

## Senator McCain Introduces New Acquisition Reform Legislation

Late last month, Senator John McCain (R-AZ) introduced a piece of acquisition reform legislation that, if enacted into law, has the potential to significantly affect the way the Department of Defense (DOD) conducts major systems acquisitions. The bill, S. 32 (the Defense Acquisition Reform Act of 2007), has been referred to the Senate Armed Services Committee, and it is likely that several of the bill's provisions will find their way into the Senate's version of the National Defense Authorization Act for Fiscal Year 2008.

The bill seeks to reform how the Pentagon procures its biggest and most expensive weapons systems. Upon its introduction, Senator McCain released a statement noting that "despite the lessons of the past, the acquisition process continues to be dysfunctional. In the 110th Congress, major acquisition policy issues have arisen in some of the biggest defense programs, including the Navy transformational program, Littoral Combat Systems (LCS) and the Air Force's second largest acquisition program, Combat Search and Rescue Vehicle Replacement Program (CSAR-X) ... By increasing transparency and accountability and maximizing competition, meaningful acquisition reform can provide the taxpayer with the best value; minimize waste fraud and abuse; and, perhaps most importantly, help guarantee that the US maintains the strongest, most capable fighting force in the world. That is what this legislative proposal is all about."

### MAJOR SUBSTANTIVE PROVISIONS

#### Changes to the Joint Requirements Oversight Council

Much of the initial focus of Senator McCain's bill pertains to the work of the Joint Requirements Oversight Council (JROC). The JROC is a statutorily mandated high-level body within the DOD chaired by the Chairman of the Joint Chiefs of Staff whose purpose is to assist the Chairman in identifying and assessing the priority of joint military requirements to meet the national military strategy, as well as assisting the Chairman in considering alternatives to acquisition programs by evaluating the cost, schedule and performance criteria of alternatives, and to ensure that the priority of current and future acquisition programs conforms to and reflects resource levels. S. 32 would expand the membership of the JROC by adding the Undersecretary of Defense for Acquisition, Technology and Logistics (USD/ATL) and the Undersecretary of Defense (Comptroller) (USD/C) as members of the Council and the Director of Program Analysis and Evaluation (D,PA&E) as an advisor to the body.

Second, the bill would forbid the service secretaries from reprogramming funds for a major defense acquisition program, or otherwise provide additional funding for such a program, unless and until the JROC submits to the secretary concerned an assessment of the performance requirements for the item to be procured, including the effect of such requirements on cost increases under the program. Covered major defense acquisition programs are those that experience increases in the program acquisition or procurement unit cost of at least 10 percent over the current Baseline Estimate or at least 25 percent over the original Baseline Estimate for the program.

Third, S. 32 would preclude the conduct of initial operational test and evaluation of a major defense acquisition program in an environment other than that specified and defined in the test and evaluation master plan (TEMP) without the approval of the JROC.

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## **Changes involving other acquisition organizations**

Beyond the JROC, the bill would make structural changes to other DOD organizations involved in the major systems acquisition process. The legislation would establish in each of the three military departments a new position of "Military Deputy for Acquisition Matters." These officers, who would service in the grade of lieutenant general or vice admiral (O-9), would report to the service chiefs of staff and have as their principal responsibility assisting the service assistant secretaries responsible for acquisition.

Another provision of the bill would require the Secretary of Defense to establish a "Committee on Strategic Investment in Major Defense Acquisition Programs." This committee, comprised of senior DOD officials, would be chaired jointly by the Undersecretary of Defense for Acquisition, Technology and Logistics, the Vice Chairman of the Joint Chiefs of Staff, and the Director of Program Analysis and Evaluation. It would have as its purpose "to ensure the effective allocation within major defense acquisition programs of the financial resources available for such programs." The committee would be required to determine the most effective allocation of financial resources among major acquisition programs at certain designated points in the acquisition process, taking into account technological maturities, available resources, portfolio management techniques, "bounded solutions," and other appropriate investment evaluation techniques.

Finally, the Comptroller General would be required to report to Congress on potential modifications to the organization and structure of the Department of Defense for the acquisition of major defense acquisition programs. This report would include, *inter alia*, recommendations concerning the establishment within each service of major systems acquisitions commands, the establishment of a new "Office of Independent Assessment" to provide independent cost estimates, and the creation of a new milestone system for major defense acquisition programs.

## **Changes involving current procurement processes**

Senator McCain's bill also proposes a number of changes to existing acquisition processes. The bill would amend 10 U.S.C. 2366a, which currently requires the Milestone Decision Authority (MDA) for a major defense acquisition program to make certain certifications prior to Milestone B or Key Decision Point approval. S. 32 would require the program manager for a major defense acquisition program that has received Milestone B certification to immediately notify the MDA of any changes to the program that are inconsistent with that certification or deviate significantly from the material provided to the MDA in support of that certification. Upon receipt of such information, the MDA could withdraw the certification, and the information would be required to be included in Selected Acquisition Reports.

Another section of the bill would forbid the MDA for a major defense acquisition program from granting Milestone B approval until the MDA receives from a federally funded research and development center (FFRDC) a business case analysis for the program meeting certain specified requirements.

In the case of DOD contracts involving award fees, Senator McCain's legislation seeks to impose greater objectivity and less subjectivity in determining these fees. The Secretary of Defense would be required to prescribe regulations providing that, to the extent practicable, objective criteria are used in assessing contractor performance. In cases involving cost plus award fee contracts in which it is determined that objective criteria do not exist, the head of the contracting agency concerned would be required to make a finding that objective incentive criteria are not feasible or effective. The regulations would also be required to set forth a schedule of ratings of contractor performance for award fees in the categories of outstanding, excellent, good, satisfactory and unsatisfactory. Moreover, the amount of the award fee payable to a contractor would be tied to the rating determined by the contracting officer pursuant to a new "Award Fee Plan" that would be established for such contracts. Finally, the regulations would be required to establish a presumption against the rollover of amounts available for the payment of award fees from one award fee period to another.

S. 32 also speaks to contracts for the acquisition of property. One section of the bill would require the Secretary of Defense to prescribe in regulations certain mechanisms to provide cost control measures in these contracts. Specifically, cost increases that could be authorized or approved would be limited to those necessary to secure or enhance safety, to correct a defect in the contract attributable to the government, to address the unavailability of government-specified, contractor-furnished equipment, to modify the property if critical to delivery or the completion of testing, because of the operation of law or regulation or as directed by an oversight organization. All other cost increases in the acquisition of

property would be forbidden. Another section of the bill would redefine "substantial savings" under multiyear contracts for the acquisition of property, making the use of multi-year procurements more limited.

The legislation includes a provision that would require the Secretary of Defense to submit a report to Congress within 180 days of the bill's enactment containing an investment strategy for the allocation of funds and other resources among major defense acquisition programs. The investment strategy would be aimed at establishing priorities among needed capabilities in major defense acquisition programs, balancing cost, schedule and requirements, and ensuring that the budget, requirements, and acquisition processes of the DOD work in a complementary manner to achieve desired results. The DOD would be required to use this investment strategy in developing funding and other resource requests involving major defense acquisition programs.

The bill includes another reporting requirement, under which the Secretary of Defense would be required to report on the extent to which the Department has implemented the recommendations of a 2003 GAO report, entitled "Setting Requirements Differently Could Reduce Weapons Systems' Total Ownership Costs."

### **Ethics Compliance for Defense Contractors**

Senator McCain's bill contains but a single section dealing with ethics, but its implications are potentially significant. First, the section requires the Secretary of Defense to prescribe regulations under which a contracting officer would be precluded from determining a contractor to be responsible for the purposes of any contract in excess of \$5 million unless the entity to be awarded the contract has in place, within 30 days of the date of contract award, an internal ethics compliance program. Such programs would have to include a code of ethics and internal controls designed to facilitate the timely detection and disclosure of improper conduct and to ensure that appropriate corrective action is taken.

This section of the bill spells out detailed requirements for contractor ethics compliance programs, including requirements for periodic program reviews, internal reporting mechanisms, employee training, program audits, mechanisms for disciplinary actions against contractor employees, and mechanisms to report misconduct to and cooperate with government officials.

Finally, this section of the bill says that any covered contractor whose personnel are determined not to have reported "suspected" improper conduct in accordance with the entity's internal ethics compliance program may, at the election of the Secretary of Defense, be suspended from the contract or debarred.

### **Discussion**

In the aggregate the clear intent behind Senator McCain's legislation is to better integrate acquisition processes by aligning the acquisition, resources and requirements elements of the procurement process. In Senator McCain's view, these elements of the acquisition process have become disconnected from one another because of "stovepipes" within the DOD, to the ultimate detriment of both warfighters and taxpayers, and he sees this legislation as an important remedial step.

Although several of the proposals in this legislation may have merit, some would seem to overlap or be redundant with existing organizations or processes. For example, the legislation would establish new, three star service deputies for acquisition matters, but each of the services already have uniformed officers at very senior levels tasked with acquisition responsibilities, and care will be required in order to avoid creating dysfunction by implementing this provision. In other cases, the bill's provisions seem overly prescriptive. Specifying rating categories for award fees or trying to define precise milestones may sound good in theory, but given the tremendously varied nature of the goods and services the Department procures, difficulties in practical implementation are readily foreseeable. The bill's ethics requirements also seem onerous. Requiring fulsome in-house ethics compliance programs may be a non-issue for major corporations, but the \$5 million contract threshold would potentially affect many small companies for which such programs could be burdensome to develop and implement.

Assuming that some or all of the provisions of this legislation are included in the Senate's version of the National Defense Authorization Act for Fiscal Year 2008, it is likely that several will survive conference with the House of Representatives and become law. Close attention, monitoring, and communication with the Armed Services Committees will be required in order to ensure that Congress fully

understands the implications of Senator McCain's proposals.

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