

Analysis of Section 308: Modifications to Commercial Solutions Openings

Key Points

- Section 308 of the Forged Act modifies Section 3458 of Title 10, United States Code, concerning Commercial Solutions Openings (CSOs).
- The modifications aim to enhance the efficiency and scope of CSO usage for acquiring innovative commercial items, services, and nondevelopmental items.
- These changes include allowing sole-source follow-on contracts without further justification and altering the delegation authority for contracts exceeding \$100 million.
- A new subsection mandates open topic and enduring general solicitations for nontraditional defense contractors.
- The preferred acquisition pathways for these solicitations are identified as urgent capability acquisition, middle tier of acquisition, software acquisition, or services acquisition.

History of the Recommendation

The concept of Commercial Solutions Openings (CSOs) has evolved over time to streamline the Department of Defense's (DoD) acquisition of innovative commercial products and services¹. The Defense Innovation Unit (DIU) established an initial CSO process in 2016 to accelerate the adoption of commercial technology within the military¹. This initial model focused on a three-phase competitive process leading to prototype Other Transaction (OT) agreements¹. Recognizing the potential benefits, Congress provided temporary CSO authority to the DoD through a pilot program in the FY 2017 National Defense Authorization Act (NDAA), which differed somewhat from DIU's model¹. This pilot program aimed to address capability gaps using commercial solutions¹. The Under Secretary of Defense for Acquisition and Sustainment (USD) also issued guidance to expand the use of the CSO program¹. The authority for CSOs was made permanent by the FY 2022 NDAA, codified under 10 U.S.C. § 3458¹. This legislative history indicates a growing recognition of the need for more agile acquisition methods to keep pace with commercial technological advancements³. Section 308 of the Forged Act represents a further step in refining and expanding the utility of CSOs within the DoD.

Desired Effect of the Recommendation

The modifications introduced by Section 308 are intended to have several positive effects on the DoD's ability to acquire and implement innovative commercial solutions.

- **Desired Effect 1: Enhanced Acquisition Speed and Flexibility:** The primary aim of these modifications is to expedite the process of acquiring cutting-edge commercial technologies⁵. By streamlining procedures and allowing for sole-source follow-on contracts, the DoD can potentially reduce the time and

administrative burden associated with traditional procurement methods⁵. This increased flexibility is crucial for rapidly addressing emerging threats and capability gaps¹. The ability to issue follow-on contracts without further justification [Forged Act] will allow for quicker scaling and deployment of successful prototypes or initial solutions.

- **Desired Effect 2: Increased Engagement with Nontraditional Defense Contractors:** Section 308 explicitly mandates the establishment of open topic and enduring general solicitations specifically for nontraditional defense contractors [Forged Act]. This focus aims to broaden the DoD's access to innovative solutions from companies that may not typically engage with the government due to the complexities of traditional procurement⁶. By creating a dedicated pathway, the DoD hopes to tap into a wider pool of commercial innovation and foster a stronger national security innovation base¹.
- **Desired Effect 3: Improved Transition to Operational Capabilities:** The recommendation emphasizes the use of urgent capability acquisition, middle tier of acquisition, software acquisition, or services acquisition pathways for developing and producing operational military capabilities sourced through these general solicitations [Forged Act]. This preference signals an intent to ensure that solutions acquired via CSOs can be efficiently integrated into existing operational frameworks and scaled for broader use within the DoD¹. This linkage to established acquisition pathways should facilitate a smoother transition from initial concept to fielded capability.
- **Desired Effect 4: Streamlined Approval Processes for Larger Awards:** By shifting the approval authority for contracts exceeding \$100 million from the Under Secretary of Defense for Acquisition and Sustainment or the relevant service acquisition executive to the head of the contracting activity (or their designated delegate, at the general or flag officer/equivalent civilian grade level) [Forged Act], Section 308 aims to decentralize and potentially expedite the approval process for significant CSO awards. This change acknowledges the growing importance and scale of CSO-based acquisitions¹.
- **Desired Effect 5: Encouraging Innovation in Specific DoD Entities:** The requirement for each systems command, science and technology reinvention laboratory, and portfolio acquisition executive to establish an open topic and enduring general solicitation [Forged Act] is likely intended to foster a culture of continuous innovation within these key DoD organizations. By providing a dedicated mechanism for engaging with nontraditional contractors, these entities are empowered to proactively seek and evaluate novel commercial solutions relevant to their specific needs and missions.

Potential Negative Impacts of the Recommendations

- **Potential Negative Impact 1: Risk of Reduced Competition in Follow-On Awards:** While the ability to issue sole-source follow-on contracts can accelerate deployment, it also carries the risk of reducing competition in the long term⁵. Once an initial vendor is selected through the competitive CSO process, the lack of further competition for subsequent phases or larger-scale production could lead to higher costs or a lock-in to potentially less optimal solutions over time.
- **Potential Negative Impact 2: Increased Workload and Responsibility for Contracting Activities:** The delegation of approval authority for larger contracts to the head of the contracting activity, while potentially speeding up approvals, will also place a greater burden of responsibility on these individuals and their teams [Forged Act]. This increased workload could strain resources and potentially lead to delays if contracting activities are not adequately prepared or resourced to handle the additional oversight and decision-making requirements.
- **Potential Negative Impact 3: Challenges in Defining "Nontraditional Defense Contractor":** The effectiveness of the provision targeting nontraditional defense contractors hinges on a clear and consistently applied definition [Forged Act]. Ambiguity or inconsistent interpretation of this term could lead to confusion among potential vendors and within the DoD, potentially hindering the intended outreach to new entrants in the defense market.
- **Potential Negative Impact 4: Potential for Inefficient Use of Acquisition Pathways:** While recommending specific acquisition pathways aims to streamline the transition of CSO-sourced solutions, a rigid adherence to these pathways may not always be the most efficient or appropriate approach for every type of commercial technology acquired [Forged Act]. Some innovative solutions might require more tailored acquisition strategies that fall outside these preferred models.
- **Potential Negative Impact 5: Oversight and Accountability Concerns with Streamlined Processes:** The very nature of CSOs, with their streamlined procedures and reduced regulatory burden compared to traditional FAR-based acquisitions, could raise concerns about oversight and accountability⁵. It will be crucial to ensure that adequate safeguards are in place to prevent waste, fraud, and abuse, particularly with the expanded use and higher potential contract values associated with these modifications.

Mitigations the Organization Will Take to Diminish the Negative Impacts

- **Mitigation of Negative Impact 1:** To mitigate the risk of reduced competition in follow-on awards, the DoD can implement strategies such as establishing clear

performance metrics and milestones in the initial CSO award. Regular performance reviews and the potential for re-competition after a defined period or upon failure to meet key objectives can help maintain a degree of competitive pressure even in sole-source follow-on scenarios. Furthermore, the DoD can explore options for modular contracting, allowing for the introduction of new vendors for specific components or capabilities in later phases.

- **Mitigation of Negative Impact 2:** To address the increased workload on contracting activities, the DoD should invest in training and resources to ensure that contracting personnel are well-equipped to handle the expanded responsibilities and higher-value contracts associated with the modified CSO process. This could include specialized training on evaluating innovative commercial technologies and managing non-traditional vendor relationships. Additionally, the DoD could consider establishing dedicated teams or centers of excellence focused on CSO acquisitions to provide expertise and support to contracting activities across the department.
- **Mitigation of Negative Impact 3:** To ensure clarity regarding the definition of "nontraditional defense contractor," the DoD should issue clear and comprehensive guidance on the criteria used to classify a vendor as such [Forged Act]. This guidance should be widely disseminated to both DoD personnel and potential contractors. Regular review and updates to this definition may be necessary to adapt to evolving market dynamics and ensure the intended beneficiaries are being reached.
- **Mitigation of Negative Impact 4:** While the recommendation identifies preferred acquisition pathways, the DoD should maintain flexibility to utilize other appropriate pathways when they offer a more effective or efficient approach for specific commercial technologies. Guidance should emphasize a tailored approach based on the unique characteristics of the acquired solution and the specific needs of the program, rather than a strict adherence to the listed pathways in all circumstances.
- **Mitigation of Negative Impact 5:** To address oversight and accountability concerns, the DoD should develop robust monitoring and evaluation mechanisms for CSO acquisitions. This could include enhanced reporting requirements, independent audits, and regular reviews of CSO program outcomes. Emphasis should be placed on transparency and data collection to track the effectiveness of CSOs and identify any potential areas of concern. Clear guidelines on ethical considerations and conflict-of-interest avoidance are also crucial in this less regulated environment.

Several categories of DoD personnel will be most directly affected by the modifications to Commercial Solutions Openings.

- **Contracting Officers and Specialists:** These individuals will be on the front lines of implementing the revised CSO procedures⁴. They will need to adapt to the new authorities, including the ability to issue sole-source follow-on contracts and the revised delegation authority for larger awards. Their workload may increase due to the potential for a greater volume of CSO solicitations and awards, particularly those involving nontraditional defense contractors. They will also need to develop expertise in evaluating proposals from these vendors and understanding commercial technology landscapes.
- **Program Managers:** Program Managers seeking rapid acquisition of commercial technology will be significantly impacted. The modifications aim to provide them with more streamlined and flexible tools to address their needs. They will need to understand how to leverage the new CSO authorities, particularly the open topic solicitations for nontraditional contractors and the preferred acquisition pathways, to accelerate the delivery of capabilities to their users.
- **Heads of Contracting Activities (HCAs) and their Delegates:** With the delegation of approval authority for contracts exceeding \$100 million, HCAs and their designated general/flag officer or equivalent civilian delegates will assume greater responsibility for these significant awards [Forged Act]. They will need to establish processes for reviewing and approving these contracts, ensuring appropriate due diligence and risk assessment.
- **Personnel in Systems Commands, Science and Technology Reinvention Laboratories, and Portfolio Acquisition Executive Offices:** These personnel will be responsible for establishing and managing the new open topic and enduring general solicitations specifically for nontraditional defense contractors [Forged Act]. This will require them to develop strategies for outreach, proposal evaluation, and engagement with this unique vendor community.

Stakeholders Opposed and Rationale for Opposition

Several stakeholders might oppose the modifications to Commercial Solutions Openings for various reasons.

- **Traditional Defense Contractors:** These established contractors may view the increased emphasis on nontraditional vendors and the potential for sole-source follow-on awards to those vendors as a threat to their existing market share and revenue streams. They might argue that these changes could lead to a less level playing field and potentially favor companies with less experience in defense contracting.
- **Government Oversight Agencies (e.g., GAO):** While supportive of efficient acquisition, oversight agencies might raise concerns about the potential for

reduced competition, increased risk of fraud and abuse, and the adequacy of oversight mechanisms associated with the streamlined CSO procedures and sole-source follow-on authority. They may advocate for robust reporting requirements and independent evaluations to ensure accountability.

- **Some Members of Congress:** Certain members of Congress might express concerns about the potential for bypassing traditional acquisition processes and oversight mechanisms. They may question the justification for sole-source follow-on awards and the potential impact on small businesses that are not classified as "nontraditional." They might also scrutinize the delegation of approval authority for large contracts.
- **Internal DoD Acquisition Professionals (concerned with process):** Some acquisition professionals within the DoD who are accustomed to traditional, highly regulated procurement processes might be hesitant about the increased flexibility and reduced oversight associated with CSOs. They may express concerns about potential risks and the need for clear guidance and training to ensure proper implementation.

Additional Resources

The DoD will likely require several additional resources to successfully implement the modifications to Commercial Solutions Openings.

- **Increased Funding:** The expanded use of CSOs, particularly for larger-scale follow-on contracts and the establishment of enduring general solicitations, will likely require increased budgetary allocations to support these acquisition activities.
- **Specialized Training Programs:** Contracting officers, program managers, and other relevant personnel will need specialized training on the revised CSO procedures, best practices for engaging with nontraditional defense contractors, and the nuances of evaluating innovative commercial technologies. This training should also cover the preferred acquisition pathways for CSO-sourced solutions.
- **Dedicated Personnel:** The establishment and management of open topic and enduring general solicitations for each systems command, science and technology reinvention laboratory, and portfolio acquisition executive may necessitate the allocation of dedicated personnel with expertise in outreach, technology scouting, and proposal evaluation for nontraditional vendors.
- **Enhanced IT Infrastructure and Tools:** To effectively manage the increased volume of CSO solicitations, proposals, and awards, the DoD may need to invest in enhanced IT infrastructure and tools to support these processes, including platforms for vendor outreach, proposal submission, and evaluation.
- **Legal and Policy Guidance:** Clear and comprehensive legal and policy guidance

will be essential to ensure consistent and effective implementation of the modified CSO procedures across the DoD. This guidance should address the definition of "nontraditional defense contractor," the appropriate use of sole-source follow-on authority, and the delegation of approval authority for larger contracts.

Measures of Success

The DoD should measure the success and effectiveness of the modifications to Commercial Solutions Openings based on several key indicators.

- **Increased Speed of Acquisition:** A primary measure of success will be a demonstrable reduction in the time required to acquire innovative commercial products and services using the modified CSO procedures compared to traditional methods. Metrics such as the time from identification of a need to contract award and the time to initial operational capability can be tracked.
- **Greater Participation of Nontraditional Defense Contractors:** The number of nontraditional defense contractors submitting proposals and receiving awards through the open topic and enduring general solicitations should be tracked as a measure of the provision's effectiveness in broadening the DoD's vendor base.
- **Successful Transition to Operational Capabilities:** The rate at which solutions acquired through CSOs are successfully transitioned into operational use via the preferred acquisition pathways (urgent capability acquisition, middle tier, software, services) will be a critical indicator of success. Metrics could include the number of prototypes that transition to production and the time taken for this transition.
- **Cost-Effectiveness of Acquired Solutions:** While speed and innovation are key, the DoD should also assess the cost-effectiveness of solutions acquired through the modified CSO process. This could involve comparing the cost of CSO-sourced solutions to those acquired through traditional methods, as well as evaluating the return on investment in terms of improved capabilities or reduced operational costs.
- **Feedback from End Users and Program Managers:** Gathering qualitative feedback from program managers and end users on the effectiveness and impact of solutions acquired through the modified CSO process will be essential for understanding the real-world benefits and identifying areas for improvement.

Alternative Approaches

While Section 308 aims to enhance the use of CSOs, there are alternative approaches that could potentially achieve similar outcomes, either independently or in conjunction with these modifications.

- **Further Streamlining Traditional FAR-Based Acquisitions:** Instead of solely

focusing on CSOs, the DoD could explore additional ways to streamline traditional Federal Acquisition Regulation (FAR)-based acquisition processes for commercial items. This could involve reducing bureaucratic hurdles, increasing the use of simplified acquisition procedures, and providing more flexibility to contracting officers in negotiating terms and conditions for commercial products and services⁵.

- **Expanding the Use of Other Transaction Authority (OTA):** Other Transaction Authority provides even greater flexibility than CSOs and is often used for prototype projects and research and development¹. Expanding the use of OTAs, potentially with streamlined processes for transitioning successful prototypes to production, could be another avenue for rapidly acquiring innovative commercial solutions.
- **Enhanced Collaboration with Commercial Industry:** The DoD could invest in more proactive and continuous engagement with commercial industry through mechanisms such as industry days, technology scouting initiatives, and collaborative research and development agreements. This could help the DoD better understand emerging commercial technologies and build relationships with potential vendors, regardless of the specific acquisition mechanism used.
- **Improving Data Rights and Intellectual Property Policies:** One of the challenges in acquiring commercial technology is often the negotiation of data rights and intellectual property⁶. Developing more flexible and commercially aligned policies in this area could encourage greater participation from commercial companies and facilitate the adoption of their innovative solutions.

Section Specific Question 1: What changes does Section 308 make to the procedures, authorities, or limitations associated with using Commercial Solutions Openings (CSOs) for acquiring innovative commercial items? How does this affect Program Managers seeking rapid acquisition of commercial tech?

Section 308 introduces several key changes to the procedures and authorities related to CSOs. Firstly, it explicitly allows the Secretary of Defense and Secretaries of the military departments to issue sole-source follow-on contracts or agreements, without further justification, to recipients initially selected through a competitive CSO process [Forged Act]. This significantly streamlines the process for scaling successful prototypes or initial deployments. Secondly, it alters the delegation authority for contracts exceeding \$100 million, shifting it from higher-level acquisition executives to the head of the contracting activity (or a designated delegate at the general/flag officer equivalent level) [Forged Act]. This aims to expedite the approval process for larger CSO awards. Thirdly, Section 308 mandates the establishment of open topic

and enduring general solicitations specifically for nontraditional defense contractors within each systems command, science and technology reinvention laboratory, and portfolio acquisition executive's purview [Forged Act]. Finally, it specifies the preferred acquisition pathways for capabilities developed through these solicitations as urgent capability acquisition, middle tier of acquisition, software acquisition, or services acquisition [Forged Act].

For Program Managers seeking rapid acquisition of commercial technology, these changes are likely to be highly beneficial. The ability to pursue sole-source follow-on contracts will significantly accelerate the transition from successful prototypes to operational capabilities. The decentralized approval authority for larger contracts has the potential to reduce administrative delays. The focus on nontraditional contractors and the establishment of dedicated solicitations may provide Program Managers with access to a wider range of innovative solutions and vendors they might not have encountered through traditional procurement methods. The emphasis on specific acquisition pathways should also facilitate a more streamlined integration of commercially sourced technologies into existing DoD programs.

Section Specific Question 2: (This question was not provided in the initial prompt.)

Summary

Section 308 of the Forged Act introduces significant modifications to the existing authority for Commercial Solutions Openings within the Department of Defense. These changes aim to enhance the speed, flexibility, and scope of CSO usage, particularly in engaging with nontraditional defense contractors and facilitating the transition of innovative commercial solutions to operational capabilities. By allowing sole-source follow-on contracts, decentralizing approval authority for larger awards, and mandating open solicitations for nontraditional vendors, the provision seeks to streamline the acquisition process and broaden the DoD's access to cutting-edge commercial technologies. While these modifications offer numerous potential benefits for rapid acquisition and innovation, they also present potential challenges related to competition, oversight, and the workload of contracting personnel. The DoD will need to implement appropriate mitigation strategies, invest in necessary resources, and establish effective measures of success to fully realize the intended positive outcomes of Section 308.

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