in practices across government.

An index of the proposals is enclosed and additional explanation is provided in the section-by-section analysis accompanying each proposal. We hope the Congress will give prompt and favorable consideration to these proposals.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Vought". The signature is fluid and cursive, with a large initial "R" and a distinct "V" and "A".

Russell T. Vought  
Acting Director

Enclosures

Identical Letter Sent to:

The Honorable Michael R. Pence

The Honorable Nancy Pelosi

The Honorable Ron Johnson

The Honorable Gary C. Peters

The Honorable Elijah E. Cummings

The Honorable Jim Jordan

The Honorable James M. Inhofe

The Honorable Adam Smith

The Honorable Mac Thornberry

The Honorable Jack Reed

## OMB Proposals for Potential Inclusion in the NDAA for FY 2020

<b>Proposal Title</b>	<b>Proposal Synopsis</b>
Acquisition Test Programs	This proposal would establish an Acquisition Modernization Test Board to accelerate work on a contemporary acquisition state through testing, feedback, re-testing, and scaling of ideas that have been shown to work. It would also authorize the Administrator for Federal Procurement Policy to exercise a waiver of one or more acquisition or procurement laws as part of a pilot program to evaluate how changing the statutory requirement(s) might facilitate more efficient achievement of the purpose underlying the law.
Disestablishment of the Defense Cost Accounting Standards Board	This proposal would repeal the statutory requirement to manage a Defense Cost Accounting Standards Board and avoid the creation of a more complicated regulatory framework for cost accounting standards (CAS).
Revision to the Mandatory Use of the Cost Accounting Standards	This proposal would decouple the monetary threshold for CAS applicability from the threshold for Truth in Negotiations Act applicability and increase the basic threshold for CAS applicability from \$2 million to \$15 million.
Uniformity in Procurement Thresholds	This proposal seeks to bring uniformity to procurement thresholds following the increase of the micro-purchase threshold from \$3,000 to \$10,000 in the NDAA for FY 2018 (Public Law 115-91).
Task and Delivery Order Protest Threshold	This proposal seeks to standardize the task and delivery order protest dollar threshold for defense and civilian agencies by raising the civilian agency threshold from \$10 million to equal the defense agency threshold at \$25 million.
Removal of Recovered Materials Certification Requirement	This proposal would revise 42 U.S.C. 6962(c)(3)(A), which requires certification by Federal contractors to estimate the percentage of the total recovered material content for U.S. Environmental Protection Agency (EPA)-designated item(s) delivered and/or used in contract performance, and to submit a certified report to their contracting officer.

1 **SEC. \_\_\_\_.** **ACQUISITION TEST PROGRAMS.**

2 (a) Section 1124 of title 41, United States Code, is amended—

3 (1) in subsection (a) by inserting in paragraph (2) after “develop” the following:

4 “, or support the development of,”;

5 (2) in subsection (b) by striking “heads” and inserting “senior procurement  
6 executives”; and

7 (3) by striking subsection (c) and inserting the following new subsections:

8 “(c) **ACQUISITION MODERNIZATION TEST BOARD.**--(1) There is established an  
9 Acquisition Modernization Test Board to support the continual improvement and agility of  
10 federal acquisition practices.

11 “(2) The responsibilities of the Board are—

12 “(A) to work with agencies in developing test programs that promote  
13 incremental improvement of acquisition practices, including through new,  
14 innovative, or otherwise better business processes and applications of technology,  
15 and identifying candidate agencies to conduct tests;

16 “(B) to support the use of appropriate criteria for measuring the impact of  
17 acquisition tests and to use such criteria in reviewing progress and results of test  
18 programs;

19 “(C) to support government-wide information sharing on the results of tests to  
20 facilitate additional testing and measured adoption of promising practices,  
21 including through the maintenance of a portal to collect information on test  
22 programs and a website to make this information available to the public;

23 “(D) to work with the Administrator to recognize and encourage acquisition  
24 innovation by members of the acquisition workforce and contractors;

25 “(E) to conduct outreach with industry and other representatives of the private  
26 sector to promote greater understanding within the acquisition workforce of  
27 innovative industry practices that may be suitable for adoption by the Federal  
28 Government and awareness by the private sector of ongoing federal acquisition  
29 modernization and innovation activities; and

1 “(F) to make recommendations to the Administrator for legislative, regulatory,  
2 and policy changes based on the results of test programs.

3 “(3) The Chair of the Board shall be the Administrator for Federal Procurement  
4 Policy. The members of the Board shall include –

5 “(A) the Chief Acquisition Officer of the General Services Administration;

6 “(B) the Under Secretary of Defense for Acquisition and Sustainment;

7 “(C) the Senior Procurement Executive of the National Aeronautics and Space  
8 Administration;

9 “(D) the Senior Procurement Executive of the Department of Homeland  
10 Security;

11 “(E) the Chief Acquisition Officer of the Department of Veterans Affairs;

12 “(F) the Chief Acquisition Officer of the Department of Health and Human  
13 Services;

14 “(G) the Administrator for the Small Business Administration;

15 “(H) at least two officials of the Federal Government with expertise in one or  
16 more of the following: major systems development, management of major  
17 services programs, supply chain management, data management, digital services,  
18 and advanced technology applications; and

19 “(I) such other officials as the Chair deems appropriate.

20 “(d) TAILORED PROGRAMS TO TEST WAIVERS OF ACQUISITION OR  
21 PROCUREMENT LAWS.—(1) The Administrator (without delegation) may waive one or more  
22 acquisition or procurement laws that fall within the scope of paragraph (4) using the following  
23 prescribed procedures:

24 “(A) The Administrator may waive the application of one or more provisions  
25 of law for one or more agencies to carry out a proposed program to test innovative  
26 or modernized procurement methods and procedures under subsection (a), if the  
27 Administrator determines, based on a business case developed by the agency, that  
28 waiver is necessary to accomplish the objectives of the proposed test program.

29 The business case shall include --

30 “(i) a description of the proposed program, including –

31 “(I) the purpose of the proposed program,

1 “(II) the process that will be tested and how it deviates from existing  
2 processes;

3 “(III) the expected outcome compared to past outcomes (which must  
4 take into account one or more outcomes identified in (d)(5);

5 “(IV) how actual impact and program success will be assessed; and

6 “(V) estimated value and number of acquisitions to be conducted  
7 under the program;

8 “(ii) the provision or provisions of law to be waived and an explanation of  
9 why the waiver or waivers are necessary to achieve the expected outcome or,  
10 in the case where a waiver would be achieved through a temporary increase in  
11 a statutory threshold, an explanation of why the threshold increase is  
12 necessary to achieve the expected outcome.

13 Obligations for work authorized under a waiver granted under this paragraph shall  
14 be made within a period not to exceed three years after the Administrator has  
15 granted the waiver.

16 “(B) Upon the successful demonstration of an innovative or modernized  
17 procurement method or procedure under subparagraph (A), the Administrator may  
18 extend the period for testing by the agency or agencies managing the test  
19 program, and authorize additional agencies to use the authority under the same  
20 general terms and for the same general purposes, provided obligations for work  
21 authorized under such extended period shall be made within a period not to  
22 exceed five years after the original waiver has been granted.

23 “(C) The Administrator may grant a blanket waiver of one or more covered  
24 acquisition or procurement laws to an agency that has demonstrated responsible  
25 use of existing acquisition flexibilities in the Federal Acquisition Regulation. A  
26 blanket waiver may be used by the agency to develop one or multiple programs to  
27 test innovative practices in acquisitions with a cumulative value of an amount  
28 specified by the Administrator up to \$100 million for work that is obligated  
29 within a period not to exceed three years after the blanket waiver has been  
30 granted. Each test program shall be based on a business case meeting the  
31 requirements of subparagraph (A). The Administrator shall establish criteria for

1 agencies to demonstrate responsible use of existing acquisition flexibilities. At a  
2 minimum, such criteria shall require that—

3 “(i) the agency can demonstrate that the innovation efforts achieved their  
4 intended outcomes (which may include improvements enabled by the insight  
5 gained from good faith testing that proved unsuccessful) by addressing, to the  
6 maximum extent practicable, the factors identified in paragraph (5);

7 “(ii) the agency has designated an acquisition innovation advocate and an  
8 industry liaison to support continual improvement of acquisition practices  
9 within the agency; and

10 “(iii) the agency actively shares information on its innovation and  
11 modernization activities and conducts outreach with industry.

12 “(2)(A) Not less than 30 days prior to the start of a test program involving waivers  
13 of acquisition or procurement law approved under paragraph (1), or an agency’s use  
14 of a test program sponsored by another agency under subparagraph (1)(B), the Senior  
15 Procurement Executive of an agency carrying out or using the test program shall  
16 publish a notice of the test program in the single Government-wide point of entry  
17 designated in the Federal Acquisition Regulation pursuant to section 1708(d) of this  
18 title. In the case of a blanket waiver, the Senior Procurement Executive shall publish  
19 notice for each test program. The notice shall include a summary of the business  
20 case, as set forth in paragraph (1)(A).

21 “(B) If a program is expected to involve acquisitions whose cumulative value,  
22 including all options, is expected to exceed \$10 million for civilian agencies and  
23 \$50 million for the Department of Defense, the testing agency shall also provide  
24 notification to Congress.

25 “(C) The notification required by subparagraph (B) shall be submitted –

26 “(i) if the testing agency is the Department of Defense, to the Committee  
27 on Armed Services of the House of Representatives and the Committee on  
28 Armed Services of the Senate; and

29 “(ii) if the testing agency is other than the Department of Defense, to the  
30 Committee on Oversight and Government Reform of the House of



1                   Representatives and the Committee on Homeland Security and Governmental  
2                   Affairs of the Senate.

3                   “(3) (A) The cumulative annual value of contract obligations approved by the  
4                   Administrator for all new test programs requiring waivers of law under this section  
5                   shall not exceed more than one-tenth of one percent of the total amount of contract  
6                   obligations during the prior fiscal year, as reported in the Federal Procurement Data  
7                   System and validated in accordance with Subpart 4.6 of the Federal Acquisition  
8                   Regulation.

9                   “(B) The total number of new test programs for which waivers are granted  
10                  under paragraph (1)(A) shall not exceed 10 in FY 2020, 15 in FY 2021 and 20 in FY  
11                  2022 and the total number of new blanket waivers granted under paragraph (1)(C)  
12                  shall not exceed one in FY 2020, two in FY 2021 and three in FY 2022.

13                  “(4) (A) Provisions of law addressing the acquisition of property and services may  
14                  be waived by the Administrator under this section except for—

15                         “(i) laws that provide for criminal or civil penalties;

16                         “(ii) Buy American Laws;

17                         “(iii) federal labor or employment laws;

18                         “(iv) the Small Business Act, 15 U.S.C. 631, et seq.; and

19                         “(v) federal environmental laws.

20                  “(B) Notwithstanding paragraph (A), the Administrator (without delegation)  
21                  may authorize an agency to use the authorities in section 2371 and 2371b of title  
22                  10, United States Code, to support tests of innovative procurement methods and  
23                  procedures with new entrant contractors.

24                  “(5) By March 30, 2022, the Administrator shall submit a report to Congress  
25                  describing results achieved under any test programs involving waivers of laws. The  
26                  Administrator shall report annually therefore on results achieved during the prior  
27                  fiscal year. At a minimum, the report shall address, and provide supporting data on  
28                  improvements, or lack thereof, on the following factors—

29                         “(A) acquisition timeliness;

30                         “(B) program, end-user, and contractor satisfaction;

31                         “(C) performance;

- 1 “(D) contract costs;
- 2 “(E) estimated contractor compliance costs;
- 3 “(F) estimated agency administrative costs; and
- 4 “(G) participation by new-entrant contractors.

5 “(e) DEFINITIONS.—For purposes of this section—

6 “(1) the term “acquisition innovation advocate” means an official identified by an  
7 agency to help encourage testing of new ideas and better ways of executing existing  
8 practices and working with the Office of Management and Budget and other agencies to  
9 share best practices and lessons learned.

10 “(2) the term “Buy American Laws” means any federal statute covered within the  
11 meaning of section 1 of Executive Order 13788, Buy American and Hire American.

12 “(3) the term “end user” means the customer directly impacted by or receiving the  
13 delivery of the good or service.

14 “(4) the term “industry liaison” means an official identified by an agency to serve as a  
15 conduit and promote effective communications between agency personnel with  
16 acquisition responsibilities and contractors who seek or are doing business with the  
17 agency.

18 “(5) the term “new entrant contractor” means an entity that has not been awarded a  
19 Federal contract within the 5-year period ending on the date on which a solicitation for  
20 that contract is issued under the program.”.

21 (b) The Administrator shall issue any policies or procedures necessary to effectively  
22 implement this section.

23 (c) This provision shall be applied in a manner consistent with United States obligations  
24 under international agreements.

25

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]**

### **Section-by-Section Analysis**

Since its creation in 1974, the Office of Federal Procurement Policy (OFPP) has been authorized by 41 U.S.C. § 1124 to conduct tests of innovative procurement methods and procedures. This proposal would modernize these mechanisms and the authorities available for Executive Branch testing and adoption of new and better practices to help the acquisition system keep pace with ongoing and emerging mission complexities and demands as well as transformative developments in technology that support the buying of goods and services. The results of these tests would be used to inform both (i) incremental improvements to the government-wide regulatory and policy framework for acquisition and (ii) data-driven legislative proposals from the Executive Branch to Congress to ensure acquisition statutes are as effective and efficient as possible.

Subsection (a) would amend section 1124 to establish an Acquisition Modernization Test Board, chaired by the Administrator for Federal Procurement Policy (Administrator). The Board would work with agencies to develop test programs, identify candidate agencies to conduct tests, review progress and results of test programs, and make recommendations to the Administrator for government-wide legislative, regulatory, and policy changes based on the results of test programs. The Board would not be an exclusive avenue for testing. Agencies would continue to retain autonomy, through innovation labs and related mechanisms, to drive continual process improvement. But, the Board would play an important role in accelerating the adoption of promising practices by building touchpoints across innovation sources to increase awareness and promote collaboration.

Subsection (a) would also establish measured and accountable processes for the Administrator to waive the application of one or more covered acquisition or procurement laws, on an exception basis, if the Administrator and the testing agency or agencies determine that that the Government interest served by the application of the law or laws could potentially be met more effectively through alternative application of the procedures to be tested under the program. The testing agency or agencies would be required to develop a business case to support the waiver, which would address the expected outcome compared to past outcomes and how actual impact and program success would be measured, among other things. Time-bound and dollar-capped waivers also could be provided on a blanket basis to an agency that has demonstrated responsible use of existing flexibilities in the FAR and contributed to advances in FAR-based acquisitions by sharing success stories and other information with agencies and the federal acquisition community.

The total dollar value of acquisitions subject to waivers in any given year could not exceed one-tenth of one percent of the total amount of contract obligations during the prior fiscal year and the total number of new test programs for which waivers are granted would also be capped during FYs 2020, 2021 and 2022. With limited exception, waiver authority would not apply to laws that provide for criminal and civil penalties, laws imposing domestic source restrictions on federal acquisitions (known collectively as Buy American Laws), or requirements set forth in labor laws, the Small Business Act, or environmental laws. The Administrator would submit annual reports to Congress on results achieved during the prior fiscal year under test programs involving waivers of laws.

Subsection (b) would require the Administrator to issue any policies or procedures necessary to effectively implement section 1124, as amended.

In recent years, a number of agencies have been making meaningful progress in improving the responsiveness and agility of their acquisition practices through the piloting and scaling of strategies that focus on simpler and faster competitions, user-driven requirements development, and greater reliance on cost effective commercial solutions that aggregate the Government's significant demand. A patchwork of results-driven organizations and officials have helped to facilitate this work, including acquisition innovation labs; interagency business practice councils; Government technology modernization catalysts, such as the U.S. Digital Service, and the General Services Administration's Technology Transformation Service; and communities of practice.

These efforts have resulted in consideration and use of long-recognized but underutilized strategies described in the FAR, such as oral presentations and competitions conducted in multiple phases to improve the efficiency of the source selection process. Efforts have also led to use of approaches not specified in the FAR, but also not prohibited. These include use of confidence ratings that provide evaluators the ability to look more holistically at an offeror's strong and weak points and avoid the pitfalls of the more commonly used adjectival ratings, and on-the-spot consensus evaluations that can more effectively capture evaluator impressions and avoid unnecessary delays.

With the help of acquisition innovation advocates, who are charged with helping their workforce colleagues identify new and better ways of doing business, agencies are reducing costly paperwork and unnecessarily lengthy evaluation processes – sometimes by 50% or more -- while simultaneously increasing customer satisfaction with the improved responsiveness of the acquisition process. The Procurement Innovation Lab in the Department of Homeland Security (DHS) issued an annual report documenting impressive results from a dozen projects across almost all of its components. The report highlights improved acquisition responsiveness for a variety of mission priorities, including: the detection and blocking of cyber attacks on all .gov domains with the acquisition of cybersecurity services in the EINSTEIN program; upgrading E-Verify, a system used by more than 600,000 companies nationwide to improve verification of employment eligibility; and migrating a legacy data system to the cloud, meeting FedRamp standards for security assessment, authorization, and continuous monitoring. Between 2015, when the PIL was first stood up, and March 2019, the PIL has conducted more than 40 webinars, attended by nearly 9,000 members of the DHS workforce, and has also provided 17 PIL Boot Camp workshops focused on sharing most commonly utilized innovative procurement techniques to over 700 members of the DHS and Federal acquisition workforce, including industry representatives. See

<https://www.dhs.gov/sites/default/files/publications/PIL%20ANNUAL%20REPORT.pdf>.

<https://www.dhs.gov/sites/default/files/publications/PIL-BOOT-CAMP-WORKBOOK.pdf>.

Other agencies are similarly making noteworthy accomplishments using a combination of modern acquisition practices, including flexible strategies, agile techniques, and greater reliance on cost-effective commercial solutions. The Department of Veterans Affairs uses micro-consulting services to rapidly upgrade software supporting its veterans' website applications. The US Agency for International Development has used modern digital strategies promoted by the U.S. Digital Services to shorten its acquisition lifecycle while satisfying end user needs for a global innovation platform. The Department of Defense is reducing its risk of costly maintenance

commonly associated with a customized priority solution after successfully purchasing a commercial-of-the-shelf product to improve its Defense Travel System.

While the list of results achieved from user-driven and innovative acquisitions continues to grow, the overall pace of testing and acquisition modernization is slow and uneven across the Federal Government. The establishment of an inter-agency Acquisition Modernization Test Board is designed to facilitate greater testing and information sharing within the Executive Branch and send an important signal to the federal marketplace at large that innovation and continual process improvement are critical to a successful acquisition system. The Board would operate within existing available appropriations.

The Board would play a variety of roles to support efforts, such as those in the President's Management Agenda, that are designed to modernize government operations. Activities could include serving as a convener for dialogues with agencies and industry about potential piloting for future state requirements with whole-of-government implications, a reviewer of business models proposed by internal and/or outside sources, and a consultant to OMB or other entities, such as the Technology Modernization Fund Board or the Government Effectiveness Advanced Research (GEAR) Center, on models that may be suitable for testing and development, if feasible to their core missions and functions. Where an agency, as part of its continual process improvement efforts, identifies a potential need to modernize an acquisition law, the Board could assist the agency and OFPP in developing a tailored test to evaluate whether and how changing the statutory requirement might facilitate more efficient achievement of the purpose underlying the law. Tests involving waivers are expected to be a small but important part of acquisition innovation efforts.

Currently, section 1124 requires an agency to secure passage of legislation if it wishes to test a practice that involves the waiver of an acquisition law -- a process that can take months, if not years. This proposal seeks to recognize the benefits taxpayers may receive if the Executive Branch and Congress, armed with the timely insight of pilot results, can be more agile in their respective abilities to identify and act on evidence-based opportunities for statutory refinement.

Equally important, the proposal recognizes the critical role that statutes play as the ultimate guardrail for taxpayer accountability. For this reason, the proposal includes multiple controls and accountability mechanisms. These include: (i) limitations on the types of authorities that can be waived, (ii) a cap during FYs 2020, 21, and 22 on the number of test programs that can be conducted pursuant to waivers issued under this authority as well as the number of blanket waivers that can be granted, (iii) a cap on the value of acquisitions that can be conducted pursuant to waivers issued under this authority, (iv) a requirement to develop business cases that explain the expected outcome to achieve under the test compared to past outcomes and how actual impact and program success will be measured, among other things, (v) public notice of tests, (vi) collection and analysis of data as a basis for measuring whether a test program produced its desired result, (vii) reporting to Congress on the results of tests, and (viii) public access to information on the results of test programs.

Reporting would address the various dimensions of impact, such as on timeliness, program end user and contractor satisfaction, performance and contract costs, contractor compliance costs, administrative costs and participation by new entrants – the type of data that can inform Congress where future legislative action may be most impactful in strengthening the acquisition system. Prior to submitting a report to Congress, OMB would strive to consult with one or more agency Evaluation Officers, appointed under the Foundations for Evidence-Based Policymaking Act.

In the past, agencies have used waivers provided by Congress on an as-needed basis to improve acquisition practices. For example, in the 1990s, the Executive Branch used waiver authority provided in section 5061 of Federal Acquisition Streamlining Act (Pub. Law 103-355) to test electronic notice of solicitations in lieu of paper notice, which led to one of the Government's early adoptions of the Internet to replace the long-standing paper-based Commerce Business Daily and improve the efficiency and effectiveness of acquisition processes. More recently, GSA and DHS are using the "commercial solutions" pilot authority authorized by section 880 of Pub Law 114-328 to help interested agencies quickly acquire emerging commercial technologies from start-up companies and those new to the Federal marketplace.

A growing number of opportunities presently exist to test new or improved acquisition practices. In January, the Advisory Panel on Streamlining Acquisition Regulations established by Section 809 of the FY 16 NDAA released its third set of recommendations to transform defense acquisition and enable the Department of Defense to better position itself to address its increasingly challenging mission. A number of the Panel's recommendations may also provide benefit for civilian agencies. With the aid of test authority that permits controlled and accountable waiving of acquisition laws, OFPP and interested civilian agencies could work together in the development of a coordinated set of pilot programs that would permit real-time evaluation of various Panel recommendations. Tests might include:

- use of business processes that remove transaction burden for procuring select products and services "readily available" in the marketplace;
- contracting with highly skilled IT consultants through an online talent marketplace in line with commercial best practices in the "freelance economy" to improve the speed, cost, and quality by which the government accesses outside expertise;
- waiving synopsis requirements for open market buys up to \$75,000, or higher if deemed appropriate to test, to give agencies greater discretion in shaping competitions in recognition of technological and data management advances that may help bring the market more effectively to the workforce; and
- use of simplified acquisition procedures for mixed buys of commercial and non-commercial items.

Other tests that might be evaluated in the near term could include:

- for new entrants to government contracting, allowing a grace period from some of the FAR-based terms and conditions that require the potential bidder to stand up compliance programs and keep records before receiving any government funds<sup>1</sup>;
- enhanced communication between industry and government during evaluation of offers to allow full understanding of the proposed technical solutions before making an award (e.g., true interactive dialogue during the source selection process);
- in case of contractor's failure to perform within one year of contract award, allowing agencies to award a replacement contract to the runner-up offer using the original competition;

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<sup>1</sup>FAR-based contracts for commercial items require up to 80 clauses and 22 clauses flowing-down the supply chain, such as service contract reporting. One of these clauses, the "Examination of Records" clause, requires the contractor to make available the record, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment.

- extending other transactions authority to agencies not currently authorized so that they may partner with non-traditional contractors for research and prototyping;
- use of Qualification Based Selection (QBS) processes typically reserved for architect-engineering (A&E) services under the Brooks A&E Act (40 U.S.C. 1101, et seq) to select user centered design and software development firms based on their demonstrated competence and qualifications to develop modern technology solutions utilizing industry best practices at fair and reasonable prices;
- award of a hybrid contract with both fixed-price and cost-type contract line items that might provide more flexibility to agencies in their work with commercial contractors and allow policy officials to evaluate if the long-time ban on cost-type contracting for commercial items remains appropriate.

The proposed authority to allow waiver of acquisition and procurement laws is not intended to excuse agencies from important tenets of public procurement that have long been embraced in the Federal Government’s procurement statutes, such as ensuring interested sources have easy access to the federal marketplace and making awards based on value for the taxpayer. Rather, the proposal is meant to allow the Administrator to test, in a controlled environment, how statutory requirements might be realigned so that these important tenets can be more effectively met in the twenty-first century using twenty-first century strategies and tools. It is anticipated that the vast majority of pilot programs would focus around using existing flexibilities and use of waivers would be considered on an exception basis.

Modernizing a vast and complex acquisition culture affecting a large and diverse population of stakeholders requires mechanisms and resources dedicated to constant process improvement testing, feedback, re-testing and scaling. With the support of an Acquisition Modernization Test Board, the Administrator and agencies will be better positioned to more regularly engage with one another and with industry in formulating and testing reasonable hypotheses. Simultaneously, agencies will enjoy limited downside risk and the ability to rapidly course correct to ensure results match expectations and practices continue to meet long-standing public procurement principles, including impartiality, integrity, and easy access to the marketplace by new entrants and small businesses.

**Budget Implications:** There would be no budgetary impact as a result of this legislative change because the proposal only addresses the authority to test innovative procurement practices and would not increase the overall budget requirements of the agencies.

**Changes to Existing Law:** This proposal would amend title 41, United States Code, as follows:

TITLE 41, UNITED STATES CODE

§1124 Tests of innovative procurement methods and procedures

(a) IN GENERAL.—The Administrator may develop innovative procurement methods and procedures to be tested by selected executive agencies. In developing a program to test innovative procurement methods and procedures under this subsection, the Administrator shall consult with the heads of executive agencies to—

- (1) ascertain the need for and specify the objectives of the program;

(2) develop, or support the development of, the guidelines and procedures for carrying out the program and the criteria to be used in measuring the success of the program;

(3) evaluate the potential costs and benefits which may be derived from the innovative procurement methods and procedures tested under the program;

(4) select the appropriate executive agencies or components of executive agencies to carry out the program;

(5) specify the categories and types of products or services to be procured under the program; and

(6) develop the methods to be used to analyze the results of the program.

(b) **APPROVAL OF EXECUTIVE AGENCIES REQUIRED.**—A program to test innovative procurement methods and procedures may not be carried out unless approved by the heads of senior procurement executive of executive agencies selected to carry out the program.

~~(c) **REQUEST FOR WAIVER OF LAW.**—If the Administrator determines that it is necessary to waive the application of a provision of law to carry out a proposed program to test innovative procurement methods and procedures under subsection (a), the Administrator shall transmit notice of the proposed program to the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate and request that the Committees take the necessary action to provide that the provision of law does not apply with respect to the proposed program.—The notification to Congress shall include—~~

~~(1)—a description of the proposed program (including the scope and purpose of the proposed program);~~

~~(2) the procedures to be followed in carrying out the proposed program;~~

~~(3) the provisions of law affected and the application of any provision of law that must be waived in order to carry out the proposed program; and~~

~~(4) the executive agencies involved in carrying out the proposed program.~~

(c) **ACQUISITION MODERNIZATION TEST BOARD.**—(1) There is established an Acquisition Modernization Test Board to support the continual improvement and agility of federal acquisition practices.

(2) The responsibilities of the Board are—



(A) to work with agencies in developing test programs that promote incremental improvement of acquisition practices, including through new, innovative, or otherwise better business processes and applications of technology, and identifying candidate agencies to conduct tests;

(B) to support the use of appropriate criteria for measuring the impact of acquisition tests and to use such criteria in reviewing progress and results of test programs;

(C) to support government-wide information sharing on the results of tests to facilitate additional testing and measured adoption of promising practices, including through the maintenance of a portal to collect information on test programs and a website to make this information available to the public;

(D) to work with the Administrator to recognize and encourage acquisition innovation by members of the acquisition workforce and contractors;

(E) to conduct outreach with industry and other representatives of the private sector to promote greater understanding within the acquisition workforce of innovative industry practices that may be suitable for adoption by the Federal Government and awareness by the private sector of ongoing federal acquisition modernization and innovation activities; and

(F) to make recommendations to the Administrator for legislative, regulatory, and policy changes based on the results of test programs.

(3) The Chair of the Board shall be the Administrator for Federal Procurement Policy. The members of the Board shall include –

(A) the Chief Acquisition Officer of the General Services Administration;

(B) the Under Secretary of Defense for Acquisition and Sustainment;

(C) the Senior Procurement Executive of the National Aeronautics and Space Administration;

(D) the Senior Procurement Executive of the Department of Homeland Security;

(E) the Chief Acquisition Officer of the Department of Veterans Affairs;

(F) the Chief Acquisition Officer of the Department of Health and Human Services;

(G) the Administrator for the Small Business Administration;

(H) at least two officials of the Federal Government primarily with expertise in one or more of the following: major systems development, management of major services programs, supply chain management, data management, digital services, and advanced technology applications; and

(I) such other officials as the Chair deems appropriate.

(d) TAILORED PROGRAMS TO TEST WAIVERS OF ACQUISITION OR PROCUREMENT LAWS.—(1) The Administrator (without delegation) may waive one or more acquisition or procurement laws that fall within the scope of paragraph (4) using the following prescribed procedures:

(A) The Administrator may waive the application of one or more provisions of law for one or more agencies to carry out a proposed program to test innovative or modernized procurement methods and procedures under subsection (a), if the Administrator determines, based on a business case developed by the agency, that waiver is necessary to accomplish the objectives of the proposed test program. The business case shall include --

(i) a description of the proposed program, including –

(I) the purpose of the proposed program,

(II) the process that will be tested and how it deviates from existing processes;

(III) the expected outcome compared to past outcomes (which must take into account one or more outcomes identified in (d)(5));

(IV) how actual impact and program success will be assessed; and

(V) estimated value and number of acquisitions to be conducted under the program;

(ii) the provision or provisions of law to be waived and an explanation of why the waiver or waivers are necessary to achieve the expected outcome or, in the case where a waiver would be achieved through a temporary increase in a statutory threshold, an explanation of why the threshold increase is necessary to achieve the expected outcome.

Obligations for work authorized under a waiver granted under this paragraph shall be made within a period not to exceed three years after the Administrator has granted the waiver.

(B) Upon the successful demonstration of an innovative or modernized procurement method or procedure under subparagraph (A), the Administrator may extend the period for testing by the agency or agencies managing the test program, and authorize additional agencies to use the authority under the same general terms and for the same general purposes, provided obligations for work authorized under such extended period shall be made within a period not to exceed five years after the original waiver has been granted.

(C) The Administrator may grant a blanket waiver of one or more covered acquisition or procurement laws to an agency that has demonstrated responsible use of existing acquisition flexibilities in the Federal Acquisition Regulation. A blanket waiver may be used by the agency to develop one or multiple programs to test innovative practices in acquisitions with a cumulative value of an amount specified by the Administrator up to \$100 million for work that is obligated within a period not to exceed three years after the blanket waiver has been granted. Each test program shall be based on a business case meeting the requirements of subparagraph (A). The Administrator shall establish criteria for agencies to demonstrate responsible use of existing acquisition flexibilities. At a minimum, such criteria shall require that—

(i) the agency can demonstrate that the innovation efforts achieved their intended outcomes (which may include improvements enabled by the insight gained from good faith testing that proved unsuccessful) by addressing, to the maximum extent practicable, the factors identified in paragraph (5);

(ii) the agency has designated an acquisition innovation advocate and an industry liaison to support continual improvement of acquisition practices within the agency; and

(iii) the agency actively shares information on its innovation and modernization activities and conducts outreach with industry.

(2)(A) Not less than 30 days prior to the start of a test program involving waivers of acquisition or procurement law approved under paragraph (1), or an agency's use of a test program sponsored by another agency under subparagraph (1)(B), the Senior Procurement Executive of an agency carrying out or using the test program shall publish a notice of the test program in the single Government-wide point of entry designated in the Federal Acquisition Regulation pursuant to section 1708(d) of this title. In the case of a blanket waiver, the Senior Procurement Executive shall publish notice for each test program. The notice shall include a summary of the business case, as set forth in paragraph (1)(A).

(B) If a program is expected to involve acquisitions whose cumulative value, including all options, is expected to exceed \$10 million for civilian agencies and

\$50 million for the Department of Defense, the testing agency shall also provide notification to Congress.

(C) The notification required by subparagraph (B) shall be submitted –

(i) if the testing agency is the Department of Defense, to the Committee on Armed Services of the House of Representatives and the Committee on Armed Services of the Senate; and

(ii) if the testing agency is other than the Department of Defense, to the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate.

(3)(A) The cumulative annual value of contract obligations approved by the Administrator for all new test programs requiring waivers of law under this section shall not exceed more than one-tenth of one percent of the total amount of contract obligations during the prior fiscal year, as reported in the Federal Procurement Data System and validated in accordance with Subpart 4.6 of the Federal Acquisition Regulation.

(B) The total number of new test programs for which waivers are granted under paragraph (1)(A) shall not exceed 10 in FY 2020, 15 in FY 2021 and 20 in FY 2022 and the total number of new blanket waivers granted under paragraph (1)(C) shall not exceed one in FY 2020, two in FY 2021 and three in FY 2022.

(4)(A) Provisions of law addressing the acquisition of property and services may be waived by the Administrator under this section except for—

(i) laws that provide for criminal or civil penalties;

(ii) Buy American Laws;

(iii) federal labor or employment laws;

(iv) the Small Business Act, 15 U.S.C. 631, et seq.; and

(v) federal environmental laws.

(B) Notwithstanding paragraph (A), the Administrator (without delegation) may authorize an agency to use the authorities in section 2371 and 2371b of title 10, United States Code, to support tests of innovative procurement methods and procedures with new entrant contractors.

(5) By March 30, 2022, the Administrator shall submit a report to Congress describing results achieved under any test programs involving waivers of laws. The

Administrator shall report annually therefore on results achieved during the prior fiscal year. At a minimum, the report shall address, and provide supporting data on improvements, or lack thereof, on the following factors—

- (A) acquisition timeliness;
- (B) program, end-user, and contractor satisfaction;
- (C) performance;
- (D) contract costs;
- (E) estimated contractor compliance costs;
- (F) estimated agency administrative costs; and
- (G) participation by new-entrant contractors.

(e) DEFINITIONS.—For purposes of this section—

(1) the term “acquisition innovation advocate” means an official identified by an agency to help encourage testing of new ideas and better ways of executing existing practices and working with the Office of Management and Budget and other agencies to share best practices and lessons learned.

(2) the term “Buy American Laws” means any federal statute covered within the meaning of section 1 of Executive Order 13788, Buy American and Hire American.

(3) the term “end user” means the customer directly impacted by or receiving the delivery of the product or service

(4) the term “industry liaison” means an official identified by an agency to serve as a conduit and promote effective communications between agency personnel with acquisition responsibilities and contractors who seek or are doing business with the agency.

(5) the term “new entrant contractor” means an entity that has not been awarded a Federal contract within the 5-year period ending on the date on which a solicitation for that contract is issued under the program.

1 **SEC. \_\_\_\_ . DISESTABLISHMENT OF THE DEFENSE COST ACCOUNTING**  
2 **STANDARDS BOARD**

3 (a) REPEAL OF THE AUTHORITY FOR THE DEFENSE COST ACCOUNTING

4 STANDARDS BOARD – (1) Chapter 7 of title 10, United States Code, is amended by striking  
5 section 190.

6 (2) The table of sections at the beginning of chapter 7 of such title is amended by  
7 striking after the item relating to section 189 the following item:

8 “Sec. 190. Defense Cost Accounting Standards Board.”.

9 (b) EFFECTIVE DATE – The amendments made by this section shall take effect upon  
10 enactment.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]**

**Section-by-Section Analysis**

This proposal would repeal the statutory requirement set forth in 10 U.S.C. § 190 for the Department of Defense (DoD) to manage a Defense Cost Accounting Standards Board (Defense CAS Board). Elimination of this requirement will help to avoid the creation of a more complicated regulatory framework for cost accounting standards (CAS) and allow the Department to give its undivided attention to working with the existing CAS Board and interested stakeholders on CAS priorities.

Section 190, which was established by section 820 of the National Defense Authorization Act for FY 2017, Pub. Law 114-328, states that the Defense CAS Board shall be responsible for reviewing CAS established by the existing Cost Accounting Standards Board (CAS Board), whose authorities are prescribed at 41 U.S.C. §§1501-06. Section 190(d)(2) further states that the Defense CAS Board shall have “the exclusive authority, with respect to the Department of Defense, to implement such cost accounting standards.” The Defense CAS Board is also required to develop standards to inform managerial decision-making associated with commercial operations performed by DoD’s federal employees. All of these new duties are in addition to the Department’s existing responsibilities to serve on the CAS Board, which is chaired by the Office of Federal Procurement Policy (OFPP) and has been given exclusive authority, since its inception in 1988, for promulgating CAS to achieve more uniform and consistent cost accounting practices on Federal Government contracts.

Since 2016, when Congress first considered the establishment of a Defense CAS Board, concerns have been voiced regarding the relationship between this board and the CAS Board and the potential risk of a more complicated regulatory environment that could arise as the board implements CAS for Defense contracts. In its June 7, 2016 Statement of Administration Policy

on S. 2943, the last Administration stated that creation of a Defense CAS Board “could result in contractors with both Defense and civilian contracts having to [effectively] comply with two different standards for the same cost issue.” [https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/114/saps2943s\\_20160607.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/114/saps2943s_20160607.pdf). More recently, the Advisory Panel on Streamlining and Codifying Acquisition Regulations (the “Section 809 Panel”) warned that having two boards could “create competing sets of CAS.” (See Volume 2 at p. 117.)

In accordance with the direction in E.O. 13771, *Reducing Regulation and Controlling Regulatory Costs*, agencies have been taking steps to evaluate and address regulatory impact associated with Federal procurement transactions. Vesting two boards with CAS-related responsibilities runs counter to these efforts. As explained above, actions by two boards increases the likelihood for a more complex regulatory framework and heightens the potential for confusing overlap, conflict and legal challenge. It also complicates the ability to take timely action on matters such as those called for by Congress in section 820, including opportunities to conform CAS to Generally Accepted Accounting Principles (GAAP). The additional requirement in section 190(d)(3) for the Defense CAS Board to create standards that can be used to evaluate commercial work performed by federal employees is misplaced and creates an additional unnecessary distraction. The government and public accounting expertise reflected by the individuals who are expected to serve on the Defense CAS Board would not likely include the type of organizational or budgetary insight into government operations that would be necessary to inform federal managerial decision-making.

The better approach to ensuring that CAS are being updated and revised, as necessary, to reflect changes in the marketplace and the federal business environment, is to concentrate efforts in one board, rather than requiring DoD, the largest federal contracting agency, to divert its attention and resources into maintaining a second board. This unitary approach to resource management will better enable the CAS Board to meet its government-wide responsibilities in a timely and responsible manner.

During this Administration, OFPP, in close collaboration with DoD and GSA (the other Government members of the CAS Board), and with the support of its two non-government members, has been taking steps to strengthen the CAS Board’s operations. These steps include (i) regular meetings, at least quarterly, and, beginning in FY 2019, publication of agendas for public awareness (see, e.g., <https://www.federalregister.gov/documents/2018/11/23/2018-25437/cost-accounting-standards-board-meeting-agenda>), (ii) recent publication of a paper for harmonizing CAS and GAAP (see <https://www.whitehouse.gov/wp-content/uploads/2019/03/2019-01-SDP-suppl1>), and (iii) a dedicated working group of experts from both DoD and civilian agencies to support revision of standards regarding pension adjustments for extraordinary events. These steps are consistent with requirements called for by section 820 to improve the current Board’s operations. In addition, OFPP, as CAS Board chair, will be well positioned to facilitate discussion between the Board and the Office of Information and Regulatory Affairs, in considering and evaluating burden that may be associated with initiatives to update or otherwise change CAS.

For all of these reasons, the Administration urges Congress to disestablish the Defense CAS Board by repealing section 190 before DoD is forced to devote significant attention into its management and maintenance. This action will allow the Department to give its full attention and support to the existing CAS Board and its ongoing work to strengthen operations and address pressing issues associated with the application of CAS in federal contracting.

**Budget Implications:** The proposal only addresses procurement processes and not amounts appropriated for the procurement of items or services.

**Changes to Existing Law:** This proposal would make the following changes to chapter 7 of title 10 of the United States Code:

## TITLE 10 – ARMED FORCES

### CHAPTER 7 – BOARDS, COUNCILS, AND COMMITTEES

#### CHAPTER 7 – FRONT MATTER

~~Sec. 190. Defense Cost Accounting Standards Board.~~

#### ~~§ 190. Defense Cost Accounting Standards Board~~

- ~~(a) ORGANIZATION.~~ — The Defense Cost Accounting Standards Board is an independent board in the Office of the Secretary of Defense.
- ~~(b) MEMBERSHIP.~~ — (1) The Board consists of seven members. One member is the Chief Financial Officer of the Department of Defense or a designee of the Chief Financial Officer, who serves as Chairman. The other six members, all of whom shall have experience in contract pricing, finance, or cost accounting, are as follows:
- ~~(A) Three representatives of the Department of Defense appointed by the Secretary of Defense; and~~
  - ~~(B) Three individuals from the private sector, each of whom is appointed by the Secretary of Defense, and—~~
    - ~~(i) One of whom is a representative of a nontraditional defense contractor (as defined in section 2302(9) of this title); and~~
    - ~~(ii) One of whom is a representative from a public accounting firm.~~
  - ~~(2) A member appointed under paragraph (1)(A) may not continue to serve after ceasing to be an officer or employee of the Department of Defense.~~
- ~~(c) DUTIES OF THE CHAIRMAN.~~ — The Chief Financial Officer of the Department of Defense, after consultation with the Defense Cost Accounting Standards Board, shall prescribe rules and procedures governing action of the Board under this section.
- ~~(d) DUTIES.~~ — The Defense Cost Accounting Standards Board—
- ~~(1) shall review cost accounting standards established under section 1502 of title 41 and recommend changes to such cost accounting standards to the Cost Accounting Standards Board established under section of 1501 of such title;~~
  - ~~(2) has exclusive authority, with respect to the Department of Defense, to implement such cost accounting standards to achieve uniformity and consistency in the standards governing measurement, assignment, and allocation of costs to contracts with the Department of Defense; and~~
  - ~~(3) shall develop standards to ensure that commercial operations performed by Government employees at the Department of Defense adhere to cost accounting standards (based~~



~~on cost accounting standards established under section 1502 of title 41 or Generally Accepted Accounting Principles) that inform managerial decisionmaking.~~

~~————(e) **COMPENSATION.**—(1) Members of the Defense Cost Accounting Standards Board who are officers or employees of the Department of Defense shall not receive additional compensation for services but shall continue to be compensated by the Department of Defense.~~

~~————(2) Each member of the Board appointed from the private sector shall receive compensation at a rate not to exceed the daily equivalent of the rate for level IV of the Executive Schedule for each day (including travel time) in which the member is engaged in the actual performance of duties vested in the Board.~~

~~————(3) While serving away from home or regular place of business, Board members and other individuals serving on an intermittent basis shall be allowed travel expenses in accordance with section 5703 of title 5.~~

1 **SEC. \_\_\_\_ . REVISION TO THE MANDATORY USE OF THE COST ACCOUNTING**  
2 **STANDARDS**

3 (a) MANDATORY USE OF STANDARDS – Paragraph (1) of section 1502(b) of title 41,  
4 United States Code, is amended --

5 (1) In subparagraph (B) by striking “the amount set forth in section 2306a(a)(1)(A)(i) of  
6 title 10 as adjusted in accordance with applicable requirements of law” and inserting  
7 “or equal to \$15 million”; and

8 (2) In subparagraph (C)—

9 (A) by adding “ or” at the end of clause (ii);

10 (B) by striking “; or” at the end of clause (iii) and inserting a period; and

11 (C) by striking clause “(iv) a contract or subcontract with a value of less than

12 \$7,500,000 if, when the contract or subcontract is entered into, the segment of the

13 contractor or subcontractor that will perform the work has not been awarded at least

14 one contract or subcontract with a value of more than \$7,500,000 that is covered by

15 the standards.”.

16 (b) EFFECTIVE DATE. – The amendments made by this section shall take effect upon  
17 enactment.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]**

### **Section-by-Section Analysis**

This proposal would modify 41 U.S.C. § 1502 to decouple the monetary threshold for Cost Accounting Standards (CAS) applicability from the monetary threshold for Truth in Negotiations Act (TINA) applicability set forth at 10 U.S.C. § 2306a(a)(1)(A)(i) and increase the basic threshold for CAS applicability from \$2 million to \$15 million. The proposal would also eliminate the trigger contract exemption. This exemption currently provides relief from CAS coverage for federal contractors who receive contract awards of \$2 million or greater but do not receive at least one contract during the fiscal year over the trigger amount, which is currently \$7.5 million. By establishing a basic monetary threshold above the current trigger threshold amount, a trigger would no longer be necessary.

Currently, there are four monetary thresholds that establish the nature and extent of CAS coverage: (i) the basic applicability threshold for CAS coverage, which is currently tied to the TINA threshold, which is \$2 million; (ii) the \$7.5 million trigger contract threshold; (iii) the \$50-million threshold for full-CAS coverage (contracts below this threshold are subject to “modified” CAS coverage requiring compliance with just four of the 19 standards); and (iv) the \$50 million threshold for requiring a disclosure statement (explaining the entity’s accounting practices and changes the entity has made to such practices while it holds CAS-covered contracts).

Except for the first threshold, which was adjusted in 2018 when Congress raised the TINA threshold, the CAS thresholds have remain unchanged for nearly two decades. The current threshold amounts are largely based on an assessment performed by the Government Accountability Office (GAO) which conducted a comprehensive review of CAS and its program requirements in the late 1990s. In proposing the amounts that Congress subsequently adopted, GAO sought to strike a balance between the probable costs and benefits received from implementing CAS. In making its assessment, GAO expressly acknowledged that some companies would not enter the federal market if the resulting contract was to be CAS-covered.

Last year, the Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel) issued a report on CAS that included recommended adjustments to the CAS thresholds. Specifically, the Panel proposed to decouple the CAS and TINA thresholds, raise the basic threshold from \$2 million to \$25 million, eliminate the trigger contract, and raise the thresholds for full-CAS coverage and disclosure statements to \$100 million. The Panel projected that these proposed changes would substantially reduce the number of CAS-covered business segments by more than 70% while maintaining coverage for more than 90% of dollars covered by CAS under the existing thresholds.

The Administration agrees with some of the Panel's recommendations and believes further analysis is required on others. Specifically, the Administration agrees with the Panel's recommendation to decouple the CAS and TINA thresholds. TINA and CAS serve different purposes. TINA seeks to provide taxpayer protections for cost-based contracts that have not had the benefit of adequate price competition by requiring contractors to certify that the data on which the contract price has been negotiated is accurate, current and complete at the time of settlement on a single contract. While CAS also addresses cost-based contracts, its coverage is systemic in orientation, not transactional, and more broadly focused on providing protections to the Federal Government by achieving uniformity and consistency in the cost accounting practices used by contractors for the measurement, assignment and allocation of costs to federal contracts. Decoupling would allow for more effective consideration of threshold amounts suitable to each law.

The Administration also agrees with providing relief, by eliminating the trigger contract and increasing the basic threshold amount. Raising the trigger threshold would reduce the number of contracting entities subject to CAS while its outright elimination in combination with an increase in the basic threshold could achieve the same result while also simplifying determination and administration of CAS coverage. However, the Administration has concluded, based on analyses conducted since release of the Panel's report in the summer of 2018, that changes should be more modest than those proposed by the Panel.

In its review of the 809 Panel's sensitivity analysis, the Cost Accounting Standards Board (CAS Board) noted that the Panel did not take into consideration the impact of threshold increases on indefinite delivery vehicles (IDVs), such as task and delivery order contracts, or activity at the subcontract level. While data in the Federal Procurement Data System at the task and delivery order level presents certain difficulties in analysis and available government-wide information on subcontracting is limited, certain educated assumptions may be made based on the data and other information that is available.

First, task and delivery order contracts can be assumed to be more elastic in relation to threshold changes than the definitive contracts that the Panel reviewed due, in part, to the nature of products commonly acquired through such vehicles, such as spare parts, and the general volume of orders for services. Second, the prevalence of subcontracting in major programs is not disputed. While many subcontracts are held by small businesses who are exempt from CAS, many others are held by mid-size contracting entities who are currently covered by CAS but would not be covered if the threshold is raised. For these reasons, the CAS Board concluded that the recommended threshold increase to \$25 million and elimination of the trigger contract threshold would likely reduce the universe of dollars covered by CAS by more than the 8% projected by the Panel. Equally important, the Board concluded that an increase of the threshold to \$15 million (an amount not addressed in the Panel's report) would still reduce the number of CAS-covered business segments by a substantial amount -- approximately 60%. In other words, the magnitude of the reduction is only modestly less than that which would be achieved by increasing the threshold to \$25 million.

For these reasons, the Administration recommends an increase of the basic threshold to \$15 million and elimination of the trigger contract threshold. The combined increase in the basic threshold and elimination of the trigger contract threshold would simultaneously provide relief for entities that would continue to be CAS-covered by narrowing the scope of covered transactions and enabling them to make business decisions regarding accounting practice changes with reduced CAS compliance burden. The Administration intends to continue studying available data to understand costs and benefits of threshold changes for full CAS coverage and submission of disclosure statements.

**Budget Implications:** The proposal only addresses procurement processes and not amounts appropriated for the procurement of items or services.

**Changes to Existing Law:** This proposal would make the following changes to chapter 15 of title 41 of the United States Code:

## **TITLE 41 – PUBLIC CONTRACTS**

### **CHAPTER 15 – COST ACCOUNTING STANDARDS**

#### **§ 1502. COST ACCOUNTING STANDARDS**

**(a) AUTHORITY.—**

**(1) COST ACCOUNTING STANDARDS BOARD.—**The Cost Accounting Standards Board has exclusive authority to prescribe, amend, and rescind cost accounting standards, and interpretations of the standards, designed to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the Federal Government.

**(2) ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY.—**The Administrator, after consultation with the Board, shall prescribe rules and procedures governing actions of the Board under this chapter. The rules and procedures shall require that any action to prescribe, amend, or rescind a standard or interpretation be approved by majority vote of the Board.

**(b) MANDATORY USE OF STANDARDS.—**

**(1) SUBCONTRACT.—**

**(A) DEFINITION.—** In this paragraph, the term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

**(B) WHEN STANDARDS ARE TO BE USED.—** Cost accounting standards prescribed under this chapter are mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the Federal

Government in excess of ~~the amount set forth in section 2306a(a)(1)(A)(i) of title 10 as the amount is adjusted in accordance with applicable requirements of law or equal to \$15 million.~~

- (C) **NONAPPLICATION OF STANDARDS.**— Subparagraph (B) does not apply to—
- (i) a contract or subcontract for the acquisition of a commercial item;
  - (ii) a contract or subcontract where the price negotiated is based on a price set by law or regulation; or
  - (iii) a firm, fixed-price contract or subcontract awarded on the basis of adequate price competition without submission of certified cost or pricing data; or
  - (iv) ~~a contract or subcontract with a value of less than \$7,500,000 if, when the contract or subcontract is entered into, the segment of the contractor or subcontractor that will perform the work has not been awarded at least one contract or subcontract with a value of more than \$7,500,000 that is covered by the standards.~~

- (2) **EXEMPTIONS AND WAIVERS BY BOARD.**— The Board may--
- (A) exempt classes of contractors and subcontractors from the requirements of this chapter; and
  - (B) establish procedures for the waiver of the requirements of this chapter for individual contracts and subcontracts.

(3) **WAIVER BY HEAD OF EXECUTIVE AGENCY.**—

- (A) **IN GENERAL**—The head of an executive agency may waive the applicability of the cost accounting standards for a contract or subcontract with a value of less than \$100,000,000 if that official determines in writing that the segment of the contractor or subcontractor that will perform the work--
- (i) is primarily engaged in the sale of commercial items; and
  - (ii) would not otherwise be subject to the cost accounting standards under this section.

- (B) **IN EXCEPTIONAL CIRCUMSTANCES.**— The head of an executive agency may waive the applicability of the cost accounting standards for a contract or subcontract under exceptional circumstances when necessary to meet the needs of the agency. A determination to waive the applicability of the standards under this subparagraph shall be set forth in writing and shall include a statement of the circumstances justifying the waiver.

- (C) **RESTRICTION ON DELEGATION OF AUTHORITY.**— The head of an executive agency may not delegate the authority under subparagraph (A) or (B) to an official in the executive agency below the senior policymaking level in the executive agency.

- (D) **CONTENTS OF FEDERAL ACQUISITION REGULATION.**— The Federal Acquisition Regulation shall include--
- (i) criteria for selecting an official to be delegated authority to grant waivers under subparagraph (A) or (B); and
  - (ii) the specific circumstances under which the waiver may be granted.
- (E) **REPORT.**— The head of each executive agency shall report the waivers granted under subparagraphs (A) and (B) for that agency to the Board on an annual basis.

**(c) REQUIRED BOARD ACTION FOR PRESCRIBING STANDARDS AND INTERPRETATIONS.**— Before prescribing cost accounting standards and interpretations, the Board shall--

- (1) take into account, after consultation and discussions with the Comptroller General, professional accounting organizations, contractors, and other interested parties--
  - (A) the probable costs of implementation, including any inflationary effects, compared to the probable benefits;
  - (B) the advantages, disadvantages, and improvements anticipated in the pricing and administration of, and settlement of disputes concerning, contracts; and
  - (C) the scope of, and alternatives available to, the action proposed to be taken;
- (2) prepare and publish a report in the Federal Register on the issues reviewed under paragraph (1);
- (3)
  - (A) publish an advanced notice of proposed rulemaking in the Federal Register to solicit comments on the report prepared under paragraph (2);
  - (B) provide all parties affected at least 60 days after publication to submit their views and comments; and
  - (C) during the 60-day period, consult with the Comptroller General and consider any recommendation the Comptroller General may make; and
- (4) publish a notice of proposed rulemaking in the Federal Register and provide all parties affected at least 60 days after publication to submit their views and comments.

**(d) EFFECTIVE DATES.**— Rules, regulations, cost accounting standards, and modifications thereof prescribed or amended under this chapter shall have the full force and effect of law, and shall become effective within 120 days after publication in the Federal Register in final form, unless the Board determines that a longer period is necessary. The Board shall determine implementation dates for contractors and subcontractors. The dates may not be later than the beginning of the second fiscal year of the contractor or subcontractor after the standard becomes effective.

**(e) ACCOMPANYING MATERIAL**—Rules, regulations, cost accounting standards, and modifications thereof prescribed or amended under this chapter shall be accompanied by prefatory comments and by illustrations, if necessary.

**(f) IMPLEMENTING REGULATIONS.**— The Board shall prescribe regulations for the implementation of cost accounting standards prescribed or interpreted under this section. The regulations shall be incorporated into the Federal Acquisition Regulation and shall require contractors and subcontractors as a condition of contracting with the Federal Government to--

- (1) disclose in writing their cost accounting practices, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs; and
- (2) agree to a contract price adjustment, with interest, for any increased costs paid to the contractor or subcontractor by the Federal Government because of a change in the contractor's or subcontractor's cost accounting practices or a failure by the contractor or subcontractor to comply with applicable cost accounting standards.

**(g) NONAPPLICATION OF CERTAIN SECTIONS OF TITLE 5.**-- Functions exercised under this chapter are not subject to sections 551, 553 to 559, and 701 to 706 of title 5.



1 **SEC. \_\_\_\_ . UNIFORMITY WITH THE MICRO-PURCHASE THRESHOLD.**

2 Section 4106(c) of title 41, United States Code, is amended by striking “\$2,500” and  
3 inserting “the micro-purchase threshold under section 1902 of this title”.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]**

**Section-by-Section Analysis**

This proposal seeks to bring uniformity to procurement thresholds following the increase of the micro-purchase threshold (MPT) from \$3,000 to \$10,000 in the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Public Law 115-91).<sup>2</sup> This proposal would make an identical change in threshold amount to acquisitions conducted through the issuance of task and delivery orders under multiple award contracts. .

Specifically, 41 U.S.C. 4106(c) requires fair opportunity to be provided to all contractors under a multiple award contract for orders over \$2,500 unless an exception applies. This threshold triggering the application of fair opportunity is comparable to the threshold that the Competition in Contracting Act provided for micro-purchases. As such, the \$2,500 figure should be aligned with the recently increased micro-purchase threshold, which is reducing complexity and increasing the efficiency and effectiveness of the Federal buying process for small businesses and others currently selling goods and services to the Government below this threshold.

**Budget Implications:** The proposal only addresses procurement processes and not amounts appropriated for the procurement of items or services.

**Changes to Existing Law:** This proposal would make the changes to the following sections of the United States Code:

**TITLE 41—PUBLIC CONTRACTS**

**SUBTITLE I—FEDERAL PROCUREMENT POLICY**

**DIVISION C—PROCUREMENT**

**CHAPTER 41—TASK AND DELIVERY ORDER CONTRACTS**

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<sup>2</sup> Section 806 of the FY 2018 NDAA increased the MPT for civilian agencies to \$10,000. The MPT for the Department of Defense was subsequently increased to \$10,000 by Section 821 of the FY 2019 NDAA (Public Law 115-232).

**§4106. Orders**

(a) Application.—This section applies to task and delivery order contracts entered into under sections 4103 and 4105 of this title.

(b) Actions Not Required for Issuance of Orders.—The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for the order under section 1708 of this title or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

(2) Except as provided in subsection (c), a competition (or a waiver of competition approved in accordance with section 3304(e) of this title) that is separate from that used for entering into the contract.

(c) Multiple Award Contracts.—When multiple contracts are awarded under section 4103(d)(1)(B) or 4105(f) of this title, all contractors awarded the contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of ~~\$2,500~~ the micro-purchase threshold under section 1902 of this title that is to be issued under any of the contracts, unless—

(1) the executive agency's need for the services or property ordered is of such unusual urgency that providing the opportunity to all of those contractors would result in unacceptable delays in fulfilling that need;

(2) only one of those contractors is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor to satisfy a minimum guarantee.

(d) Enhanced Competition for Orders in Excess of \$5,000,000.—In the case of a task or delivery order in excess of \$5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (c) is not met unless all such contractors are provided, at a minimum—

(1) a notice of the task or delivery order that includes a clear statement of the executive agency's requirements;

(2) a reasonable period of time to provide a proposal in response to the notice;

(3) disclosure of the significant factors and subfactors, including cost or price, that the executive agency expects to consider in evaluating such proposals, and their relative importance;

(4) in the case of an award that is to be made on a best value basis, a written statement documenting—

(A) the basis for the award; and

(B) the relative importance of quality and price or cost factors; and

(5) an opportunity for a post-award debriefing consistent with the requirements of section 3704 of this title.

(e) Statement of Work.—A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

(f) Protests.—

(1) Protest not authorized.—A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of \$10,000,000.

(2) Jurisdiction over protests.—Notwithstanding section 3556 of title 31, the Comptroller General shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

(g) Task and Delivery Order Ombudsman.—

(1) Appointment or designation and responsibilities.—The head of each executive agency who awards multiple task or delivery order contracts under section 4103(d)(1)(B) or 4105(f) of this title shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on those contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required under subsection (c).

(2) Who is eligible.—The task and delivery order ombudsman shall be a senior agency official who is independent of the contracting officer for the contracts and may be the executive agency's advocate for competition.

1 **SEC. \_\_\_\_ . STANDARDIZATION OF DOLLAR THRESHOLDS APPLICABLE TO TASK AND DELIVERY ORDER**  
2 **PROTESTS.**

3 Section 4106(f)(1)(B) of title 41, United States Code, is amended by striking “\$10,000,000” and  
4 inserting “\$25,000,000”.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]**

**Section-by-Section Analysis**

This proposal seeks to standardize the task and delivery order protest dollar threshold for defense and civilian agencies by raising the civilian agency threshold from \$10 million to equal the defense agency threshold at \$25 million. Standardization is necessary because the current disparity deprives defense agencies the benefit of its \$25 million threshold when entering into agreements with civilian agencies to award task and delivery orders against indefinite-delivery indefinite-quantity (IDIQ) contracts on their behalf.

Background

The Federal Acquisition Streamlining Act of 1994 (FASA) enacted procedures for IDIQ contracts.<sup>3</sup> Yet, FASA did not provide for protests of defense and civilian agency task and delivery orders issued under multiple-award IDIQ contracts, with the exception of those protests alleging that an order increases the scope, period, or maximum value of an underlying IDIQ contract. However, in 2008, the Government Accountability Office (GAO) was granted limited jurisdiction to hear the following protests for task and delivery orders awarded against a multiple award indefinite-delivery indefinite-quantity contracts:

- (A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or
- (B) a protest of an order valued in excess of \$10,000,000.<sup>4</sup>

These criteria applied to defense and civilian agencies and remained into effect until September 30, 2016, when GAO’s authority expired except for orders subject to title 10 of the United States Code. On December 14, 2016, GAO’s jurisdiction was reinstated,<sup>5</sup> and on December 23, 2016, the title 10 order protest threshold was raised to \$25 million, while the civilian agency threshold under title 41 remained at \$10 million.<sup>6</sup>

Rationale

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<sup>3</sup> Pub. L. No. 103-355, 108 Stat. 3243, 3253, 3264.

<sup>4</sup> See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843, 122 Stat. 3, 236-39 (codified as amended at 41 U.S.C. § 4106(f)).

<sup>5</sup> See Government Accountability Office Civilian Task and Delivery Order Protest Authority Act of 2016, Pub. L. No. 114-260, 130 Stat. 1361 (codified as amended at 41 U.S.C. § 4106(f)(3)).

<sup>6</sup> See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 835, 130 Stat. 2000, 2285 (codified as amended at 41 U.S.C. § 4106(f)).

Raising the civilian agency protest threshold to \$25 million will provide parity for all agencies, thereby simplifying protest procedures for ordering activities and interested bidders. Moreover, providing a consistent threshold for all agencies will not negatively impact bidding contractors because of statutory measures in place to promote competition. Additionally, actions are being taken to enhance debriefings for unsuccessful bidders in order to provide feedback that will improve their competitive performance and alleviate the need for some protests.

The bifurcation of the defense and civilian agency thresholds becomes problematic when defense agencies enlist civilian agencies to acquire mission essential solutions. For example, the General Services Administration (GSA) routinely performs assisted acquisitions on behalf of defense agencies yet is subject to the \$10 million protest threshold under title 41 of the United States Code.<sup>7</sup> This scenario was affirmed by GAO in its decision regarding HP Enterprise Services, LLC's protest of a task order awarded by GSA under its ALLIANT IDIQ contract to acquire various IT support services for the Department of Defense's Joint Service Provider.<sup>8</sup>

Standardizing the task and delivery order threshold would provide benefits without putting bidders at a competitive disadvantage. First, protest procedures at 41 U.S.C. 4106(f) will still allow interested parties to protest on the ground that the task or delivery order increases the scope, period, or maximum value of the contract under which the order is issued. Secondly, 41 U.S.C. 4106(c) will still require agencies to ensure contractors are afforded a fair opportunity to be considered for the award of task and delivery orders.

Finally, defense and civilian agencies are taking steps to enhance debriefings and thereby alleviate the need for some protests. The Department of Defense has implemented procedures enacted by section 818 of the National Defense Authorization Act for Fiscal Year 2018<sup>9</sup> that require defense agencies to provide unsuccessful offerors an opportunity to submit additional questions related to debriefings within two business days after receiving a debriefing. Additionally, GSA launched the IN-depth Feedback through Open Reporting Methods (INFORM) pilot to improve the—

- quality of post-award communications with industry
- usefulness of post-award communications with industry; and
- bidders' perception of the fairness of the evaluation process.

**Budget Implications:** The proposal only addresses procurement processes and not amounts appropriated for the procurement of items or services.

**Changes to Existing Law:** This proposal would make the following changes to section 4106(f) of title 41, United States Code:

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<sup>7</sup> 10 U.S.C § 2303(a) states that Chapter 137 of title 10, which includes the \$25 million threshold at § 2304c(e), is applicable to the Department of Defense, Department of the Army, the Department of the Navy, the Department of the Air Force, the Coast Guard, and the National Aeronautics and Space Administration.

<sup>8</sup> See U.S. Government Accountability Office decision in the matter of HP Enterprise Services, LLC—Reconsideration, B-413382.3 (January 26, 2017).

<sup>9</sup> Pub. L. No. 115-91.

## **§4106. Orders**

(a) APPLICATION.—This section applies to task and delivery order contracts entered into under sections 4103 and 4105 of this title.

(b) ACTIONS NOT REQUIRED FOR ISSUANCE OF ORDERS.—The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for the order under section 1708 of this title or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

(2) Except as provided in subsection (c), a competition (or a waiver of competition approved in accordance with section 3304(e) of this title) that is separate from that used for entering into the contract.

(c) MULTIPLE AWARD CONTRACTS.—When multiple contracts are awarded under section 4103(d)(1)(B) or 4105(f) of this title, all contractors awarded the contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts, unless—

(1) the executive agency's need for the services or property ordered is of such unusual urgency that providing the opportunity to all of those contractors would result in unacceptable delays in fulfilling that need;

(2) only one of those contractors is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor to satisfy a minimum guarantee.

(d) ENHANCED COMPETITION FOR ORDERS IN EXCESS OF \$5,000,000.—In the case of a task or delivery order in excess of \$5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (c) is not met unless all such contractors are provided, at a minimum—

(1) a notice of the task or delivery order that includes a clear statement of the executive agency's requirements;

(2) a reasonable period of time to provide a proposal in response to the notice;

(3) disclosure of the significant factors and subfactors, including cost or price, that the executive agency expects to consider in evaluating such proposals, and their relative importance;

(4) in the case of an award that is to be made on a best value basis, a written statement documenting—

(A) the basis for the award; and

(B) the relative importance of quality and price or cost factors; and

(5) an opportunity for a post-award debriefing consistent with the requirements of section 3704 of this title.

(e) STATEMENT OF WORK.—A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

(f) PROTESTS.—

(1) PROTEST NOT AUTHORIZED.—A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of ~~\$10,000,000~~ \$25,000,000.

(2) JURISDICTION OVER PROTESTS.—Notwithstanding section 3556 of title 31, the Comptroller General shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

**SEC. \_\_\_\_ . REMOVAL OF RECOVERED MATERIALS CERTIFICATION REQUIREMENT.**

Section 6962 of title 42, United States Code, is amended—

(1) in subsection (c)(3)(A), by striking “contracting officers shall require that vendors” and inserting “contractors shall ensure that to the maximum extent practicable”;

(2) in clause (i) of subsection (c)(3)(A), by striking “certify that”; and

(3) in subsection (c)(3)(B), by striking “\$100,000” and inserting “the simplified

acquisition threshold under section 134 of title 41, United States Code”.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]**

**Section-by-Section Analysis**

This proposal aims to revise 42 U.S.C. 6962(c)(3)(A), which requires certification by Federal contractors to estimate the percentage of the total recovered material content for U.S. Environmental Protection Agency (EPA)-designated item(s) delivered and/or used in contract performance, and to submit a certified report to their contracting officer.

This certification is unnecessary because compliance with recovered/recycled product requirements can be verified through the normal contract administration process in accordance with the Federal Acquisition Regulation and the Resource Conservation and Recovery Act. Requiring the contractor to submit a separate certification places an additional burden on the contractor that is unnecessary and duplicative. Further, contracting officers can validate compliance by checking a manufacturer’s product documentation or EPA’s Comprehensive Procurement Guideline (CPG) Product Supplier Directory.

This proposal also seeks to make contractors, and not contracting officers, responsible for ensuring compliance with the recovered/recycled product requirements.

In addition, this proposal aims to facilitate greater uniformity in procurement terminology by replacing a dollar figure as the threshold for application with the “simplified acquisition threshold.”

**Budget Implications:** The proposal only addresses procurement processes and not amounts appropriated for the procurement of items or services.

**Changes to Existing Law:** This proposal would make the following changes to paragraph 6962(c)(3) of title 42, United States Code:



# TITLE 42—THE PUBLIC HEALTH AND WELFARE

## CHAPTER 82—SOLID WASTE DISPOSAL

### SUBCHAPTER VI—FEDERAL RESPONSIBILITIES

#### §6962. Federal procurement

##### *(a) Application of section*

Except as provided in subsection (b), a procuring agency shall comply with the requirements set forth in this section and any regulations issued under this section, with respect to any purchase or acquisition of a procurement item where the purchase price of the item exceeds \$10,000 or where the quantity of such items or of functionally equivalent items purchased or acquired in the course of the preceding fiscal year was \$10,000 or more.

##### *(b) Procurement subject to other law*

Any procurement, by any procuring agency, which is subject to regulations of the Administrator under section 6964 of this title (as promulgated before October 21, 1976, under comparable provisions of prior law) shall not be subject to the requirements of this section to the extent that such requirements are inconsistent with such regulations.

##### *(c) Requirements*

(1) After the date specified in applicable guidelines prepared pursuant to subsection (e) of this section, each procuring agency which procures any items designated in such guidelines shall procure such items composed of the highest percentage of recovered materials practicable (and in the case of paper, the highest percentage of the postconsumer recovered materials referred to in subsection (h)(1) practicable), consistent with maintaining a satisfactory level of competition, considering such guidelines. The decision not to procure such items shall be based on a determination that such procurement items—

(A) are not reasonably available within a reasonable period of time;

(B) fail to meet the performance standards set forth in the applicable specifications or fail to meet the reasonable performance standards of the procuring agencies; or

(C) are only available at an unreasonable price. Any determination under subparagraph (B) shall be made on the basis of the guidelines of the National Institute of Standards and Technology in any case in which such material is covered by such guidelines.

(2) Agencies that generate heat, mechanical, or electrical energy from fossil fuel in systems that have the technical capability of using energy or fuels derived from solid waste as a primary or supplementary fuel shall use such capability to the maximum extent practicable.

(3)(A) After the date specified in any applicable guidelines prepared pursuant to subsection (e) of this section, ~~contracting officers shall require that vendors~~ contractors shall ensure that to the maximum extent practicable:

(i) ~~certify that~~ the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by applicable specifications or other contractual requirements and

(ii) estimate the percentage of the total material utilized for the performance of the contract which is recovered materials.

(B) Clause (ii) of subparagraph (A) applies only to a contract in an amount greater than \$100,000 the simplified acquisition threshold under section 134 of title 41, United States Code.

*(d) Specifications*

All Federal agencies that have the responsibility for drafting or reviewing specifications for procurement items procured by Federal agencies shall—

(1) as expeditiously as possible but in any event no later than eighteen months after November 8, 1984, eliminate from such specifications—

(A) any exclusion of recovered materials and

(B) any requirement that items be manufactured from virgin materials; and

(2) within one year after the date of publication of applicable guidelines under subsection (e), or as otherwise specified in such guidelines, assure that such specifications require the use of recovered materials to the maximum extent possible without jeopardizing the intended end use of the item.

*(e) Guidelines*

The Administrator, after consultation with the Administrator of General Services, the Secretary of Commerce (acting through the National Institute of Standards and Technology), and the Director of the Government Publishing Office, shall prepare, and from time to time revise, guidelines for the use of procuring agencies in complying with the requirements of this section. Such guidelines shall—

(1) designate those items which are or can be produced with recovered materials and whose procurement by procuring agencies will carry out the objectives of this section, and in the case of paper, provide for maximizing the use of post consumer recovered materials referred to in subsection (h)(1); and

(2) set forth recommended practices with respect to the procurement of recovered materials and items containing such materials and with respect to certification by vendors of the percentage of recovered materials used, and shall provide information as to the availability, relative price, and performance of such materials and items and where appropriate shall recommend the level of recovered material to be contained in the procured product. The Administrator shall prepare final guidelines for paper within one hundred and eighty days after November 8, 1984, and for three additional product categories (including tires) by October 1, 1985. In making the designation under paragraph (1), the Administrator shall consider, but is not limited in his considerations, to—

(A) the availability of such items;

(B) the impact of the procurement of such items by procuring agencies on the volume of solid waste which must be treated, stored or disposed of;

(C) the economic and technological feasibility of producing and using such items; and

(D) other uses for such recovered materials.

*(f) Procurement of services*

A procuring agency shall, to the maximum extent practicable, manage or arrange for the procurement of solid waste management services in a manner which maximizes energy and resource recovery.

(g) *Executive Office*

The Office of Procurement Policy in the Executive Office of the President, in cooperation with the Administrator, shall implement the requirements of this section. It shall be the responsibility of the Office of Procurement Policy to coordinate this policy with other policies for Federal procurement, in such a way as to maximize the use of recovered resources, and to, every two years beginning in 1984, report to the Congress on actions taken by Federal agencies and the progress made in the implementation of this section, including agency compliance with subsection (d).

(h) *"Recovered materials" defined*

As used in this section, in the case of paper products, the term "recovered materials" includes—

(1) postconsumer materials such as—

(A) paper, paperboard, and fibrous wastes from retail stores, office buildings, homes, and so forth, after they have passed through their end-usage as a consumer item, including: used corrugated boxes; old newspapers; old magazines; mixed waste paper; tabulating cards; and used cordage; and

(B) all paper, paperboard, and fibrous wastes that enter and are collected from municipal solid waste, and

(2) manufacturing, forest residues, and other wastes such as—

(A) dry paper and paperboard waste generated after completion of the papermaking process (that is, those manufacturing operations up to and including the cutting and trimming of the paper machine reel into smaller rolls or rough sheets) including: envelope cuttings, bindery trimmings, and other paper and paperboard waste, resulting from printing, cutting, forming, and other converting operations; bag, box, and carton manufacturing wastes; and butt rolls, mill wrappers, and rejected unused stock; and

(B) finished paper and paperboard from obsolete inventories of paper and paperboard manufacturers, merchants, wholesalers, dealers, printers, converters, or others;

(C) fibrous byproducts of harvesting, manufacturing, extractive, or wood-cutting processes, flax, straw, linters, bagasse, slash, and other forest residues;

(D) wastes generated by the conversion of goods made from fibrous material (that is, waste rope from cordage manufacture, textile mill waste, and cuttings); and

(E) fibers recovered from waste water which otherwise would enter the waste stream.

(i) *Procurement program*

(1) Within one year after the date of publication of applicable guidelines under subsection (e), each procuring agency shall develop an affirmative procurement program which will assure that items composed of recovered materials will be purchased to the maximum extent practicable and which is consistent with applicable provisions of Federal procurement law.

(2) Each affirmative procurement program required under this subsection shall, at a minimum, contain—

(A) a recovered materials preference program;

(B) an agency promotion program to promote the preference program adopted under subparagraph (A);

(C) a program for requiring estimates of the total percentage of recovered material utilized in the performance of a contract; certification of minimum recovered material

content actually utilized, where appropriate; and reasonable verification procedures for estimates and certifications; and

(D) annual review and monitoring of the effectiveness of an agency's affirmative procurement program.

In the case of paper, the recovered materials preference program required under subparagraph (A) shall provide for the maximum use of the post consumer recovered materials referred to in subsection (h)(1).

(3) In developing the preference program, the following options shall be considered for adoption:

(A) Case-by-Case Policy Development: Subject to the limitations of subsection (c)(1)(A) through (C), a policy of awarding contracts to the vendor offering an item composed of the highest percentage of recovered materials practicable (and in the case of paper, the highest percentage of the post consumer recovered materials referred to in subsection (h)(1)). Subject to such limitations, agencies may make an award to a vendor offering items with less than the maximum recovered materials content.

(B) Minimum Content Standards: Minimum recovered materials content specifications which are set in such a way as to assure that the recovered materials content (and in the case of paper, the content of post consumer materials referred to in subsection (h)(1)) required is the maximum available without jeopardizing the intended end use of the item, or violating the limitations of subsection (c)(1)(A) through (C).

Procuring agencies shall adopt one of the options set forth in subparagraphs (A) and (B) or a substantially equivalent alternative, for inclusion in the affirmative procurement program.