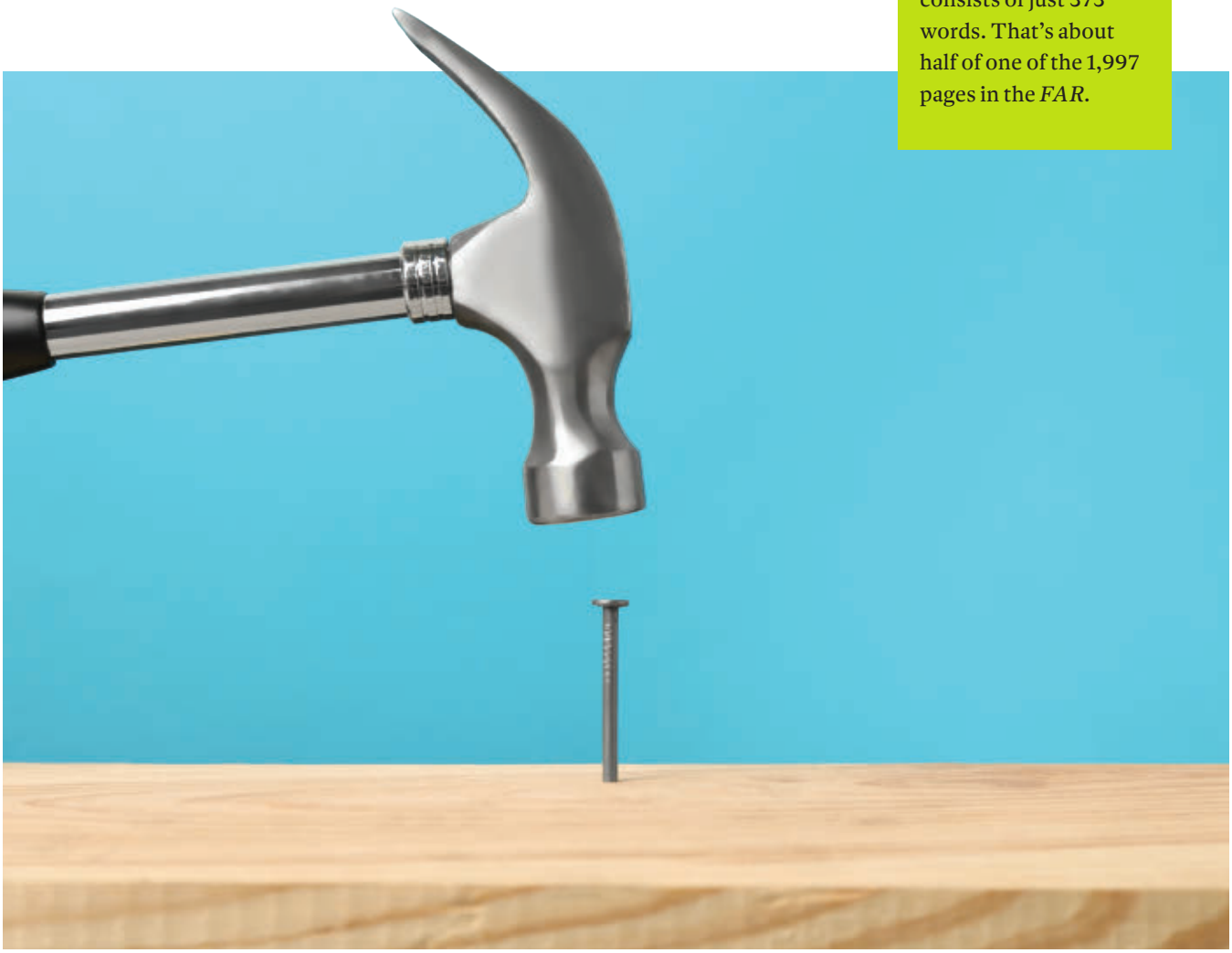
DID YOU KNOW?

FAR Subpart 37.6 consists of just 373 words. That's about half of one of the 1,997 pages in the *FAR*.



Performance-Based Acquisition: When the Hammer Doesn't Fit

BY JOHN KRIEGER, CPCM, NCMA FELLOW

We've got a job to do, get the hammer.

The concept known as the law of the instrument, or "Maslow's hammer," is an over-reliance on a familiar tool. As Abraham Maslow said in 1966: "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."[1]

In the realm of acquisition of services, this concept has become established policy for us, as stated in the *Federal Acquisition Regulation (FAR)* in Section 37.102: "Performance-based acquisition (see subpart 37.6) is the preferred method for acquiring services (Public Law 106-398, section 821)."

FAR Subpart 37.6 consists of just 373 words. That's about half of one of the 1,997 pages in the *FAR*. Yet those 373 words have become the golden hammer of service contracting.

Under the Revolutionary FAR Overhaul (RFO) Model Deviation for FAR Part 37 Service Contracting, Performance-Based

Acquisition was "promoted" to Subpart 37.1 and streamlined to 269 words. The promotion would indicate that the Office of Federal Procurement Policy (OFPP) and the FAR Council, leaders of the RFO, consider it more important than ever.

But should it?

The ability to use performance-based acquisition (PBA) efficiently and effectively is not nearly as straightforward as the writers of this regulation intended.

As this article argues, PBA – while valuable in some contexts – is often impractical, unsupported by evidence, and counterproductive when applied to complex, long-term, or rapidly evolving service needs.

For example, the Procurement Round Table (PRT) has its doubts. For those of you not familiar with the PRT, it is a nonprofit organization made up of former federal acquisition officials concerned about the "economy, efficiency, and effectiveness of the federal acquisition system." They commented on this issue in a letter to the Acquisition Advisory Panel, where they wrote:

> *We believe that the main reason PBSA has not been more successful is that it is not a practical approach to buying long-term and complex services. We think that agencies have been unable to implement PBSA as hoped because it requires them to do something that is too often impracticable.*
>
> *We think it is unrealistic to ask agencies to specify services at the time of contract award in clear, specific, objective, and measurable terms when future needs are not fully known or understood, requirements and priorities are expected to change during performance, and the circumstances and conditions of performance are not reliably foreseeable. Yet those are the difficulties faced by agencies and their contractors when they negotiate long-term and complex service contracts.*[2]

Sometimes what we really need isn't a bigger hammer but a better toolkit – and the wisdom to know which tool fits.

In short, PBA works only when requirements are stable, well-understood, and easily measurable – conditions that often do not exist.

What is Performance-Based Acquisition?

The *FAR* tells us, "'Performance-based acquisition (PBA)' means an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed."[3] The fundamental question for us, here, is "Does it work?"

The resounding answer may really be something like, "Don't know. Hard to tell." That might come as a surprise to many of you. It probably isn't what you've been told. You must be asking how we can make that assertion. Well, let's take a look at the Report of the Acquisition Advisory Panel, which was authorized by Section 1423 of the Services Acquisition Reform Act of 2003.

This is the panel that Congress created to look at PBA. The panel was tasked to "review all federal acquisition laws and regulations, and, to the extent practicable, government-wide acquisition policies, with a view toward ensuring effective and appropriate use of commercial practices and performance-based contracting."[4] Here's what the experts have to say in the Executive Summary:

> *During the Panel's public deliberations, there was some debate as to the value of this technique. Witness testimony, as well as written public statements, was mixed on PBA merits. One member and some public comments questioned the validity of PBA for government uses after more than a decade of attempts to implement have failed to produce expected results. Others, however, noted significant successes using PBA. And though a 1998 OFPP study found generally positive results, the Panel found no systematic government-wide effort to assess fully the merits of the process. Many spoke to the challenges in implementing the technique, most of which focused on the acquisition workforce, including those who define requirements. Even*

commercial organizations told the Panel that implementing the technique can be difficult, especially identifying the appropriate performance standards to measure.[5]

That does not sound like a resounding or unequivocal endorsement of PBA, and there are doubts elsewhere, as indicated by the PRT citation above, and the one below. According to the PRT:

Since [1997] agencies have tried to use the technique, but with disappointing results. Implementation goals were established, but not achieved. Government acquisition officials and industry representatives have expressed doubts about the success of PBSA, independent reviews have not validated predictions and anecdotal claims of improvements in quality and reductions in cost, and people at the working level are frustrated.[6]

Nonetheless, we plow ahead, trying to implement a process that even some of the greatest minds in the business of acquisition cannot say, unequivocally, works. Anyone who has agonized over watching one of their young offspring try to shove a square peg into a round hole knows that this can be time-consuming, frustrating, and, ultimately, unsuccessful.

It's so easy a child can do it.

Well, maybe not. Have you ever asked about PBA and how it works? Yes? And, what were you told? Let me guess, lawn mowing. Or, if really innovative, custodial services. I can see you nodding your heads.

Were any of you, instead, told how to apply PBA to the acquisition of a complex requirement for contract advisory and assistance services for program office support to successfully complete a Defense Acquisition Board (DAB) review to get Milestone B approval from the Milestone Decision Authority (MDA) to enter the Engineering

FIGURE 1. Thought Experiment Statement of Objectives and Schedule

Statement of Objectives (SOO)

The Congress shall provide all necessary support so that each of the regular appropriations bills will become law by or on October 1.

Congressional Action Schedule

Regular appropriations bills become law by or on October 1

House Authorization Bill	**May**
Senate Authorization Bill	**May**
House Appropriation Bill	**May -June**
Senate Appropriation Bill	**June**
Omnibus Reprogramming	**June**
Authorization Conference	**June-July**
Appropriation Conference	**July-Aug**

FIGURE 2. Thought Experiment Incentive Structures

Example Incentive 1

For this thought experiment, incentive structures could include only positive fees for meeting statutory deadlines.

Event	Incentive
Each bill passed by October 1; or	+ 1%
All bills passed by October 1	+ 13%

Example Incentive 2

For this thought experiment, incentive structures could include a combination of positive fees for meeting statutory deadlines and negative fees for late action, continuing resolutions, or shutdowns.

Event	Incentive
All bills passed by OCT 1 individually	+ 10 %
All bills passed by OCT 1	+ 5 %
Continuing Resolution Required	- 5 %
Partial Government Shutdown	- 10 %
Complete Government Shutdown	- 25 %

& Manufacturing Development Phase on a program that has been slipping both the program and DAB schedules?

I can see you shaking your heads. When the only examples offered for PBA are lawn care and janitorial services, it signals a deeper truth: much of what the federal government buys does not fit the PBA paradigm.

A PBA SOO for Congress? A Thought Experiment.

Let's look at an example of applying the tenets of performance-based acquisition to what many might consider one of the most complex and difficult requirements in the federal government – timely passage of the dozen appropriations laws required to keep the federal government operating.

The point is not to critique Congress, but to show that some missions simply cannot be forced into a PBA model without generating perverse or meaningless results. When the environment is volatile and outcomes depend on factors outside any contractor's control, rigid performance frameworks break down.

Let's begin by establishing our statement of objectives (SOO), including a "strawman" schedule (see Figure 1), and then we'll look at two different incentive approaches.

The example is based on the current U.S. government fiscal year. When the U.S. government fiscal year was established, it coincided with the calendar year. That eventually proved to be unworkable. So, in 1843, the federal government changed the fiscal year from a calendar year to a year starting on July 1.

That eventually proved to be unworkable. So, the Congressional Budget and Impoundment Control Act of 1974 created the current fiscal year of October 1 to September 30. The change was made so Congress would have more time to pass the Appropriation Acts. (Note: It didn't work.)

Congress is always telling us to do more PBA. What results would have been achievedhad either of the incentives shown in Figure 2 been applied to Congress since the new, easier-to-meet deadline of October 1 was established for the start of the federal government fiscal year?

Two potential historical scenarios based on these incentives are shown in Figure 3. Neither of them looks particularly good.

If Congress was attempting to "look good" and pass appropriation bills on time, we would expect and hope to see each bar in the Incentive 1 chart in Figure 3 at its maximum height of 13% for Fiscal Years 1977 through 2005, 11% for 2006 and 2007, and 12% thereafter. That goal has only been reached four times in almost 50 years.

In the Incentive 2 chart in Figure 3, if Congress was attempting to "look good" and pass appropriation bills on time, there should only be green bars. There should be no bars for continuing resolutions. More importantly, there should be no bars for partial government shutdowns or, even worse, full government shutdowns. Yet, we have three of the former and seven of the latter, including the shutdowns in FY2026.

Clearly, the first incentive structure is more beneficial to Congress while the second provides more benefit to the overall federal government.

Choosing Proper Incentives

Unlike the scenarios shown in Figures 2 and 3, there is little or no incentive for Congress in the real world. The best incentive would be not to re-elect them unless they changed their behavior. However, U.S. voters have consistently shown no propensity to make that happen; we just continue reelecting them.

The only way to make such an incentive work would be to prohibit any representative or senator from running for reelection in the next general election if there had been a government shutdown or the need to operate under continuing resolutions during their term in office.

If you consider this to be drastic or outlandish, consider this, it is similar to recommendation made by the "Oracle of Omaha," multibillionaire Warren Buffett, former Chairperson of Berkshire Hathaway, when he was discussing the need for Congress to pass balanced budgets.

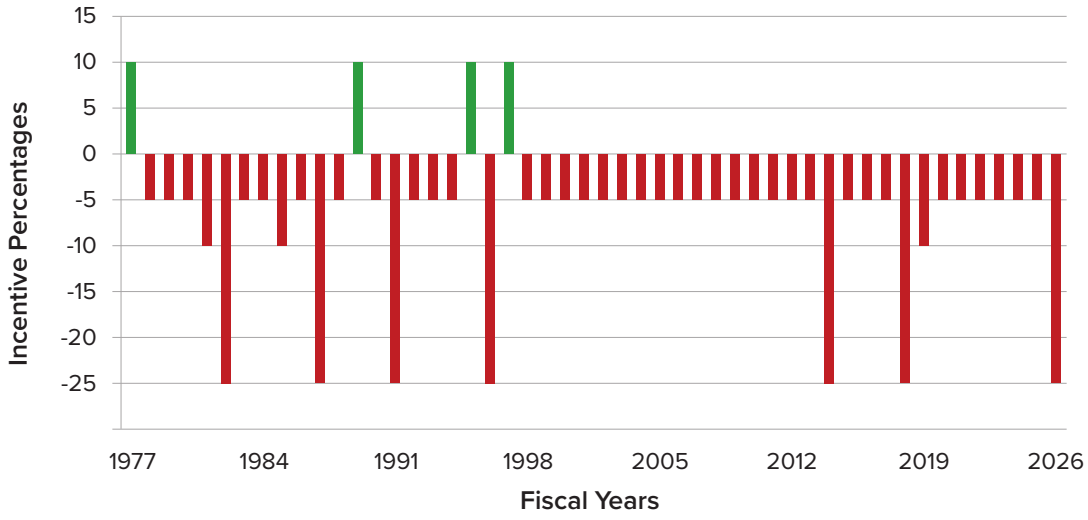
Alternatively, a less drastic approach would be to withhold congressional pay if the appropriation acts were not passed timely. If that sounds a bit fantastic, consider this snippet from the Cato Institute:

In 2013 just such an incentive was put to the test. After the Senate failed to pass budget resolutions for three consecutive fiscal years (FY2011, FY2012, FY2013),

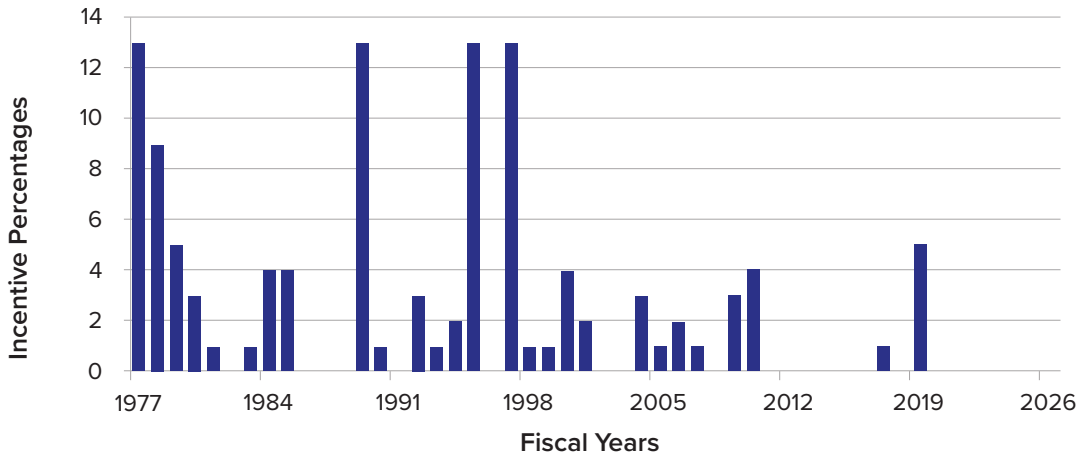
FIGURE 3. Thought Experiment Historical Scenarios

The charts below show the hypothetical incentive percentages applied to each year based on actual congressional deadline performance in those years. Note that the Incentive 1 chart only includes positive fees, while the Incentive 2 chart includes both positive and negative fees (as defined in Figure 2). Note that the incentives are not additive, and that for Fiscal Years 2006 and 2007 the number of appropriation bills dropped from 13 to 11; from Fiscal Year 2008 and subsequent years, there were 12 appropriations bills.

EXAMPLE INCENTIVE 1 HISTORICAL TIMELINE



EXAMPLE INCENTIVE 2 HISTORICAL TIMELINE



Congress adopted a law that threatened to withhold members' pay if they failed to adopt a budget resolution by the statutory deadline. The threat, while constitutionally questionable, worked. And the Senate adopted its first budget resolution in four years, more than three weeks before the deadline.[7]

Even some in Congress think the idea has merit. In January 2025, Representative Robert J. Wittman introduced H.R.208 - No Budget, No Pay Act. However, it had only two actions: It was introduced in the U.S. House of Representatives on January 3, 2025 and referred to the House Committee on House Administration the same day. The bill never made it to the next action, "Consideration by the Committee."

Unfortunately, either of these would require Congress to pass an act establishing such a rule in statute.

And there may be issues related to the Twenty-seventh Amendment to the Constitution, which states: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."

What are the chances of either of these two events happening?

These proposals illustrate the core challenge: meaningful incentives must be within the contractor's control, and outcomes must be predictable enough to measure. In complex service environments – just like in government budgeting – that control rarely exists.

Conclusion: Look Beyond the Hammer

Trying to turn all requirements into a performance work statement (PWS) may be an inefficient and ineffective use of limited resources. The result could be a contract that is difficult for both the government and the successful offeror to manage and may not meet the government's needs.

Look at all your options. In fact, the PRT "...recommends a new approach called Relational Contracting which emphasizes the need to establish solid working relationships between the Government and its complex service support contractors."[8]

PRT wrote a position paper, "A proposal for a new approach to Performance-Based Services Acquisition," which explains a proposed approach:

> *We call our proposed approach to* PBSA Relational Contracting or Relational PBSA. *The key features of this approach are:*
>
> - *competency-based contractor selection;*
> - *in-depth, one-on-one negotiations with the contractor selectee before contract award to jointly develop a contract work statement;*
> - *joint management to budget instead of to a fixed-price or estimated costs;*
> - *advanced agreement on specified direct and indirect cost limitations;*
> - *ad hoc specification of results and adjustment of expectations during performance;*
> - *fair and reasonable fee arrangements; and*
> - *mandatory use of alternative dispute resolution procedures.* [9]

For those of you who want to read more about relational contracting, perhaps a more promising path for complex services than PBA, the PRT position paper is available as an article by Vernon J. Edwards and Ralph C. Nash, Jr. published in *Contract Management* ("Relational Contracting: A Proposal for a New Approach to Performance-Based Services Acquisition," August 2006).

If you're going to march to a single PBA drumbeat, keep in mind what dad taught us kids when we were growing up: "If it doesn't fit, don't force it; you need a bigger hammer." My suggestion, instead, is that you take another look into that toolbox of yours and see if there is a screwdriver and some vise grips. Sometimes what we really need isn't a bigger hammer but a better toolkit – and the wisdom to know which tool fits. **CM**

John Krieger, CPCM, NCMA Fellow, is an independent acquisition consultant with more than 45 years of experience in acquisition. He is President of the NCMA Old Dominion Chapter.

ENDNOTES

1 Maslow, Abraham H. The Psychology of Science: A Reconnaissance, 1966, page 15. Accessed at http://books.google.com/books?id=3_40fK8PW6QC&printsec=frontcover#PPT7,M1, September 14, 2011.
2 Procurement Round Table Position Paper, A Proposal for a New Approach to Performance-Based Services Acquisition, 2006, page 2.
3 Federal Acquisition Regulation, page 2.1-11.
4 REPORT OF THE ACQUISITION ADVISORY PANEL to the Office of Federal Procurement Policy and the United States Congress, January 2007, page ix.
5 REPORT OF THE ACQUISITION ADVISORY PANEL to the Office of Federal Procurement Policy and the United States Congress, January 2007, page 15.
6 Procurement Round Table Position Paper, A Proposal for a New Approach to Performance-Based Services Acquisition, 2006, page 2.
7 Boccia, Romina. "Congressional Pay for Performance: No Budget, No Pay," Cato Institute. January 17, 2023 9:57AM.
8 Procurement Round Table (PRT), Letter to Laura Auletta, Designated Federal Officer, Acquisition Advisory Panel, March 13, 2006.
9 Procurement Round Table Position Paper, A Proposal for a New Approach to Performance-Based Services Acquisition, 2006, page 5.

COUNSEL COMMENTARY

GSA Rolls Out New Standard AI Clause

A draft contract clause would impose sweeping new requirements on contractors and their AI model providers.

BY STEPHEN L. BACON

Earlier this year, the Department of Defense (DoD) and Anthropic, one of the nation's leading artificial intelligence (AI) companies, reached an impasse over the terms under which the DoD could use Anthropic's AI model, Claude. The DoD demanded the contractual right to use Claude for any lawful purpose, while Anthropic insisted on restrictions for applications related to lethal autonomous warfare and domestic mass surveillance.

Ultimately, the DoD designated Anthropic as a "supply chain risk" and banned it from federal contracting because it would not agree to provide Claude to the DoD on its preferred terms. Anthropic quickly challenged the legal validity of the DoD designation, which is the subject of ongoing litigation.

On March 6, 2026, within days of the DoD's "supply chain risk" designation against Anthropic, the General Services Administration (GSA) proposed a new clause, GSAR 552.239-7001, *Basic Safeguarding of Artificial Intelligence Systems* (proposed clause).[1] In addition to establishing that the government has the broad right to use AI systems "for any lawful government purpose," the proposed clause includes a range of new requirements that govern GSA contracts for AI capabilities. The proposed clause builds on and implements directives and policies set forth in Office of Management and Budget (OMB) Memorandum M-25-22, *Driving Efficient Acquisition of Artificial Intelligence in Government*.[2]

GSA requested comments on the proposed clause by April 3, 2026, offering a short window for contractors to provide feedback. Although the proposed clause would only apply to GSA solicitations and contracts, it will likely serve as a template for other federal agencies that may soon establish their own standard AI clauses. It is therefore important for all contractors and AI model providers to understand the potential ramifications of the proposed clause.

Coverage of the Proposed Clause

The proposed clause applies to all "solicitations and contracts for artificial intelligence capabilities." But the phrase "artificial intelligence capabilities" is not defined in the proposed clause and, thus, it is not clear how broadly it will apply.

However, certain uses of AI are excluded from the scope of acquisitions covered by OMB Memorandum M-25-22. Specifically, M-25-22 exempts the acquisition of "common commercial products within which artificial intelligence is embedded, such as a word processor or map navigation system." M-25-22 also excludes "AI used incidentally by a contractor during performance of a contract," meaning AI used at the contractor's option when not directed or required to fulfill contract requirements.

GSA should confirm that the M-25-22 carve-outs apply with equal force to the proposed clause, or clarify when a solicitation or contract is for "AI capabilities," such that it will be subject to the proposed clause. Absent additional clarity, contracting officers are likely to make inconsistent determinations regarding application of the proposed clause.

The "American AI Systems" Requirement

OMB Memorandum M-25-22 directed agencies to "maximize the use of AI products and services that are developed and produced in the United States." Although M-25-22 establishes a strong policy preference for American AI systems, the proposed clause imposes an outright ban on the use of any foreign AI systems and "any AI components manufactured, developed, or controlled by non-U.S. entities."

The proposed clause does not define the term "AI component," and it appears to impose a domestic sourcing requirement more stringent than existing standards governing federal software procurement. The Trade Agreements Act (TAA), for example, applies a "substantial transformation" test to determine a product's country of origin.

Under this test, a software product is generally "substantially transformed" in the location where the final software build takes place, regardless of where individual components or source code contributions originated.[3] The proposed clause's new component-level origin test would appear to require a tracing exercise that the TAA has never demanded of software vendors.

In addition, the proposed clause inserts a "control" test for AI components that departs from the TAA's focus on where "substantial transformation" occurs. AI components could potentially be deemed under the control of non-U.S. entities that have foreign investors, foreign board representation, or foreign development team members. GSA should either eliminate the "controlled by" standard, or define how it will determine whether an entity is subject to foreign control.

Contractor Responsibility for AI Service Providers

The proposed clause defines a "service provider" to mean "an entity that directly or indirectly provides, operates, or licenses an AI system but is not a party to the contract." The proposed clause is clear that a contractor that uses an AI system of a service provider is responsible for that service provider's adherence to the terms of the proposed clause.

To the extent there is any conflict between the proposed clause and an agreement between a contractor and a service provider, the proposed clause expressly states that it will govern. Thus, contractors must require their service providers to adhere to the requirements of the proposed clause even if they differ from the service provider's standard commercial terms.

For example, as noted above, the proposed clause specifies that the contractor grants the government a license "to use the AI system for the duration of this contract for any lawful government purpose." Thus, any usage restrictions in a service provider's standard terms would not apply if they conflict with the government's right to use the AI system for any lawful purpose.

Government Data Ownership and Use Restrictions

The proposed clause vests the government with full ownership of all "government data," defined to include both data inputs and data outputs. Data inputs encompass everything submitted to the AI system, including all user prompts, queries, instructions, and documents. Data outputs are equally broad, covering everything generated by the AI system in performance of the contract including responses, analyses, data, and logs.

The prohibited use provisions in the proposed clause are also expansive. Contractors and their AI service providers may not use government data to train, fine-tune, or improve any AI model, for any customer or any commercial or non-commercial purposes. They also may not retain, access, or use government data beyond the scope and duration permitted by the contract.

The proposed clause mandates "eyes off" data handling procedures that restrict human review of government data except as strictly necessary to provide the AI system or respond to security incidents. All human access must be logged, justified, and limited to the minimum necessary for system functionality. Government data must be logically segregated from the data of non-government customers.

For companies whose commercial operations depend on using interaction data to improve their models, including for safety purposes, these restrictions may demand significant changes to the architecture and training of their AI systems.

Intellectual Property in Custom Developments

The proposed clause grants the government full, exclusive ownership of all custom developments, which are defined broadly to include any modifications, configurations, enhancements, or fine-tuning performed specifically for the government under the contract. Custom developments must be dedicated to the government's exclusive use, and contractors cannot use, reproduce, or derive benefit from custom developments without express written authorization from the contracting officer.

The proposed clause does specify that custom developments do not include background intellectual property (IP) developed independently by the contractor or service provider without use of or reference to the government's information during the contract. In practice, however, it may be difficult to clearly distinguish existing models developed with background IP from improvements made under a government contract.

Fine-tuning a model on government data does not produce a distinct new artifact. Instead, the fine-tuning modifies the base model's parameters in ways that may not be cleanly attributed to a particular source. This practical reality means that the background IP carve-out may be difficult to administer, and contractors should expect the government to broadly assert ownership over model improvements that the contractor may reasonably view as its own.

Unbiased AI Requirements and Government Evaluation Rights

The proposed clause establishes certain "Unbiased AI Principles" that contractors must make "commercial efforts" to satisfy. Specifically, the AI system must "be truthful in responding to user prompts seeking factual information or analysis," and act as "a neutral, nonpartisan tool that does not manipulate responses in favor of ideological dogmas such as diversity, equity, inclusion."

The government may conduct automated assessments of the AI system at any time using its own benchmarks, and is under no obligation to disclose those benchmarks, the underlying test data, or its evaluation methodologies to the contractor. The consequences of noncompliance are severe. The government may "suspend use of the AI System, until performance issues are satisfactorily addressed," and if the contract is terminated for cause based on a violation of Unbiased AI Principles, the contractor is liable for the government's "reasonable decommissioning costs."

The proposed clause does not provide any definition of "performance issues" or "decommissioning costs." The combination of vague compliance standards, undisclosed benchmarks, and potentially expansive liability creates a significant risk for contractors.

The uncertainty for contractors and service providers is compounded by another provision that provides that the "AI system must not refuse to produce data outputs or conduct analyses based on the contractor's or service provider's discretionary policies." That requirement is difficult to reconcile with the proposed clause's acknowledgment that compliance does not require retraining the model or altering model weights. For most commercial AI systems, content policies and safety guardrails are implemented at the model weight level and cannot be selectively disabled without retraining.

Disclosure, Reporting, Data Portability, and Change Management

In addition to the requirements outlined above, the proposed clause imposes obligations that will require contractors to build new compliance processes:

- **Disclosure.** Contractors must identify all AI systems used in contract performance to the ordering contracting officer within 30 days of award, including whether any AI system has been modified to comply with a non-U.S. or commercial regulatory framework.
- **Incident Reporting.** Contractors must notify CISA and the contracting officer within 72 hours of any confirmed or suspected security incident, provide daily status updates until the incident is resolved, and preserve relevant logs and forensic artifacts for a minimum of 90 calendar days. Contractors must follow FedRAMP incident communication and response procedures to the extent they conflict with the proposed clause.
- **Data Portability.** Contractors must use open, standard data formats and application programming interfaces (APIs) for all data outputs and must provide export tools that allow the government to extract all government data, including conversational history, uploaded documents, and custom knowledge bases, in machine-readable formats sufficient for reconstruction in a separate system. These provisions implement M-25-22's goal of preventing vendor lock-in situations.
- **Change Management.** Contractors must provide 30 days' advance access to any successor model before discontinuing an existing one. In addition, contractors must notify the government within seven days of identifying any change that materially increases bias or decreases safety guardrails.

Conclusion

The federal government is moving quickly to establish formal standards for AI procurement, and GSA's proposed clause represents a significant step in that direction. Once finalized, GSAR 552.239-7001 will be considered for implementation in Multiple Award Schedule Solicitation Refresh 32 and other new contracts for AI capabilities issued by GSA. Contractors and AI model providers should expect that similar standard terms applicable to non-GSA contracts will be established in the near future. **CM**

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The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

ENDNOTES

1 GSA MAS Solicitation Refresh 31 Advanced Notice (Mar. 6, 2026) ("Advanced Notice"). The draft GSAR 552.239-7001 and its prescription regulation, GSAR 539.71, are included as attachments to the Advanced Notice.
2 OMB M-25-22, Apr. 3, 2025.
3 U.S. Customs and Border Protection, HQ H192146, Jun. 8, 2012; U.S. Customs and Border Protection, HQ H268858, Feb. 12, 2016; U.S. Customs and Border Protection, HQ H301776, Aug. 7, 2019.

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The Story of FAR Part 12:

From Origin to Overhaul

The Revolutionary FAR Overhaul (RFO) of FAR Part 12 is filled with unintended consequences. The original FAR Part 12 was imperfect, but successful changes cannot occur without an understanding of its original intent and what is being changed.

By Eve Lyon

The *Federal Acquisition Regulation* (*FAR*) provides the legal infrastructure for government procurement. As with any infrastructure, the *FAR* continues to evolve. One pivotal change was FAR Part 12 – Acquisition of Commercial Products and Commercial Services.

In May 2025, the Office of Management and Budget (OMB) issued a memorandum implementing Executive Order 14275 – Restoring Common Sense to Federal Procurement, known as the "Revolutionary FAR Overhaul" (RFO).

In the memorandum, OMB cites changing FAR Part 12 as a prime opportunity to "lower transaction costs for contractors, increase competition, … and make it easier for buyers to negotiate better deals for the taxpayer."

OMB's direction aligns with prior policy goals to expand commercial contracting; however, many still misunderstand commercial contracting. As one of the drafters of FAR Part 12, I share the untold story of its development. In doing so, I highlight both the benefits and pitfalls of commercial contracting.

History of FAR Part 12

Textbooks state "commercial contracting" started with the Federal Acquisition Streamlining Act of 1994 (FASA).[1] Though FAR Part 12 was created in response to FASA, federal departments and agencies did not need congressional direction to acquire commercial items.

Admittedly, FASA waives certain statutes,[2] but the ability to buy commercial items did not depend on waiving these statutes. Congressional direction, however, was required to change the mindset of the acquisition workforce. Remember, pre-FASA, most commercial items were purchased via FAR Part 13, Simplified Acquisition Procedures, or the Federal Supply Schedule (FSS).

Pre-FASA Mindset

I stumbled upon the bias against commercial acquisitions in the early 1980s. At the time, I was a young attorney at the Naval Air Systems Command (NAVAIR) providing counsel to reprocure C-2 aircraft from what was then the Grumman Aerospace Company.

The congressional grant of multiyear authority for the C-2 reprocurement was a novel and exciting challenge and was the Navy's first multiyear contract using the new statute.[3] I focused on drafting clauses to yield maximum cost savings over the duration of the contract.

I endorsed Grumman's plan to expend advanced procurement funds for the entire five-year effort, coining the term "expanded advance procurement" (EAP). For many years, Congress viewed the practice of EAP as a step too far; though legal, it

FIGURE 1. The Grumman C-2 Greyhound

The Grumman C-2 Greyhound was a Carrier-on-Board Delivery aircraft, colloquially known as a "flying truck," resupplying carriers at sea. Congress granted multiyear authority to the C-2 program, the least controversial and least expensive of NAVAIR's programs.

further deprived Congress of the "power of the purse" over annual procurement. EAP allowed Grumman to buy parts for the entire purchase (39 aircraft) instead of an annual purchase (8 aircraft).

The multiyear aspect of the procurement overshadowed the fact that Grumman had to reopen its assembly line to reprocure the C-2 aircraft. I thought reopening a line involved taking special tooling and test equipment out of storage. Yet the program office captain was so concerned about the reopening of the assembly line that he asked three times whether the contract was legal.

My father was a captain in the Navy, and I knew O-6 officers did not walk down five flights of stairs to see a GS-12 attorney unless something was very wrong. On his first two visits, I thought the captain was concerned about contracting on a multiyear basis. It wasn't until his third visit that I understood his true concern.

On this visit, I learned that one vendor no longer could provide the avionics component (a black box to me), which met a military specification (mil-spec). Grumman proposed incorporating an equivalent black box in the C-2 that was FAA-certified. The captain believed it was illegal to buy anything without a mil-spec and that this substitution could create legal repercussions.[4] Being relatively new to procurement, I did not know what a mil-spec was, but I knew Naval captains did not have idle concerns. So, I asked:

Q: Is the FAA-certified black box more expensive?

A: No, it is less than half the price of the mil-spec box.

Q: Is the FAA-certified black box less capable or less reliable?

A: No, the FAA-certified black box is technically far superior to the mil-spec black box.

Q: Does the FAA-certified equipment weigh more than the mil-spec black box?

A. No, the FAA-certified black box is much lighter.

These responses allowed me to tell the captain all was fine. I drafted a "special provision" authorizing Grumman to acquire FAA-certified equipment when mil-spec equipment was not available.

Though I satisfied the captain's concerns, this conversation haunted me. I had uncovered a flaw in the procurement system: a reluctance to buy commercial products in lieu of mil-spec products.

Drafting FAR Part 12

Fast forward to 1994, when I served as legal representative for the National Aeronautics and Space Administration (NASA) to the Defense Acquisition Regulations Council (DAR Council). Nancy Ladd, then Head of the DAR Council, asked me to chair a small team to implement a FASA case. I declined, instead requesting to join the FASA team implementing commercial items. I wanted to avoid a repeat of the C-2 story.

When FASA was first drafted in the 1990s, the Federal Acquisition System stood down its normal operations to publish final FASA rules within 330 days of its enactment. What is the Federal Acquisition System and how did standing down part of the Federal Acquisition System inadvertently hide the thought process behind FAR Part 12?

The Federal Acquisition System is headed by the FAR Council, created by the Office of Federal Procurement Policy Act.[5] The FAR Council remained in place during the implementation of FASA. The special FASA teams replaced the organizations and individuals beneath the FAR Council, supplanting the DAR Council, Civilian Agency Acquisition Council (CAAC), and the individuals responsible for drafting *FAR* rules.[6] Unwittingly, the special FASA teams replaced the parts of the system that recorded the deliberation of each *FAR* case.

Although special FASA teams publish rules in the Federal Register, the Federal Register notices barely explained FAR Part 12. So, after the final rule was published, I wrote a 14-page memo documenting the decisions behind FAR Part 12. Today, this 14-page memo forms the nucleus of Chapter 24 in "Government Contract Awards: Negotiation & Sealed Bidding."[7]

Because the story of FAR Part 12 is too long for one article, this article highlights three issues affecting FAR Part 12: the clash between simplified acquisition and major systems acquisition, defining commercial items, and terms and conditions.

Simplified vs. Major Systems Acquisition: Two Worlds, One FAR Part

The FAR Part 12 drafting team was composed of individuals representing two "philosophies" of government procurement: simplified acquisition and major systems acquisition.

The DAR Council members on the FAR Part 12 team had expertise in major systems acquisition. At that time, major systems acquisition did not acquire commercial items, but it dominated policy. On the other hand, the simplified acquisition group had expertise in commercial acquisition. Before FAR Part 12, the government bought commercial items either using FAR Part 13 or the General Services Administration (GSA) Federal Supply Schedule (FSS).

The simplified acquisition group relied on templates to handle large volumes of contract actions. In contrast, the major systems group, of which I was a member,

handcrafted each solicitation and contract. While the major systems group awarded billions of dollars, the simplified acquisition group awarded thousands of contracts. Each group read the *FAR* very differently.

Then, as with any effort, one decision led to another. The major systems group decided that FAR Part 12 must include one provision containing all statutorily required certifications, one clause containing all commercial terms and conditions (T&Cs), and one clause containing all statutorily required clauses.

The simplified acquisition group saw consolidation as a way to create a simple form for commercial acquisitions. No simple form could incorporate the myriad *FAR* provisions and clauses needed for even small acquisitions. Consolidation reduced the number of provisions and clauses to three.

Then the simplified acquisition group drafted two additional provisions: FAR 52.212-1, Instructions to Offerors—Commercial Items, and FAR 52.212-2, Evaluation—Commercial Items. These new provisions turned a simple form into a combined solicitation and contract, the SF 1449, Solicitation/Contract/Order for Commercial Items. (The Simplified Acquisitions group had devised the SF 1449 to be the complete contract and created "addendum" for the excess information that could not fit on the SF 1449; the group also believed the addendum would not exceed four pages.)

The major systems group expressed concern, declaring the SF 1449 inappropriate for complex commercial acquisitions (e.g., an acquisition requiring contract administration). This group relied on the uniform contract format (UCF) to easily find parts of the contract needed for contract administration.

The unusual process used to develop FAR Part 12 hid the "thought process" or the "why" of FAR Part 12 from the Revolutionary FAR Overhaul.

The major acquisition systems group also liked the fact that UCF retained the solicitation provisions in the contract file, but did not include solicitation provisions in the resulting contract. This group insisted FAR Part 12 retain the option for SF 33, Solicitation, Offer and Award, which invoked the UCF. (At the time, the UFC was in FAR Part 4.)

The major systems group also stated that while the provisions at FAR 52.212-1 and FAR 52.212-2 could be mandatory for the SF 1449, contracting officers needed the ability to modify FAR 52.212-1 and FAR 52.212-2. The major systems group viewed FAR 52.212-1 as the equivalent of Section L and FAR 52.212-2 as the equivalent of Section M.

In hindsight, simple solicitation provisions reduce proposal requirements. While FAR 52.212-1 and FAR 52.212-2 were drafted to turn the SF 1449 into a solicitation and a contract, these provisions also simplify proposal requirements. Reducing proposal requirements is one key way to streamline competitions.[8]

With so many moving pieces, the major systems group must have conceded its position because the published version of FAR Part 12 mandates the use of the SF 1449.[9] Obviously, I was a vocal minority because this battle still rages in

my mind. Had use of the SF 1449 been optional, contracting officers could have selected the form that best matched the complexity of the acquisition. Instead, mandating SF 1449 creates a nightmare for any FAR Part 12 procurement that involves contract administration.

Also, the Revolutionary FAR Overhaul has not addressed forms. However, the RFO must redesign the SF 1449 if the FAR Part 12 deletes FAR 52.212-3 and FAR 52.212-5.[10] When the RFO redesigns the SF 1449, it should consider expanding the use of the UCF beyond FAR Part 14 and FAR Part 15.

Definition of Commercial Items

The FAR Part 12 drafting team spent most of its time interpreting the expansive definition of a commercial item. I assumed a commercial item would have an established market with sufficient market forces protecting the buyer (like my C-2 black box). However, FASA expanded the definition of commercial by adding the following concepts:

- **Of a type:** The team initially considered deleting this phrase, not knowing what the phrase meant. The team's best guess was that the phrase allowed military uniforms to be commercial since uniforms are a type of clothing. The team retained this ambiguous phrase because it was included in the legislative history.
- **Minor modifications to meet federal requirements:** The team recognized that this phrase included supplies that were different from supplies in the commercial marketplace (e.g., commercial off-the-shelf (COTS)) items. I worried whether an established marketplace with sufficient protections would still exist when agencies purchased commercial items with minor modifications.
- **Modifications of a type customarily in the marketplace:** Although the drafters did not understand this expansion, this type of modification caused less concern since the change had to be customarily available in the marketplace.
- **Offered for sale to the general public, or evolved from advancements in technology that are not available in the commercial marketplace but would be available in time to meet the government's schedule:** The expansions "offered for sale" and "evolved from advancements" mean the item did not have to be in the marketplace until delivery. To limit the breadth of these expansions, the drafters provided that under certain circumstances, the contracting officer could exclude new or evolving items through "market acceptance" at FAR 11.103(e).

Equally surprisingly, the FASA definition contained two types of services. The first category of services (herein referred to as incidental services) involved installation services, maintenance services, repair services, and certain training. Including incidental services was a logical extension of commercial items.

The second type of services are "services of a type competitively sold in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions." (I refer to this category as standalone services.)

Unlike incidental services, the drafting team did not know what standalone services were except that they had to be "sold competitively in substantial quantities" at "catalog or market prices." The drafters added the words "or market price" to include contractors with established market prices not in a formal "catalog."[11]

Given the confusion surrounding the definition of commercial items, the drafting team retained the FASA's definition and then drafted FAR Part 12 for supplies.[12] These decisions created the illusion that FAR Part 12 fully implemented FASA's requirement for commercial items, when in reality FAR Part 12 does not cover commercial services or commercial products beyond COTS.

Terms and Conditions

FASA directs the *FAR* to contain "to the maximum extent practicable" 1) those terms and conditions required by law or executive order and 2) those T&Cs consistent with standard commercial practices. I intentionally deleted the phrase "to the maximum extent practicable," since DoD used this phrase to avoid the congressional mandate to use R&D to fund dual technology.

I wrote three consolidated FASA clauses:

1. 52.212-3, Offeror Representations and Certifications-Commercial Items
2. 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders
3. FAR 52.212-4, Contract Terms and Conditions-Commercial Products and Commercial Services

FAR 52.212-4 — Contract Terms and Conditions-Commercial Products and Commercial Services was the most

difficult consolidated clause to write. I established a baseline of generic commercial T&Cs, balanced seller and buyer commercial T&Cs, combined concepts from *FAR* clauses, and adopted principles from the Uniform Commercial Code (UCC). The marketplace naturally balances T&Cs when the buyer and seller have similar bargaining positions.

T&Cs become one-sided and onerous when one party controls the marketplace (e.g., the seller is the only source of products buyers need). This dominance can result in unconscionable contracts or clauses, which are unenforceable under the UCC. The *FAR* rulemaking process mitigates this risk. Additionally, while the government is the buyer, sellers are part of the public the government represents. In other words, while the government wants the lowest possible price, unlike other buyers, it also wants a healthy industrial base.

Also, there is no standard set of T&Cs in the commercial marketplace. Instead, different commercial marketplaces have different T&Cs. The concept of tailoring allows contracting officers to modify FAR 52.212-4 to fit the marketplace without a deviation. Also, contracting officers can modify FAR 52.212-4 for services since this clause was written for supplies. Additionally, tailoring allows contracting officers to augment the baseline clause at FAR 52.212-4.

Remember, I was part of the major systems group for handcrafting contracts; therefore, I was accustomed to writing special provisions for Section H of the contract and seeking deviations. As explained below, the concept of tailoring was sidelined because it gave contracting officers too much authority and discretion.

As a corollary to tailoring, the drafters created waivers to limit agencies' ability to include T&Cs inconsistent with the commercial marketplace. The Changes clause at FAR 52.243-1, for example, is inconsistent with Changes clauses in commercial marketplaces; however, no deviation would have been required to include the FAR Changes clause in FAR Part 12 contracts. Tailoring and waivers provide all the flexibility needed to modify commercial acquisitions. The drafters intentionally designed FAR Part 12 to be deviation-free.

The RFO never had access to the thinking behind FAR Part 12. Then, too, history shows that the procurement community never understood that FAR 52.212-4 was a generic clause containing basic T&Cs for the simple acquisition of a commercial product. Different commercial marketplaces have different T&Cs; tailoring was barely used, if used at all.

FAR Council Actions: Narrowing Discretion

Adding Other T&Cs

The FAR Council recognized that the original coverage did not capture all the T&Cs needed in FAR Part 12 contracts. Consequently, the FAR Council added two categories of clauses to FAR Part 12, the first of which consisted of mandatory clauses not required by statute (e.g., 52.204-16, Commercial and Government Entity Code Reporting).

The drafters of FAR Part 12 had overlooked the administrative provisions and clauses the government needs to administer contracts. The first category of T&Cs is consistent with the spirit of FASA and is permitted by the phrase "to the maximum extent practicable."

Regretfully, "to the maximum extent practicable" also permits the second category of discretionary clauses, which might limit how contracting officers augment the T&Cs in FAR 52.212-4. This second category allows contracting officers to include other *FAR* provisions and clauses when their use is consistent with tailoring in section 12.302.

Yet any list of discretionary clauses, by nature, must be incomplete. Moreover, this category of discretionary clauses added nothing except confusion. Why did the FAR Council believe discretionary clauses, which were nothing more than guidance, belonged in FAR Part 12?

Adding the second category of clause sent two conflicting messages: (1) contracting officers can only use other *FAR* clauses listed in FAR Part 12 and (2) contracting officers still can tailor FAR Part 12 contracts to fit a particular marketplace or requirement. As discussed below, the RFO seems to have turned advisory guidance on discretion clauses into mandatory use of additional clauses for FAR Part 12 contracts.

FAR 13.5, Simplified Procedures for Certain Commercial Items

FAR Subpart 13.5 implements a discretionary test case permitting modified Competition in Contracting Act (CICA)[13] procedures for procuring commercial items.[14] When FAR Subpart 13.5 was written, the FAR Council debated whether the *FAR* should explain the type of flexibility the test case authorized, a debate that ended in compromise. FAR Subpart 13.5 contains processes required by the simplified procedures while the Federal Register notice[15] outlines the test case's flexibility from CICA procedures. These flexibilities include:

- Foregoing formal evaluation plans, scoring of quotes or offers, and competitive range determinations.
- Negotiating with one or more offerors, as appropriate, but not necessarily all offerors.

- Conducting comparative evaluations of offers.
- Evaluating past performance based on informal information such as the contracting officer's knowledge and previous experience with the item or service being purchased, and customer surveys.

I encourage people to read the full Federal Register notice to appreciate the scope of flexibilities associated with FAR Subpart 13.5. Moreover, Congress created "other competitive procedures," which this paper mentions.

While no two "other competitive procedures" are alike, "other competitive procedures" streamline CICA-mandated procedures. Unfortunately, agencies apply CICA-mandated procedures to solicitations using "other competitive procedures" because agencies equate CICA-mandated procedures with competitions.

CICA-mandated procedures, not the *FAR*, create the hated complexity of government competitions. Using "other competitive procedures" is key to simplifying competitions. Unfortunately, the FAR Council buried the flexibility associated with one "other competitive procedure" in a Federal Register notice. The RFO failed to identify "other competitive procedures," unfortunately believing uncovering FAR Subpart 13.5 was enough.

RFO Excitement Caused Veering

The unusual process used to develop FAR Part 12 hid the "thought process" or the "why" of FAR Part 12 from the RFO. The RFO authors didn't know about the debate over the SF 1449, the fact that FAR 52.212-4 was written for products, or the compromise behind FARSubpart 13.5, which hid the flexibilities of a new "other competitive procedure."

Instead, the excitement of discovering the unused FAR Subpart 13.5 caused the RFO to inadvertently veer from OMB's direction to focus on statutory roots and replace non-statutory regulations with buying guides.

OMB Memo. No. M-25-26[16] states, "The FAR will be refocused on its statutory roots. Most nonstatutory regulations will be replaced with OFPP-endorsed buying guides that highlight proven innovative buying techniques for different phases of the acquisition lifecycle as well as solutions and a manageable procurement pathway."

A More Rigid Prescription

The RFO proposed two significant restrictions.

The RFO's first change adds Table 12-4, which replaces the FAR Council's discretionary list of T&Cs with a more detailed prescription. Table 12-4 prescribes those *FAR* clauses contracting officers can include in FAR Part 12 contracts (e.g., clauses prescribed in FAR Part 36 on Construction). Unlike the FAR Council's approach, straying from Table 12-4 apparently requires a formal deviation.

Without knowing the "why" of FAR Part 12, the RFO does not understand the philosophy of tailoring with its authority to modify all T&Cs except those prescribed by statute. Sadly, the RFO also does not seem to realize the mandatory language in Table 12-4 tells contracting officer they cannot add or modify the table without a deviation. The RFO never knew FAR Part 12 was intentionally designed to be deviation-free.

Additionally, the RFO, like the rest of the procurement community, does not appear to realize that:

- No standard set of commercial T&Cs exists because different commercial marketplaces have different T&Cs.
- Tailoring allows contracting officers to modify FAR 52.212-4 to fit the marketplace without a deviation.
- FAR Part 12 was written for supplies.
- FAR 52.212-4 was a generic clause containing basic T&Cs for simple acquisition of commercial products.

These unknowns are to be expected since the FASA drafting process buried the "why" or the reasoning behind FAR Part 12's T&Cs.

Nevertheless, FAR 52.212-4 lessens the effect of the RFO's first restriction. FAR 52.212-4 protects both buyers and sellers by blending *FAR* clauses, commercial buyers and seller T&Cs, and UCC principles. Ironically, the RFO probably does not recognize the protection FAR 52.212-4 provides.

Recharacterizing FAR Part 13: A More Serious Concern

In contrast, the RFO's second veer is more serious and has no mitigation.

To highlight FAR Subpart 13.5, the RFO limits FAR Part 13 to Noncommercial Acquisitions and transfers selected techniques from FAR Part 13 to FAR Part 12. Regretfully, this change overlooks the procedures left in FAR Part 13 as well as "other competitive" source selection procedures elsewhere in the *FAR*. The RFO is unaware that pre-FASA, FAR Part 13 was interchangeable with commercial acquisitions, and that FAR Subpart 13.5 is not the only "other competitive procedure" available to streamline competitions.

Just as troubling, the RFO does not understand Section 12.102(b) is the heart of FAR Part 12, telling contracting officers to use the policies in FAR Part 12 with the

source selection procedures in FAR Part 13 on Simplified Acquisition Procedures, FAR Part 14 on Sealed Bidding, or FAR Part 15 on Negotiations. Stated differently, FAR Part 12 sets policy for commercial items while contracting officers may use any available procedure in the *FAR*. Regretfully, FAR Section 12.102(b) overlooks other available source selection procedures; source selection procedures are not subject to CICA procedures. Only FAR Part 14 and FAR Part 15 implement CICA-mandated procedures.

The CICA mandated procedures, not the *FAR*, make government competition complex. Using "other competitive procedures" is key to simplifying competitions. "Other competitive procedures" authorized by statute, include:

- Placing orders against GSA's FSS authorized by Federal Property and Administrative Services Act.[17]
- Placing orders issued Infinite Delivery/Infinite Quantity Contracts authorized by FASA.[18]
- Acquiring Architect & Engineering services authorized by the Brooks Act.[19]
- Acquiring basic research under a Broad Agency Announcement authorized by CICA.[20]

Moreover, FAR Part 13 may be the most significant "other competitive procedure." When passing CICA, Congress recognized that simplified acquisition procedures promote efficiency and economy for small purchases of property services.[21] FAR Part 13 contains those identified simplified procedures and then encourages contracting officers to "use other innovative approaches, to the maximum extent practicable."

By folding some procedures from FAR Part 13 into FAR Part 12 and then reserving FAR Part 13 for non-commercial acquisitions, the RFO leaves other available procedures out of FAR Part 12 and renders FAR Part 13 meaningless.

More seriously, the RFO changes turn FAR Part 12 into a mini-*FAR* where everything applicable to commercial acquisitions either resides or is referenced. Successfully creating a complete mini-*FAR* is impossible.

The history of FAR Part 12 is unknown because the coverage was created outside the regulatory process. The FAR Council did not want to know the "why" of FAR Part 12 because the coverage gave contracting officers too much discretion.

Looking Forward

Looking forward involves looking back. While this article reviews FAR Part 12 circa 1995, it does not advocate returning to that version. The original FAR Part 12 was imperfect; the drafters implemented a flawed statute. However, successful changes cannot occur without understanding the original intent of what is being changed.

The history of FAR Part 12 is unknown because the coverage was created outside the regulatory process. The FAR Council did not want to know the "why" of FAR Part 12 because the coverage gave contracting officers too much discretion.

In its efforts to limit discretion, the FAR Council muddled tailoring by adding discretionary *FAR* clauses in FAR Part 12. The FAR Council hid the flexibility associated with FAR Subpart 13.5, a test

case designed to streamline commercial competitions under $9 million.

The RFO reactions are both understandable and lamentable. The RFO's focus on FAR Subpart 13.5 causes fatal changes to the overhauled FAR Part 12, folding selected procedures from FAR Part 13 into FAR Part 12 and then reserving FAR Part 13 for noncommercial acquisitions. This detour turns FAR Part 12 into one-stop shopping or a mini-*FAR* for commercial acquisitions.

It also causes the RFO to veer from its OMB-determined direction, prescribing solutions instead of having guides suggesting various approaches. To make matters worse, the RFO then requires deviations if the contracting officer wishes to do something other than that which is prescribed (e.g., use another nonstatutory clause not in the overhauled FAR Part 12).

These changes give contracting officers imprecise templates, not flexibility. OMB wants the *FAR* to contain the "what" of procurement policy, with guides that show the "how" for executing the "what."

Still, policy requires judgment. For example, the FAR Council may have been right to add discretionary *FAR* clauses to limit discretion. For 40 years, FAR 52.212-4 has been used without tailoring; it uniquely blends *FAR* clauses, seller and buyer T&Cs, and UCC principles suitable for both the government and commercial contractors. Nevertheless, the RFO's concept of deviations is contrary to FAR Part 12; commercial acquisitions are to be simple and free from bureaucracy. The RFO needs to reexamine how it applies deviations to FAR Part 12.[22]

Further, the RFO must return to the policy in FAR 12.102(b), where FAR Part 12 contains the policy unique to commercial acquisitions, but allows contracting officers to use any appropriate competition procedure in the *FAR*. The RFO's proposed approach of a mini-*FAR* for commercial items is folly. Other parts of the *FAR* will apply to certain commercial purchases.

Instead, OMB must issue robust guides containing the "how" to execute the "what" in FAR 12.102(b). The "how" must explain the flexibility each "other competitive procedures" offers along with best practices and templates to streamline FAR Part 12 competitions. Then, contracting officers can adopt or modify the information in the guides to best fit their requirements.

While not binding, guides are critical tools to implement policy wisely. The potential starkness of the "what" must be offset by superb guides containing descriptive "hows." The guides must be constantly maintained adding templates on new and emerging practices. Guides need to replace the wisdom of senior procurement personnel who left government. Only then will the combination of regulations containing the "what" and the guide outlining the "how" have the potential to improve procurement by increasing information, providing flexibility, and fostering contracting officers' discretion.

Commercial acquisitions are deceivingly more complex than government acquisitions. Government acquisition is free from the dynamics of marketplaces with buyers and sellers vying for dominance. Then, the broad definition of commercial products and services includes "commercial-lite" marketplaces for items of a type, items with minor modifications, and items offered for sale (but never sold).

The FAR Council wanted to protect government buyers in commercial transactions; the RFO must balance protections with flexibility. Yet when FAR Part 12 works well, the magic of that FAA-certified black box never ends. CM

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ENDNOTES

1 Federal Streamlining Act of 1994, Publ. L. No. 103-355 at 10 U.S.C. § 3401 and 41 U.S.C. § 4101.

2 Section 8301 of the Federal Acquisition Streamlining Act of 1994 (FASA) waives the clause for the Anti-Kickback Act of 1986 at 41 U.S.C.A. §1986 as well as certification requirements in several procurement statutes. More importantly, section 4201 in the National Defense Authorization Act for Fiscal Year 1996, not FASA, creates the blanket for TINA exception for commercial items.

3 Section 909 in the National Defense Authorization Act for Fiscal Year 1982, Pub. L. 97-86 , originally at 10 U.S.C.A. § 2306(h) now codified at 10 U.S.C.A §§ 3531 – 3532.

4 Long ago, sealed bidding was the preferred method of procurement since sealed bidding is transparent. Bid opening is public; award is made to the lowest-priced bidder that is responsive and responsible. Responsiveness is defined as complying with the four corners of the invitation for bid (IFB). Bidders merely have to state they will comply with the IFB to be responsive. Imprecise descriptions in IFBs resulted contractors complying with the contract and still providing uniforms that fell apart after the first washing. In retaliation, the Department of Defense (DoD) developed military specifications (mil-specs) or exacting standards, allowing DoD to use sealed bidding to obtain goods meeting agency needs. DoD included mil-specs in all IFBs. However, the mil-spec for chocolate chip cookies was 20 pages. Often, DoD began a procurement with an R&D contract to obtain a mil- spec for future procurements. When Congress passed FASA, Congress wanted to end needless

R&D contracting and mil-specs as much as to promote commercial items. Mil-specs had become part of the fabric of DoD procurement as the only method to obtain quality goods. So, while the program office captain did not know the history behind mil-specs, he knew mil-specs were vital to procurement.

5 The Office of Federal Procurement Policy (OFPP) Act, Pub. L. 93–400 at 41 U.S.C. § 1302. The OFFP Act provides that the FAR Council will be comprised of principals from DoD, NASA, GSA, and OFPP who direct and coordination "Government-wide procurement policy and Government-wide procurement regulatory activities."

6 The Defense Acquisition Regulatory (DAR) Council and Civilian Agency Acquisition Council (CAAC) are below the FAR Council. DoD runs the DAR Council and GSA runs the CAAC. (In the mid-1990s, NASA was a member of the DAR Council.) Teams established by subject area, are below the DAR Council and the CAAC. Subject matter determines which established team receives the tasker to prepare a proposed rule. The team submitted its proposed coverage along with an explanation to the DAR Council. Team reports can include minority opinions. The DAR Council reviews and modifies the team's case before submitting modified text to the CAAC. A case becomes a bouncing ball when the councils disagree. Once the councils agreed on the language, they send the coverage to the FAR Council for approval to be published in the Federal Register as a proposed rule.Next, the public submits its comments on the proposed rule. The original drafting team analyzes the public comments and makes the proposed changes, producing a proposed final rule. The same review process is repeated and ends with the FAR Council approving the final rule for publication in the Federal Register. Finally, the DAR Council retains a complete file of each finished *FAR* case, preserving the history of the rule.

7 Steven W. Felman & Eve Lyon, Government Contract Awards: Negotiation & Sealed Bidding, 1055 -1096 (2025-2026).

8 Limiting proposal requirements is a second means to streamline competitions and a good subject for a second article. Methods to streamline proposals include asking for quotes, using commercial literature in lieu of proposals, having oral proposals, and identifying discriminating evaluation factors. Other methods for streamlining proposal requirements are waiting to be discovered and shared.

9 In 1995, Section 12.204 states: The Standard Form 1449, Solicitation/Contract/Order for Commercial Items, shall be used by the contracting officer when issuing written solicitations and awarding contracts and placing orders for commercial items. This form contains the information necessary for solicitations and contracts. The form may also be used for documenting receipt, inspection and acceptance of commercial items. Other forms shall not be used for solicitation or award of contracts or orders for the acquisition of commercial items.

10 The RFO's deletion of FAR 52.212-3 and FAR 52.212-5 is consistent with the intent of FAR Part 12. Creating FAR 52.212-3 and FAR 52.212-5, which specified the statutory certifications and statutes applicable to FAR Part 12 contracts, allowed the original drafting team to avoid changing all the prescriptions in the *FAR*. The FAR Council undertook a two-year effort to change all *FAR* prescriptions after FAR Part 12 was published. Also, the RFO's Tables 12-2 and 12-3 preserves information once in FAR 53.21-3 and FAR 52.212-5. Additionally, the RFO has the authority to overturn FAR Council determinations to apply post-FASA statutes to FAR Part 12.

11 Section 1432 of the National Defense Authorization Act for Fiscal Year 2004 expands standalone services by allowing time-and-materials contract (T&M) and labor-hour contracts in addition to fixed priced contracts. T&M contracts vastly increase those services that qualify as "commercial." Now, is any service "offered and sold competitively in substantial quantities in the commercial marketplace" a commercial service? This question is relevant because the commercial marketplace typically has equivalent labor categories that meet government needs.

12 Section 836 in National Defense Authorization Act for Fiscal Year 2019 divides the definition of commercial items into commercial products and commercial services, giving the FAR Council the ability to write separate coverage on commercial products and commercial services. Products are acquired differently from different services. This division enables the FAR Council to provide guidance on the scope of commercial standalone services.

13 Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984) at 10 U.S.C § 3012 and 41 U.S.C. § 152.

14 Section 4202 of the Federal Acquisition Reform Act of 1996 (Pub. L. 104-106) authorizes a test case for simplified procedures to acquire Commercial Items. The lack of data required Congress to keep reauthorizing the test case until section 815 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291), made the test case permanent.

15 61 Fed. Reg. 47384 (Sept. 6, 1996) at https://www.govinfo.gov/content/pkg/FR-1996-09-06/html/96-22745.htm.

16 Office of Management & Budget, Executive Office of the President, OMB Memo. No. M-25-26, Overhauling the Federal Acquisition Regulation (2025).

17 Federal Property and Administrative Services Act of 1949, Pub. L. 81-153, at 40 U.S.C Subtitle I, Chapters 1–13.

18 Federal Streamlining Act of 1994, Publ. L. No. 103-355 at 10 U.S.C. 3401 – 3406 and 41 U.C.S. 4101 – 4106.

19 The Brooks Act, Publ. Law No. 92-582 at 40 U.S.C. §§ 1101–1104. Like construction, architect-engineer services meet the definition of a commercial service.

20 Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984) at 10 U.S.C § 3012 and 41 U.S.C. § 152. In the 1990s, no one thought R&D services qualified as a commercial service because R&D is purchased on a cost reimbursement basis and FASA prohibits the use of cost type contracts. The drafting team dismissed Industry's argument that R&D could be purchased "by the yard," where each yard of research was fixed priced. Industry explained early success influenced decisions to continue purchasing R&D "by the yard." Subsequently, Congress modified FASA to permit the use of Time-and-Material for standalone services. Then, Section 879 and Section 880 of the National Defense Authorization Act (NDAA) for Fiscal Year 2017, Publ. L. No. 114-328 at 10 U.S.C. § 3458, authorizes DoD to buy R&D as a commercial service through the Commercial Solutions Opening program. Congress designated the Commercial Solutions Opening program another "competitive procedure." FAR Subpart 212.70 in the DFARS contains the competitive procedures DoD follows for the Commercial Solutions Openings program.

21 Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984) at 10 U.S.C. §§ 3571-3573 and 41 U.S.C. §§ 1901-1909.

22 Deviations could be used when 1) modifying T&Cs in FAR 52.212-4 and 2) the clauses in FAR Part 36. First, changes to the "tried and true" generic T&Cs in FAR 52.212-4 should raise questions. Second, requiring deviations to the FAR Part 36 clauses satisfies industry's concern about construction being commercial. In the 1990s, industry rejected the concept of tailoring, arguing that standard commercial practices were already baked into FAR Part 36 and standardized T&Cs provided stability. These objections kept the FAR Council from declaring construction a commercial service in the 1990s.