

Analysis of Section 319: Modifications to Steps to Identify and Address Potential Unfair Competitive Advantage of Technical Advisors to Acquisition Officials

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Key Points

Section 319 of the Forged Act introduces critical modifications to the process by which the Department of Defense (DoD) identifies and addresses potential unfair competitive advantages held by entities providing technical advice to acquisition officials, particularly in the realm of research and development awards¹. This provision mandates that the Secretary of Defense must issue guidance within 180 days of the Act's enactment, outlining specific steps to identify and prevent such advantages¹. The legislation defines "potentially unfair competitive advantage" as unequal access to acquisition officials responsible for award decisions or resource allocation, or to acquisition information relevant to these decisions¹. Furthermore, it specifies the types of entities considered as "providing technical advice to acquisition officials," including science and technology reinvention laboratories (STRs), federally funded research and development centers (FFRDCs), and other nonprofit entities engaged in systems engineering and technical direction, technical evaluations, preparation of specifications or work statements, or general technical advice on defense acquisition programs¹.

The provision necessitates a comprehensive report to be submitted to the Senate and House Armed Services Committees within one year of the Act's enactment¹. This report must detail the policies established under Section 319, specifically describing how employees or assigned personnel of the defined entities will be prevented from performing acquisition functions, including the development, award, or administration of contracts within program offices¹. Additionally, the report must outline measures to prevent these individuals from formulating, overseeing, or evaluating performance on developmental or operational testing, or experimentation¹. The legislation also mandates the establishment of a waiver process that would allow these individuals to provide technical advice under very specific conditions, including that the individual has never supported a product, service, or development of a modular open system architecture that may compete with or be required by the acquisition effort¹. This waiver process must also include mechanisms for reporting potential violations, maintaining effective oversight, and establishing appropriate disciplinary actions for non-compliance¹. Finally, the report must include information on pass-through

charges levied by STRLs when receiving funded work from DoD program offices, detailing the amounts charged by each laboratory and the ultimate uses of these funds ¹. Significantly, Section 319 also repeals Section 881 of the National Defense Authorization Act for Fiscal Year 2016, indicating a shift in the legislative approach to this issue ¹. This repeal suggests a move towards more targeted regulations concerning the specific context of technical advisors in R&D, potentially reflecting a perceived inadequacy of the broader provisions of Section 881 ². The urgency implied by the 180-day deadline for issuing guidance underscores the importance placed on addressing this potential vulnerability in the defense acquisition process ¹.

History of the recommendation

The principle of fostering competition in defense acquisition has a long history within the United States, with formal bidding processes being introduced as early as 1781 ³. Over time, legislation has increasingly emphasized the importance of competitive strategies in government contracting, aiming to maximize efficiency and prevent undue influence ³. The concept of unfair competitive advantage, particularly in the context of contractors with prior government work, has been recognized by both the Government Accountability Office (GAO) and the Court of Federal Claims ⁴. These entities have historically differentiated between a "natural advantage" derived from experience and an "unfair competitive advantage" gained through privileged access to information or officials ⁴.

Concerns surrounding the potential for unfair competitive advantages have often centered on the movement of individuals between government service and the private sector, commonly referred to as the "revolving door" ⁵. The GAO has substantiated protests where offerors were found to have gained an unfair advantage by hiring former agency officials with access to non-public, competitively sensitive information ⁵. This highlights a long-standing awareness of the risks associated with unequal access to information in the procurement process. Efforts to enhance competition in defense contracting were further codified in legislation such as the Weapon Systems Acquisition Reform Act of 2009, which mandated competition at both the prime and subcontractor levels throughout the lifecycle of major defense acquisition programs ³.

The National Defense Authorization Act for Fiscal Year 2016 included Section 881, which focused on ensuring that oversight efforts within the DoD acquisition system did not lead to unnecessary delays or increases in program costs ². This provision took a broader approach to acquisition efficiency, contrasting with the more specific focus of Section 319 on the potential conflicts of interest arising from technical advisory roles in R&D. The legislative history of the NDAA for FY16 reveals a comprehensive bill

addressing a wide range of defense-related topics². The enactment of the Preventing Organizational Conflicts of Interest in Federal Acquisition Act in December 2022⁷ signaled a renewed emphasis on addressing OCI across the federal government, requiring updates to the Federal Acquisition Regulation (FAR). This act mandated definitions and guidance related to various types of OCIs, including those involving relationships with both domestic and foreign entities⁸.

The GAO has consistently reported on organizational conflicts of interest within defense contracting, raising concerns about consulting services provided to both the U.S. government and potential adversaries¹³. These reports have underscored the need for improved identification, assessment, and mitigation of such risks¹³. The Defense Science Board (DSB), an advisory committee to the Secretary of Defense, also produces reports on various aspects of defense acquisition¹⁸, and it is plausible that their findings and recommendations have contributed to the legislative focus on the role and potential conflicts of technical advisors. The historical trend indicates a growing recognition of the complexities and potential risks associated with organizational conflicts of interest in defense acquisition, leading to more specific and targeted legislative interventions like Section 319. The shift from the broader focus of Section 881 of the FY16 NDAA to the more targeted approach of Section 319 suggests a deliberate effort to address the specific ethical considerations inherent in the relationship between technical advisors and acquisition officials in the context of R&D.

Desired Effect of the recommendation

The primary aim of Section 319 is to prevent entities providing technical advice to acquisition officials from gaining an unfair competitive advantage in the award of research and development work¹. This is intended to foster a more equitable and transparent acquisition process, ensuring that contract awards are based on merit rather than privileged access or influence.

One key desired effect is to ensure equal access to acquisition officials and relevant information for all potential bidders¹. By defining "potentially unfair competitive advantage" as unequal access, the provision directly targets situations where technical advisors might leverage their close relationships with acquisition officials or their access to non-public information to favor certain contractors, potentially including themselves or their affiliates, in future competitions.

Another significant desired effect is to establish a clear separation between the provision of technical advice and the performance of acquisition functions¹. By explicitly preventing employees of technical advisory entities from engaging in

contract development, award, or administration, Section 319 seeks to eliminate the potential for these advisors to directly influence the acquisition outcomes in areas where they may have a vested interest. This separation is crucial for maintaining the objectivity and impartiality of the technical advice provided.

Furthermore, the provision aims to prevent technical advisors from influencing the evaluation of developmental or operational testing and experimentation¹. This restriction is intended to ensure that the assessment of competing technologies or solutions is unbiased and not swayed by the potential future involvement of the advisory entity in the development or production of those technologies. By preventing advisors from formulating, overseeing, or evaluating testing, Section 319 promotes a more objective assessment process.

The establishment of a controlled waiver process acknowledges that there may be instances where the technical expertise of these entities is essential¹. However, the stringent conditions attached to the waiver, such as the requirement that the individual has never supported a competing product and the establishment of reporting and oversight mechanisms, are designed to minimize the risk of unfair advantage. This careful balancing act reflects a recognition that while technical input is valuable, it must be provided within a framework that safeguards the integrity of the acquisition process.

Finally, Section 319 seeks to enhance transparency and accountability in the financial relationships between STRLs and DoD program offices¹. The requirement for a report detailing pass-through charges and their uses is intended to provide greater visibility into how these advisory entities are funded and to ensure that public funds are being used appropriately. This focus on financial transparency aims to prevent any potential for undue financial influence or self-enrichment through the advisory role. The detailed conditions for waivers suggest a recognition that while the expertise of technical advisors is valuable, their involvement must be carefully managed to prevent potential conflicts. Similarly, the emphasis on pass-through charges indicates a concern about ensuring financial accountability in these advisory relationships.

Potential Negative impacts of the recommendations

While Section 319 aims to enhance fairness and transparency, its implementation could potentially lead to several negative consequences. One significant concern is that the restrictions placed on technical advisors might limit the DoD's access to specialized expertise, particularly in highly technical and rapidly evolving fields²³. These advisors often possess unique knowledge and experience that may not be

readily available within the government. Severely restricting their involvement in the acquisition process could hinder innovation and potentially slow down the development and fielding of critical technologies.

The waiver process, while intended to provide flexibility, carries the risk of becoming overly bureaucratic ¹. If the guidelines for requesting and approving waivers are too complex or time-consuming, it could create significant administrative burdens for both acquisition officials and technical advisory entities. This could lead to delays in obtaining necessary technical advice, ultimately impacting the efficiency of the acquisition process.

Furthermore, the limitations on collaboration and communication between technical experts and acquisition officials could inadvertently lead to less informed acquisition decisions ²³. The close interaction between these groups often facilitates a deeper understanding of technical requirements and potential solutions. Restricting this interaction, even with the aim of preventing unfair advantage, could result in a less effective exchange of knowledge and potentially suboptimal acquisition outcomes.

The increased restrictions and potential liabilities associated with serving as a technical advisor might also discourage qualified entities from taking on these roles ¹. If the regulatory burden becomes too onerous, the DoD could face a reduced pool of experts willing to provide technical advice, which would be detrimental to the acquisition process.

Finally, the requirement for detailed reporting on pass-through charges by STRLs could impose an administrative burden on these laboratories ¹. While the goal of transparency is laudable, if the reporting requirements are overly complex or if the collected data is not effectively utilized, it could simply divert resources without yielding significant improvements in oversight or accountability. The potential for reduced access to crucial expertise highlights the delicate balance that must be struck between preventing conflicts of interest and ensuring the DoD has the necessary technical input for effective acquisition. The risk of a cumbersome waiver process further underscores the need for careful implementation to avoid unintended bureaucratic hurdles.

Mitigations the organization will take to diminish the negative impacts

To mitigate the potential negative impacts of Section 319, the DoD can implement several key strategies. To address the concern about limited access to expertise, the DoD should develop clear and concise guidelines for the waiver process ⁷. These

guidelines should specify the criteria for granting waivers and ensure a timely review process, allowing access to critical expertise when no actual conflict of interest exists. The DoD could also explore alternative mechanisms for obtaining technical advice, such as establishing independent review panels composed of experts with no potential for future contract competition.

To avoid an overly bureaucratic waiver process, the DoD should implement a streamlined electronic system for submitting and processing waiver requests⁷. This system should include clear timelines and defined responsibilities for all involved parties. Providing comprehensive training to both acquisition officials and potential technical advisors on the waiver process will also be crucial for ensuring its efficient navigation.

To mitigate the potential for limited collaboration, the DoD should establish clear communication protocols that comply with the new regulations⁷. These protocols should outline permissible forms of interaction between technical advisors and acquisition officials, focusing on the appropriate sharing of information while safeguarding against unfair advantages. The DoD could also consider utilizing anonymized data or aggregated insights from technical advisors to inform acquisition decisions, thereby reducing the need for direct advisor involvement in the decision-making process.

To prevent discouraging qualified entities from serving as technical advisors, the DoD should proactively communicate the rationale behind Section 319 and emphasize the importance of maintaining a fair and ethical acquisition process⁷. Highlighting the continued need for their expertise and clearly outlining the specific conditions under which their advice will be valued can help reassure potential advisors.

To minimize the administrative burden associated with reporting pass-through charges, the DoD should develop a standardized and user-friendly reporting template for STRLs⁷. Clear guidance on the required data and its intended use will also be essential to ensure that the reporting effort yields meaningful insights into financial practices. Proactive communication and comprehensive training programs will be vital for ensuring the successful and efficient implementation of Section 319. Furthermore, leveraging technology to streamline processes like waiver requests and reporting requirements can significantly reduce administrative burdens.

DoD Personnel Most Affected

Several categories of DoD personnel will be directly affected by the implementation of

Section 319. Contracting Officers will bear significant responsibility for ensuring compliance with the new guidance and managing the waiver process ¹. They will need to thoroughly understand the specific prohibitions and requirements outlined in the forthcoming DoD guidance and update their existing Organizational Conflict of Interest (OCI) mitigation plans accordingly ³⁴.

Program Managers will also play a crucial role in ensuring that any technical advisors working on their programs adhere to the new restrictions ¹. They will be responsible for monitoring the involvement of these advisors and reporting any potential violations of the provision. Similar to Contracting Officers, Program Managers will need to update their OCI mitigation plans to reflect the requirements of Section 319.

Personnel within Science and Technology Reinvention Laboratories (STRs), Federally Funded Research and Development Centers (FFRDCs), and other nonprofit entities that provide technical advice will experience a direct impact on their roles and responsibilities ¹. The restrictions on performing acquisition functions and overseeing testing will necessitate a shift in how these individuals engage with DoD acquisition programs. They will need to be keenly aware of the limitations on their involvement and the conditions under which waivers might be granted. The increased responsibilities for Contracting Officers and Program Managers will require them to receive adequate training and resources to effectively implement and enforce Section 319. Additionally, personnel in STRs and FFRDCs will need to adapt to a potentially more limited scope of involvement in the acquisition process, focusing primarily on providing technical advice within the defined boundaries.

Stakeholders opposed and rationale for Opposition

Several stakeholders may oppose the implementation of Section 319 for various reasons. Science and Technology Reinvention Laboratories (STRs) and Federally Funded Research and Development Centers (FFRDCs) might view the restrictions as an impediment to their traditional roles in supporting defense acquisitions ¹. These entities often possess deep technical expertise and have historically played a significant role in shaping requirements and evaluating technologies. They might argue that the limitations imposed by Section 319 could hinder their ability to provide comprehensive and effective support to the DoD.

Individual technical advisors working for these entities might also express opposition, as the restrictions could limit their ability to fully contribute their expertise throughout the acquisition lifecycle. They might perceive these limitations as a devaluation of their knowledge and experience, potentially leading to dissatisfaction and a

reluctance to continue serving in advisory roles.

Some program offices within the DoD might be concerned that the new regulations could lead to delays in the acquisition process or limit their access to necessary technical expertise¹. If the waiver process is perceived as cumbersome or if there are concerns about the availability of qualified advisors under the new restrictions, program managers might argue that Section 319 could negatively impact their ability to execute programs successfully.

Furthermore, contractors who have historically benefited from close relationships with technical advisors from these entities might oppose the provision¹. These advisors' influence could have previously provided these contractors with a competitive advantage. The implementation of Section 319, by aiming to create a more level playing field, could be seen as detrimental to their existing business models. The primary concerns driving potential opposition are likely to be the fear of hindering innovation, the creation of bureaucratic obstacles, and the limitation of access to valuable technical expertise. The level of opposition will likely depend on the perceived impact of the restrictions and the effectiveness of the DoD's mitigation efforts.

Additional Resources

Successful implementation of Section 319 will necessitate the allocation of several additional resources by the DoD. Firstly, personnel will be required to develop and issue the detailed guidance mandated by the provision within the 180-day timeframe¹. This will involve individuals with expertise in acquisition policy, legal matters, and the specific context of technical advisory roles.

Secondly, comprehensive training programs will be essential for various stakeholders, including acquisition officials, program managers, and personnel within technical advisory entities¹⁶. These programs will need to cover the specifics of Section 319, the new guidance, and the processes for identifying potential conflicts and requesting waivers.

Thirdly, financial resources might be needed to develop and implement the electronic system for managing waiver requests and tracking compliance with the new regulations¹⁶. An efficient and user-friendly system will be critical for minimizing administrative burdens.

Fourthly, legal resources will be necessary to interpret the provision, develop legally sound guidance, and provide advice on waiver requests and potential violations¹⁶.

Ensuring legal compliance will be paramount throughout the implementation process.

Finally, personnel will be needed to review the report mandated by Section 319 and to oversee the ongoing implementation and enforcement of the new policies. The DoD should aim to leverage existing resources and infrastructure, such as the Defense Acquisition University (DAU) for training⁴⁵ and the Defense Acquisition Regulations System (DARS) for disseminating guidance⁵⁶, to minimize the need for entirely new resources.

Measures of Success

The success of Section 319 can be measured through a combination of quantitative and qualitative indicators. One key measure will be the number of reported potential unfair competitive advantage violations involving technical advisors¹. A decrease in the number of such reports over time could indicate that the new policies are effective in preventing these situations.

Another important metric will be the time taken to award research and development contracts¹. The DoD should monitor whether the implementation of Section 319 leads to significant delays in the acquisition process. Ideally, the new regulations should not unduly increase award timelines.

Gathering feedback from acquisition officials and technical advisors through surveys will provide valuable insights into the effectiveness and impact of the new policies¹. These surveys can assess perceptions of fairness and transparency in the acquisition process and identify areas where improvements might be needed.

The DoD should also assess whether the implementation of Section 319 leads to a greater overall perception of fairness and transparency in the acquisition process among both government and industry stakeholders¹. This can be gauged through feedback mechanisms and industry engagement.

Monitoring the quality of technical advice received by acquisition officials will be crucial to ensure that the restrictions imposed by Section 319 are not negatively affecting the DoD's access to high-quality expertise. If acquisition officials report a decline in the value or availability of technical advice, it could indicate an unintended negative consequence of the provision.

Compliance with the reporting requirements on pass-through charges by STRLs can also be tracked as a measure of success in enhancing transparency in financial arrangements¹. Finally, the effectiveness of the waiver process in allowing necessary

technical advisor involvement while preventing unfair advantage should be specifically evaluated. The number of waivers granted, the efficiency of the process, and any reported issues related to waivers will be important indicators.

Alternative approaches

While Section 319 takes a regulatory approach by imposing restrictions, several alternative strategies could potentially achieve similar outcomes in preventing unfair competitive advantages. One alternative approach could be to enhance training and ethical guidelines for both acquisition officials and technical advisors⁴. This would focus on educating individuals about potential conflicts of interest and promoting a culture of ethical conduct, rather than strictly limiting their roles.

Another alternative could involve implementing more rigorous oversight and review processes for acquisition decisions involving technical advisors⁴. This could involve increased scrutiny of potential conflicts by independent bodies or the establishment of clearer guidelines for managing advisor involvement.

Stricter disclosure requirements for technical advisors regarding their potential conflicts of interest could also be an effective alternative⁴. This would increase transparency and allow acquisition officials to make more informed decisions about engaging with these advisors.

In specific R&D acquisitions where the potential for conflicts is high, the DoD could utilize independent third-party evaluators for technical assessments⁴. This would remove the potential for bias associated with advisors who might have future competitive interests.

Finally, the implementation of "firewalls" within organizations providing technical advice could be an alternative approach⁴. This would involve establishing clear separation between personnel involved in advisory roles and those involved in bidding or performing on related contracts. A combination of these alternative approaches, potentially incorporating a tiered system based on the level of risk associated with different advisory roles, might offer a more flexible and less restrictive means of achieving the objectives of Section 319.

Section Specific Question 1:

Section 319 adds several specific steps and requirements for identifying, mitigating, or avoiding Organizational Conflicts of Interest (OCI) related to technical advisors working for the government. It mandates the Secretary of Defense to issue guidance

on steps to identify and prevent potentially unfair competitive advantages for entities providing technical advice to acquisition officials in research and development work awards¹. This includes defining "potentially unfair competitive advantage" as unequal access to acquisition officials or information relevant to award decisions or resource allocation¹. The section requires the establishment of policies to prevent employees of these advisory entities from performing acquisition functions, such as developing, awarding, or administering contracts within program offices, and from formulating, overseeing, or evaluating performance on developmental or operational testing or experimentation¹.

Furthermore, Section 319 introduces a waiver process that allows individuals from these entities to provide technical advice only if they meet specific criteria, including never having supported a competing product or service¹. This waiver process must also include a mechanism for reporting any potential violations of unfair competitive advantage policies, ensuring effective oversight to verify compliance, and establishing appropriate disciplinary actions for non-compliant personnel¹.

Contracting Officers and Program Managers will need to update their OCI mitigation plans to fully incorporate the procedures and requirements outlined in the forthcoming DoD guidance³⁴. This will involve establishing clear processes for identifying potential unfair competitive advantages stemming from the involvement of technical advisors, ensuring adherence to the restrictions on their roles in acquisition functions and testing, and implementing the mandated waiver process, including reporting and oversight mechanisms. The updated plans must reflect the specific definitions and prohibitions detailed in the new guidance to ensure compliance with Section 319.

Section Specific Question 2:

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Summary

Section 319 of the Forged Act represents a significant effort to address the potential for unfair competitive advantages arising from the involvement of technical advisors in Department of Defense research and development acquisitions¹. By mandating new guidance and policies aimed at separating the provision of technical advice from direct acquisition functions and oversight of testing, the provision seeks to enhance fairness and transparency in the R&D award process¹. The requirement for reporting on pass-through charges by STRLs further underscores the intent to increase

accountability in these advisory relationships ¹.

While Section 319 holds the promise of a more equitable acquisition environment, its implementation carries potential risks, including limiting access to specialized expertise and creating bureaucratic hurdles ¹. To mitigate these risks, the DoD will need to focus on developing clear and streamlined guidance, implementing efficient processes for waivers and reporting, and ensuring effective communication and training for all affected personnel ¹.

Contracting Officers, Program Managers, and personnel within technical advisory entities will be most directly impacted by these changes ¹. Opposition to the provision may arise from stakeholders who fear it will hinder innovation, create unnecessary bureaucracy, or limit access to valuable technical expertise ¹. Successful implementation will require a commitment of additional resources, including personnel, training, and potentially funding ¹. The effectiveness of Section 319 can be measured by tracking reported violations, monitoring acquisition timelines, and gathering feedback from stakeholders ¹. Alternative approaches focusing on enhanced ethics, oversight, and disclosure could also be considered as potential complementary strategies ¹. Ultimately, Section 319 signifies a notable shift in the DoD's approach to managing the involvement of technical advisors in R&D acquisition, demanding careful and considered implementation to achieve its intended goals without causing undue disruption or negative consequences to the defense acquisition process.

Comparison of Section 881 (NDAA FY16) and Section 319 (Forged Act)

Feature	Section 881 (NDAA FY16)	Section 319 (Forged Act)
Focus	Ensuring acquisition oversight does not cause unnecessary delays or cost increases.	Preventing unfair competitive advantages of technical advisors in R&D awards.
Scope	Broader, applies to general acquisition oversight.	Specific to technical advisors in R&D.
Key Mandate	Agencies must ensure oversight efforts avoid unnecessary delays/costs.	Secretary of Defense to issue guidance on identifying/preventing unfair

		advantages.
Repeal	Not applicable.	Section 881 is repealed by Section 319.
Specific Actions Required	Focus on efficiency and cost-effectiveness of oversight.	Prevent advisors from performing acquisition functions/testing oversight; establish waiver process; report on pass-through charges.

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