

# Defense Contracting Innovation in State of Flux

## Viewpoint

By **Brian E. Sweeney**

Over the last few years, both the Department of Defense and Congress have been pursuing innovation in defense-related technologies, processes or methods — including research and development — from a variety of sources and through a variety of procurement techniques and strategies.

In the fiscal year 2017 National Defense Authorization Act, signed into law by then-President Barack Obama Dec. 23, Congress continued its expansion of acquisition authorities designed to promote contracting for defense innovation.

At the same time, however, Congress also directed a significant reorganization of the office of the secretary of defense, abolishing the position of undersecretary of defense for acquisition, technology and logistics and creating two new positions, the undersecretary of defense for research and engineering and the undersecretary for acquisition and sustainment, in order to further emphasize the need for defense innovation.

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Sen. John McCain, R-Ariz., chairman of the Senate Armed Services Committee, in a Nov. 30 statement declared that the NDAA “firmly establishes innovation as a primary mission of the Department of Defense.”

At the same time, however, the NDAA put the brakes on outgoing Defense Secretary Ashton Carter’s fledgling Defense Innovation Unit-Experimental, or DIUx, which was created to target innovation efforts with commercial companies in Silicon Valley and elsewhere — pending further review of DIUx’s activities in comparison to other organizations that are also pursuing defense innovation technologies.

So while contracting for defense innovation has arrived under the law, it is not yet clear exactly who will be in charge of pursuing and procuring innovation, at least in the near term.

While the outgoing Obama administration objected to the congressionally mandated reorganization and limits on DIUx, Secretary of Defense James Mattis has apparently embraced the reforms called for in the NDAA. In a Feb. 17 memorandum for the acting deputy secretary of defense, Mattis declared that he was “firmly committed” to addressing congressional concerns and “aggressively exploring and implementing reforms” to “improve the department’s ability to be innovative and responsive.”

Mattis also called for a recommendation on the designation of a chief innovation officer, and options for the treatment of “innovation organizations” within the department. In the coming months the department will reveal how it plans to implement and execute the new innovation authorities granted by Congress, and the organization changes will be effective Feb. 1, 2018.

While DoD’s internal structure and senior leadership roles will be changing, the acquisition reforms intended to spur further defense innovation have arrived, and are here to stay.

In Section 213 of the NDAA, Congress made permanent the Defense Research and Development Rapid Innovation Program, which is intended to stimulate innovative technologies and acquisition processes in order to insert rapidly new technologies and capabilities primarily into major defense acquisition programs. The program is directed principally at small businesses participating in the Small Business Innovation Research program, the defense laboratories and other small or large businesses with innovative solutions.

In May 2015, the Government Accountability Office said the program was making slow progress, although there was a high degree of interest from contractors, according to the report, “DoD Rapid Innovation Program: Some Technologies Have Transitioned to Military Users, but Steps Can Be Taken to Improve Program Metrics and Outcomes.”

Perhaps the “somewhat lengthy” process noted by the GAO in the RIP program can be attributed to the fact that the program leads to the award of conventional government contracts that require adherence to the notoriously detailed Defense Department procurement regulations and processes. In Section 847 of the NDAA, Congress revised the definition of “major defense acquisition program” to exclude an acquisition program or project that is carried out using the Rapid Innova-



tion Program.

It remains to be seen whether the department can improve the program now that it is permanent and excluded from major defense program requirements.

Meanwhile, a “non-traditional defense contractor” is now defined in the NDAA as an entity that has not, in the year preceding a solicitation, performed any contract or subcontract for the Defense Department that was subject to full coverage under the Cost Accounting Standards, which is often cited by commercial companies as the kind of complex, burdensome, expensive and bureaucratic government contract requirement that prevents commercial companies from wanting to enter into defense contracts in the first place. And while a review of the applicability of the standards is complex and beyond the scope of this article, contracts for “commercial items” are generally exempt.

In the NDAA, Congress has called for the department to implement two different pilot programs for contracting with non-traditional firms and small businesses: one to acquire innovative commercial items, technologies and services using general solicitation competitive procedures, and the other for a program to prototype “disruptive solutions that demonstrate new capabilities that could provide alternatives to existing

acquisition programs and assets,” according to the conference report accompanying the act.

“Innovation” is defined in Section 879 as any technology process, or method that is new, or any application of the foregoing that is new, as of the date of the submission of the proposal. Contracts resulting from this five-year pilot program are to be fixed-price only, and notwithstanding the detailed and often difficult to apply laws and regulations for identifying items, technologies, and services as “commercial items,” the NDAA dictates that solutions acquired under the pilot program shall be treated as commercial items.

Section 884 calls for the innovation prototyping program, with details to be presented in a plan to be submitted with the fiscal year 2018 budget, to be established within the departments of the Army, Navy, Air Force, as well as the Missile Defense Agency and Special Operations Command. Congress called for using broad agency announcements or other merit-based selection procedures and streamlined acquisition procedures leading to fixed-price contracts, and also specified the programs to be included, such as swarming of multiple air or underwater drones, integration of a laser into a weapons platform, and defense against hypersonic weapons.

Despite its support for innovation initiatives in this and

earlier NDAAs, Congress apparently disagreed with the pace, direction, success — or lack thereof — of DIUx and its implementation of the “other transaction authority” established permanently under Section 815 of the FY 2016 NDAA to enter into “Other Transaction” agreements for certain prototype projects involving non-traditional contractors and small businesses.

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In exercising its authority in the commercial tech sector, particularly

in Silicon Valley, DIUx appeared to be making progress in engaging commercial companies with its special authorities, which are exempt from almost all procurement laws and regulations.

In Section 222 of the 2017 act, however, Congress restricted DIUx’s operations and maintenance funds, as well as its research, development, test and evaluation funds used to award other transaction authorities, pending a report from the department regarding congressional concerns over DIUx’s organization, activities and relationship to other Defense entities involved in similar innovation activities.

The tussle over DIUx shows that while everyone agrees innovation is needed and should be actively pursued, the Defense Department is not the only one in charge when it comes to the specific methods and approaches to be used in pursuing and capturing innovation.

The new secretary and his team face a significant challenge to balance these forces while implementing a new organization and exercising the expanding authorities for contracting for defense innovation. **ND**

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