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Contractors should not overlook the administration's call to action on commerciality

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Last week, Secretary Hegseth delivered a speech (https://bit.ly/4rcrZNG) at the National War College introducing transformations to the defense procurement process. Among them, the Secretary discussed awarding companies bigger and longer contracts for proven systems; removing "excessive and burdensome" requirements (for example, acquisition rules, accounting standards, and testing oversight); and empowering program leaders with authority to direct program outcomes, move money, and adjust priorities.

The Secretary promised a forthcoming policy that would require commercial procurement at DoD as a first resort.

Overall, the speech outlined a vision for a more agile defense procurement process that leans heavily on practices already proven and featured in the commercial sector.

Additionally, the Secretary emphasized that the Department of Defense ("DoD") should prioritize acquiring commercial products and services. The Secretary promised a forthcoming policy that would require commercial procurement at DoD as a first resort.

Specifically, he explained: "[T]oday at my direction, commercial products and offerings will be the default policy. We will enhance the presumption of commerciality. Within 90 days, we will issue guidance that demands a commercial first and alternative proposals policy to enhance flexibility."

The Secretary explained that DoD's push for commercial solutions would be accompanied by increased flexibility to negotiate solutions that do not meet 100% of program requirements. He noted that DoD would prioritize industry-driven, commercial solutions first, "even if that means bids that do not meet every requirement." He further stated, "we will be open to buying the 85% solution and iterate together over time to achieve the 100% solution."

The Secretary's speech comes just over six months after President Trump signed Executive Order ("EO") 14271 on Ensuring Commercial, Cost-Effective Solutions in Federal Contracts (https://bit.ly/44n6lfP).

As we detailed in a prior blog post (https://bit.ly/4pmXTWb), the EO directed the Federal Government to procure commercially available products and services to the maximum extent practicable, consistent with the preference for commercial procurement already codified in statute.

Among other things, the EO introduced a procurement review process to ensure that agencies consider using commercial procurement for acquisitions and provide a justification for using a non-commercial product or service.

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Given the Administration's continued emphasis on commercial procurement, contractors of all sizes are well advised to take stock of their products and services to determine whether they could potentially fulfill commercial criteria.

FAR 2.101 (https://bit.ly/4rceg9y) defines what it takes for a product or service to qualify as commercial. For instance, if a contractor offers products, the contractor should consider whether its products are "of a type customarily used … for purposes other than governmental purposes," and have been offered for sale, lease, or license to the general public.

And if a contractor offers services, the contractor should consider whether its services are (i) procured in support of commercial products and are provided to the general public under terms similar to those offered to the Federal

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Government, or (ii) "of a type offered and sold competitively in substantial qualities in the commercial marketplace based on established catalog or market prices" under standard commercial terms and conditions.

Contractors may find that products or services they previously considered non-commercial could, with some adjustments or better documentation, be justified as commercial solutions.

The Administration's drive for commercial solutions could benefit contractors that can adjust quickly. As has always been the case, FAR Part 12, commercial item contracting imposes a less daunting suite of acquisition regulation flow-downs.

And now, in the context of the Administration's push for procuring commercial solutions as a first resort and requiring agencies to justify using non-commercial procurements, contractors that can transition to providing commercial solutions could enjoy a significant selling advantage over contractors that persist in offering non-commercial solutions.

The Secretary's recent speech reflects an intent to move quickly in reforming DoD's acquisition process, and contractors

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that are able to quickly pivot to providing commercial solutions where none previously existed could be well positioned to take advantage of new opportunities. We will continue to watch for updates as the Administration's effort to reform the government's acquisition process unfolds.

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