

Better Buying Power and Incentivizing Public-Private Partnerships Through Non-Monetary Incentives

Major Nicholas C. Frommelt*

In the year 2054, the entire defense budget will purchase just one aircraft. The aircraft will have to be shared by the Air Force and Navy three and one half days per week except for leap years, when it will be made available to the Marines for the extra day.¹

I. Introduction

A common critique of defense acquisition is that it continues to sink slowly under its own weight. Over the last fifty years, defense acquisition reform has remained “a high priority each time a new administration comes into office.”¹ However, the ills of cost growth and schedule slippages “have remained much the same throughout this period.”² Defense appropriations are an incredible investment of public treasure,³ representing a trust which is constantly bombarded by headlines alleging the latest acquisition snafu.⁴ Such headlines are not unwarranted. Defense programs have seen \$300 billion in cost-overruns and \$50 billion in canceled programs in the last ten years.⁵ Congress’s gutting of the acquisition workforce during the 1990s, coupled with explosive contingency-related growth in defense spending,

have only compounded problems, exerting incredible stress on defense acquisition.⁶

It is no surprise then that the Department of Defense (DoD) has undertaken Better Buying Power (BBP) to drive better value and control costs.⁷ Now in its third iteration, BBP 3.0 emphasizes two notable measures: increased use of incentive-based contracting and increased partnering with industry.⁸ Incentives target supplies or services that “can be acquired at lower costs and, in certain instances with improved delivery or technical performance” by relating “the amount of profit or fee payable under the contract to the contractor’s performance.”⁹ The DoD axiom is that incentives motivate better performance and reduce costs. Incentives have been around for decades,¹⁰ but BBP 3.0

* Judge Advocate, United States Air Force. Presently assigned as Staff Judge Advocate, Air Force Research Laboratory. LL.M., 2016, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia; J.D., 2008, University of Iowa College of Law, Iowa City, IA; B.A., 2005, Loyola University Chicago. Previous assignments include Executive Officer and Deputy Chief, Federal Courts Branch, Commercial Law and Litigation Directorate, Air Force Legal Operations Agency, Joint Base Andrews, Maryland, 2013-2015; Chief, Military Justice, Chief, General Law, Nellis Air Force Base, Nevada (Deployed, Criminal Investigation Task Force and Task Force 2010, Fort Belvoir, Virginia and Kabul, Afghanistan), 2011-2013; Chief, General Law, Chief, Legal Assistance, Los Angeles Air Force Base, California (Deployed, Combined Joint Interagency Task Force 435, Bagram Air Base, Afghanistan), 2009-2011. Member of the bars of Illinois, the Court of Federal Claims, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

¹ Norman R. Augustine, *Augustine’s Laws and Major System Development Programs*, DEF. ACQUISITION REV. J. (Jan. 2015), http://www.dau.mil/publications/DefenseARJ/ARJ/ARJ72/ARJ-72_Augustine.pdf.

² Richard W. Stewart, *Foreword to J. RONALD FOX, DEFENSE ACQUISITION REFORM, 1960–2009: AN ELUSIVE GOAL* vii (Center of Military History, U.S. Army 2011), http://www.history.army.mil/html/books/051/51-3-1/CMH_Pub_51-3-1.pdf [hereinafter DEFENSE ACQUISITION REFORM].

³ *Id.*

⁴ Congress appropriated over \$570 billion to the Department of Defense (DoD) in Fiscal Year 2016. See U.S. DEP’T OF DEF. FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW (Feb. 2015), http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2016/FY2016_Budget_Request_Overview_Book.pdf.

⁵ See, e.g., Sen. John McCain, *It’s Time to Upgrade the Defense Department*, WAR ON THE ROCKS (Nov. 10, 2015), <http://warontherocks.com/2015/11/its-time-to-upgrade-the-defense-department/>.

⁶ Sandra I. Erwin, *Acquisition Reform: It’s Mostly Up to Congress*, NATIONAL DEFENSE (Dec. 4, 2014),

<http://www.nationaldefensemagazine.org/blog/lists/posts/post.aspx?ID=1693>.

⁷ See, e.g., *Expert Perspectives on Managing the Defense Acquisition System and the Defense Acquisition Workforce: Before the Defense Acquisition Reform Panel of the H. Comm. on Armed Servs.*, 111th Cong. (2010) (statement of Prof. Steven L. Schooner, Co-Director of the Government Procurement Law Program, George Washington University Law School) (noting that the DoD acquisition workforce has been “starved for a couple decades”). See also, Shelley Roberts Econom, *Confronting the Looming Crisis in the Federal Acquisition Workforce*, 35 PUB. CONT. L.J. 171, 173 (2006) (arguing that “cuts to the acquisition workforce have proven too severe” and that, coupled with increased procurement spending from the Global War on Terrorism, the Government faces “increased risk of significant downstream costs . . . [that] threatens successful contract performance”).

⁸ U.S. DEP’T OF DEF., BETTER BUYING POWER, ACQUISITION, TECHNOLOGY AND LOGISTICS, [HTTP://BBP.DAU.MIL/](http://BBP.DAU.MIL/) (LAST VISITED JAN. 21, 2016).

⁹ Memorandum from Frank Kendall to Secretaries of the Military Departments et al., subject: Implementation Directive for Better Buying Power 3.0—Achieving Dominant Capabilities through Technical Excellence and Innovation (9 Apr. 2015), [http://www.acq.osd.mil/fo/docs/betterBuyingPower3.0\(9Apr15\).pdf](http://www.acq.osd.mil/fo/docs/betterBuyingPower3.0(9Apr15).pdf) [hereinafter BBP 3.0]. BBP 3.0 states that “the Department can still improve its performance in aligning profit incentives with contract performance.” *Id.* at Attachment 2, p. 7. Moreover, BBP 3.0 emphasizes that public-private partnerships such as the superior supplier incentive program (SSIP) play a critical role in incentivizing greater productivity. *Id.* at Attachment 2, p. 8. BBP 3.0 expands the SSIP with the intent “to recognize higher-performing industry partners based on past performance evaluations, with the intent of incentivizing superior performers and creating healthy competition.” *Id.*

¹⁰ FAR 16.401(a) (2010). Contract incentives obtain their acquisition objectives by “[e]stablishing reasonable and attainable targets” and by “[i]ncluding appropriate incentive arrangements designed to—(i) motivate contractor efforts that might not otherwise be emphasized; and (ii) discourage contractor inefficiency and waste.” *Id.*

¹¹ See, e.g., Vernon J. Edwards, *Award-Fee Incentives: Do They Work? Do Agencies Know How To Use Them?*, 20 No. 6 NASH & CIBINIC REP. ¶ 26

signals a renewed emphasis.

However, it is worth examining whether the DoD has had the right firing solution for employing incentives. This article will take up the case that the DoD should broaden its aperture and emphasize non-monetary incentives, which may induce better contract performance with the prospect of a long-term partnering.¹¹ In particular, the award term incentive warrants greater consideration because of its potential to spur high-level performance with the prospect of guaranteed additional contract terms.¹² Award terms have considerable potential value to contractors insofar as contractors can earn continued performance. In order to leverage award term incentives, the DoD should revisit its regulatory guidance to account for non-monetary incentives; and the DoD should specifically codify the award term in the Defense Federal Acquisition Regulation Supplement (DFARS).

II. Types of Contract Incentives

In a broad sense, incentives are native to all defense contracts insofar as they generate profit or some value for firms.¹³ However, not all contract vehicles are equal in returning value to the government. BBP 3.0 recognizes as much in directing Departments to “Incentivize Productivity in Industry and Government.”¹⁴ BBP 3.0 specifically states that “profit is a fundamental driver of private enterprise” and that

(2006) (discussing research going back to the 1960s on whether incentive fees are effective in controlling cost). See also DEFENSE ACQUISITION REFORM, *supra* note 3 at 36 (discussing how the DoD, under the leadership of Sec. Robert McNamara, began emphasizing fixed-price and incentive contracts in the early 1960s in order to increase efficiency and cost effectiveness, as well as reduce waste).

¹¹ See Michael W. Mutek, *Implementation of Public-Private Partnering*, 30 PUB. CONT. L.J. 557, 558, (2001) (discussing the value of “longer, more cooperative relationships with key suppliers”).

¹² See, e.g., Vernon J. Edwards, *Award Term: The Newest Incentive*, WHERE IN FEDERAL CONTRACTING? WIFCON.COM (Oct. 30, 2000), <http://www.wifcon.com/anal/analaterm.htm> (defining an award term as an incentive that allows a contractor to earn additional periods of performance instead of an incentive award fee).

¹³ BBP 3.0 points to profit as “a fundamental driver of private enterprise.” See BBP 3.0, *supra* note 10, at 14.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ FAR 16.401(a) provides that incentive contracts are appropriate where “supplies or services can be acquired at lower costs and, in certain circumstances, with improved delivery or technical performance, by relating the amount of profit or fee payable under the contract to the contractor’s performance.” FAR 16.401(a) (2014).

¹⁷ FAR 16.4 (describing different structures of incentive contracts).

¹⁸ FAR 16.403. A FPIF contract provides “for adjusting profit and establishing the final contract price by application of a formula based on the relationship of total final negotiated cost to total target cost. The final price is subject to a price ceiling, negotiated at the outset.” FAR 16.403(a).

¹⁹ FAR 16.404. A FPAF allows for award fees where “other incentives cannot be used because contractor performance cannot be measured

“industrial performance responds to the incentive structure . . . [in] business arrangements.”¹⁵

1. Monetary Incentives: A Questionable Link to Cost Control

Monetary incentives attempt to motivate better value to the government by way of incentive or award fees.¹⁶ These fees may increase based on an objective or subjective rating by the contracting officer vis-à-vis performance. The idea is simple—deliver better value to the government to increase fees above the contractor’s cost. Incentive contracts include cost-plus and fixed price contracts with either award fees or incentive fees.¹⁷ Combinations include: fixed-price incentive contracts (FPIF),¹⁸ fixed-price contracts with award fees (FPAF),¹⁹ cost-plus-incentive-fee contracts (CPIF),²⁰ and cost-plus-award-fee contracts (CPAF).²¹

There is an intuitive attractiveness to incentive fee contracts, as they appear to be a win-win for the government and contractor. No doubt, in many instances contractors do innovate and produce better value in response to monetary incentives. However, incentive fees are not the cure-all for defense acquisition. They are often only as good as their contract administration scheme, and there is evidence that incentive fees are often paid as a matter of course.²² Moreover, it is not clear that incentives consistently have the

objectively.” *Id.* Such contracts establish a fixed price, which must be paid for satisfactory performance, and a contractor may earn award fees in addition to the fixed price. *Id.*

²⁰ FAR 16.405-1. A CPIF allows a contractor to earn incentive fees (up to a cap) on cost-plus contracts:

The [CPIF] is a cost-reimbursement contract that provides for the initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs. [The CPIF] specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. . . . [T]he fee payable to the contractor is determined in accordance with the formula. The formula provides, within limits, for increases in fee above target fee when total allowable costs are less than target costs, and decreases in fee below target fee when total allowable costs exceed target costs. This increase or decrease is intended to provide an incentive for the contractor to manage the contract effectively. When total allowable cost is greater than or less than the range of costs within which the fee-adjustment formula operates, the contractor is paid total allowable costs, plus the minimum or maximum fee. *Id.* at 16.405-1(a).

²¹ FAR 16.405-2. A CPAF allows a contractor to earn an award fee based on the discretion of the contracting officer:

[A] fee consisting of (1) a base amount fixed at inception of the contract, if applicable and at the discretion of the contracting officer, and (2) an award amount that the contractor may earn in whole or in part during performance and that is sufficient to provide motivation for excellence in the areas of cost, schedule, and technical performance. *Id.*

²² U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-66, DEFENSE ACQUISITIONS: DoD HAS PAID BILLIONS IN AWARD AND INCENTIVE FEES REGARDLESS OF ACQUISITION OUTCOMES 3 (2005) [hereinafter GAO ACQUISITION REPORT].

desired effect of motivating better performance and limiting cost overruns.²³

In 2005, the GAO reviewed monetary incentives and found their value to motivate excellent contractor performance and improve acquisition outcomes “is diluted by the way the DoD structures and implements incentives.”²⁴ The GAO observed that contracting officers often pay incentives as a matter of course.²⁵ The GAO concluded that there is “little evidence . . . that these fees improve contractor performance and acquisition outcomes.”²⁶

The GAO’s study echoed earlier examinations of monetary incentives. As monetary incentives came into vogue in the early 1960s,²⁷ scholars began to study their effectiveness in controlling cost in government contracts; they concluded that incentive fees are generally not effective at controlling costs.²⁸ In Vernon Edwards’s examination of the GAO’s findings on paying award fees as a matter of course, he highlighted that “[s]tudies conducted by GAO, Harvard University, and the RAND Corporation, among others, have concluded that these incentives do not motivate cost efficiency, in part because profit is not the contractor’s only motivation.”²⁹ Of particular note, one of the biggest motivators of better performance was securing future business with the government.³⁰ Moreover, Edwards highlights the failures in contract administration that undermine monetary incentives’ effectiveness.³¹

Nevertheless, BBP 3.0 guidance states that the DoD “can still improve its performance in aligning profit incentives with contract performance.”³² Its assertion that “profit is a fundamental driver of private enterprise” is predicated on the premise that “Our analysis shows that industrial performance responds to the incentive structure that the Department designs into our business arrangements.”³³ The guidance specifically emphasizes using FPIF and CPIF contracts, as

they are “highly correlated with better cost and schedule performance.”³⁴ Pointing to the DoD’s *2014 Annual Report on the Performance of the Defense Acquisition System*, BBP 3.0 states that the analysis contained therein demonstrates the value of focusing on incentives.³⁵

Indeed, industry should naturally innovate in response to increased opportunity for profit. However, great care and planning need to frame any effective use of incentives in order to avoid past pitfalls with incentive contracts. One good news story with regard to monetary incentives appears to be a shift away from award fee contracts toward FPIF and CPIF contracts. The migration appears to recognize the GAO’s finding that subjective award fees—often part of CPAF contracts—often result in awarding fees as a matter of course.³⁶ The shift in emphasis suggests the DoD has heeded the GAO’s concerns in tailoring incentives to reducing costs. Nevertheless, the government should not view the link between monetary incentives and contractors delivering better value as axiomatic. The effectiveness of any incentive is a function of the effectiveness of the contract’s administration.

2. Long-Term Partnerships: A Powerful Incentive

A recent evaluation of Performance Based Lifecycle (PBL) strategies by the Defense Acquisition University (DAU) examines issues associated with lengthy, guaranteed contract vehicles for PBL contracts.³⁷ The fundamental tension explored in the study is between building long-term partnerships that encourage investment from commercial contractors and the operational and financial risks of such long-term contracts.³⁸ In their examination of six PBL programs with “top-level outcomes” as the object of the acquisition instead of “discrete quantities of goods and services,”³⁹ they found that contractors have greater incentive

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 3–4.

²⁶ *Id.* at Highlights. See also *id.* (“[T]he [DoD] has not compiled data, conducted analyses, or developed performance measures to evaluate the effectiveness of award and incentive fees.”). [NOTE: the quote comes from an unpaginated summary of the report called “Highlights” that appears between the cover page and the table of contents. A variant of this quote appears on p. 32 of the report.]

²⁷ DEFENSE ACQUISITION REFORM, *supra* note 3, at 36.

²⁸ See Edwards, *Award Fee Incentives*, *supra* note 12 (noting that incentive fees have not been shown to motivate cost efficiency) [you need a parenthetical here so it is clear how this source supports the text].

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* Edwards makes several observations concerning contract administration and incentives. Notably, Edwards recommends increased linkage between incentive payments and desired outcomes, commensurate with contractor performance. *Id.*

³² BBP 3.0, *supra* note 10, at Attachment 2, p. 7.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ GAO ACQUISITION REPORT, *supra* note 24, at Highlights.

³⁷ Major Christopher P. Gardner, USAF, Jeffrey A. Ogden, Lieutenant Colonel Harold M. Kahler, USAF, Stephan Brady, *Balancing Incentives and Risks in Performance-Based Contracts*, 22 DEF. ACQUISITION REV. J. 472 (2015). Performance based lifecycle or logistics (PBL) is an “outcome-based product support strategy . . . designed to optimize system readiness and meet the warfighter’s requirements . . . through long-term product support arrangements with clear lines of authority and responsibility.” *Id.* at 477 (citing Defense Acquisition University, *PBL Overview*, ACQUISITION COMMUNITY CONNECTION, <https://acc.dau.mil/CommunityBrowser.aspx?id=527144&lang=en-US> (last updated Aug. 18, 2015)).

³⁸ *Id.*

³⁹ *Id.* at 474.

to invest in long-term cost reducing measures when the contract vehicle guarantees business over an extended period.⁴⁰ That is, when the DoD increases contract length, contractors respond with long-term investment and innovation strategies.

The DAU study specifically found that for PBL contracts, both the government and contractors had a “consistently high level of satisfaction” among “programs with a 5-year base, followed by option years or award terms.”⁴¹ These “five-plus-five” contract arrangements “allowed for an appropriate amount of risk sharing and ROI [return on investment].”⁴² While the study provided a caveat that there is no one-size-fits-all contract length, longer contracts provide an “incentive to invest in logistics support for systems, enabling affordability improvements.”⁴³ The study concluded that the benefits of such longer-term PBL contracts build strong partnerships that encourage systemic investment by contractors, thereby benefiting both the contractor and the government.⁴⁴ Moreover, the study found that the operational and financial risks associated with longer-term contracts were minimal.⁴⁵

While the study focused on PBL contracts (with a set of six programs studied), there may be a critical lesson for non-PBL contracts. Namely, longer-term contracts may prompt innovation and the development of efficiencies in other (non-PBL) defense acquisitions.⁴⁶ While the operational and financial risks associated with longer term, non-PBL contracts may be higher, their potential for incentivizing better value to the government cannot be ignored.

III. The Award Term Incentive: Another Firing Solution

Working then on the premise that long-term, public-private partnerships incentivize the delivery of better value to

the government, one incentive bears a closer examination—the award term. Vernon Edwards succinctly describes the award term: “instead of rewarding a contractor for excellent performance with additional fee, it rewards the contractor with additional business by extending the term of the contract.”⁴⁷ The award term is relatively new and not provided for in the FAR.⁴⁸ Award terms are already used by the DoD, largely modeled after award fee contracts.⁴⁹ The Air Force developed the award term and first used the concept in October 1997.⁵⁰ Air Force guidance distinguishes award terms from options:

Award terms differ from options in that award terms are based on a formal evaluation process and the contractor earns the unilateral right to future periods of performance. Once the contractor has earned an additional performance term, only non-availability of funds or termination would jeopardize award of the subsequent terms.⁵¹

The Air Force recognizes that long-term contracts motivate increased operational efficiency, increase contractor investment, and reduce acquisition transaction costs.⁵² The Air Force also has concluded that non-monetary incentives help contractors bolster their image and reputation, and helps them retain skilled personnel.⁵³

According to Air Force guidance, one critical element of the award term is that it forces a “disciplined process to determine if we want to continue a long-term business relationship with a contractor.”⁵⁴ That is, it should force contracting officers to take a deliberate approach to assessing whether planning for an award term is appropriate. Options, of course, do not require a contracting officer to conduct a careful review of current performance.⁵⁵ For options, Air Force guidance notes that “barring truly substandard performance, the contracting activity will usually continue to

⁴⁰ *Id.* at 487.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 497–98.

⁴⁴ *Id.* at 499.

⁴⁵ *Id.*

⁴⁶ See, e.g., Mutek, *supra* note 13, at 573 (noting that “the most effective and efficient arrangement may be a long-term relationship that does not include frequent competitions.”).

⁴⁷ Edwards, *Award Term: The Newest Incentive*, *supra* note 14; Vernon J. Edwards, *The Award Term Incentive: A Status Report, WHERE IN FEDERAL CONTRACTING? WIFCON.COM* (Feb. 2002), <http://www.wifcon.com/anal/analaterm2.htm>.

⁴⁸ See Edwards, *Award Term: The Newest Incentive*, *supra* note 14 (noting the award term incentive traces back to the late 1990s).

⁴⁹ *Id.*

⁵⁰ *Id.* Edwards attributes the award term incentive to Mr. Thomas Jordan, who used the award term “on a task order contract that the Air Force’s

Aeronautical Systems Center awarded to the McDonnell Douglas Corporation in October of 1997, for simulation services for the F-15C aircraft.” *Id.* Its first use included a seven-year base period, which could be extended to fifteen years with an “excellent service” rating. *Id.*

⁵¹ U.S. AIR FORCE, SPACE & MISSILE SYSTEMS CTR., INCENTIVES GUIDE 42 (Mar. 7, 2007), https://acc.dau.mil/adl/en-US/160016/file/29743/SMC_Incentives_Guide_7Mar07a.doc [hereinafter AIR FORCE SMC INCENTIVES GUIDE].

⁵² U.S. AIR FORCE CONTRACTING (SAF/AQC), AIR FORCE GUIDE: AWARD TERM/INCENTIVE OPTIONS 4 (Jan. 2003), <https://dap.dau.mil/policy/Documents/Policy/award.term.doc> [hereinafter AIR FORCE GUIDE].

⁵³ *Id.* at 2.

⁵⁴ *Id.* As highlighted by the Air Force Guide, FAR 17.207 requires the contracting officer to make findings on how exercising an option is in the best interest of the Government. See, e.g., FAR 17.207(c)(3) (2012). Also, a contracting officer only has to determine that the “contractor’s performance on this contract has been acceptable, e.g., received satisfactory ratings.” *Id.* at 17.207(c)(7). Conversely, exercising an award term may require a review of the partnership to determine whether the contractor’s performance should rate as excellent.

⁵⁵ AIR FORCE GUIDE, *supra* note 55, at 2.

place orders and exercise options through the end of the ordering period or optional periods.”⁵⁶

The Army commissioned a study by Science Applications International Corporation (SAIC) to review contracting innovations.⁵⁷ Based on surveys of industry and acquisition professionals, SAIC found that award term contracting is a “high impact” incentive with “relative ease of implementation.”⁵⁸ The study found that award terms enable a “supplier to make investments in process improvements that it might not otherwise make when facing short-term or uncertainty in periods of performance.”⁵⁹ The incentive also allows the government to extend performance quickly, rewards reduced cost while maintaining or exceeding performance standards, and forces the government to take a disciplined approach in developing requirements.⁶⁰ However, the study did caution that with an award term it can be difficult to monitor contractor progress accurately and challenging to define the reward scheme precisely to drive high-level performance.⁶¹

The pressure for industry to achieve superior performance to trigger an award term is a critical point of differentiation from an option. Options may not spur the same type of long-term investment because of their unilateral nature. After all, options present “an element of risk to the contractor because the Government possesses discretion whether to exercise the option,”⁶² whereas contractors effectively earn award terms through high performance.

1. The Department of Defense and Award Term Incentives

The award term incentive does not appear in the DFARS, nor does it appear in any of the service regulations. However, both the Army and the Air Force have published guides on incentive-based contracting that discuss the use of award term

incentives.⁶³ Likewise, the Air Force has recognized that these long-term partnerships are “usually in the best interest of the Air Force,” so long as the partnerships are with “superior contractors.”⁶⁴ The Air Force Space and Missile Systems Center (SMC) has also developed guidance on award terms.⁶⁵ SMC articulates that such incentives are appropriate when “establishing a long-term relationship is valuable both to the Government and the contractor.”⁶⁶

Moreover, award term incentives may have utility in a variety of contracting situations. They may be appropriate in service contracts, where requirements recur over an extended period of time, and where qualitative performance metrics are measurable.⁶⁷ One example reviewed by SAIC’s study for the Army was an Air Force engine repair and maintenance acquisition.⁶⁸ The requirements contract provided for a minimum of five years and a maximum of fifteen years from the date of contract award.⁶⁹ The government informed offerors of the award term clauses through the request for proposals, indicating that “performance will be continually monitored against ‘measures of merit,’ outlined in the contract.”⁷⁰ The contract’s award term plan provided for an award term review board, which provided recommendations to an award term determining official via a performance point scheme.⁷¹ The DoD seems to already have one foot in the door when using award term incentives, but there is no formal regulatory scheme governing the incentive’s use.

2. The Environmental Protection Agency and Award Term Incentives

The Environmental Protection Agency (EPA) proposed adding the award term incentive for service contracts to the EPA Acquisition Regulation (EPAAR) in 2007.⁷² In the “Background” section of its proposal, the EPA noted:

⁵⁶ *Id.* at 3.

⁵⁷ SCIENCE APPLICATIONS INTERNATIONAL CORPORATION, CONSTRUCTING SUCCESSFUL BUSINESS RELATIONSHIPS: INNOVATION IN CONTRACTUAL INCENTIVES (Jan. 20, 2016), https://www.acquisition.gov/seven_steps/library/DOAconstructing.pdf [hereinafter SAIC REPORT].

⁵⁸ *Id.* at 28.

⁵⁹ *Id.* at 53.

⁶⁰ *Id.*

⁶¹ *Id.* at 53–54.

⁶² Mutek, *supra* note 13, at 578.

⁶³ See U.S. ARMY CONTRACTING AGENCY, ARMY CONTRACT INCENTIVES GUIDE (Nov. 2004), <https://acc.dau.mil/CommunityBrowser.aspx?id=54818&lang=en-US>; AIR FORCE GUIDE, *supra* note 55.

⁶⁴ AIR FORCE GUIDE, *supra* note 53, at 1.

⁶⁵ AIR FORCE SMC INCENTIVES GUIDE, *supra* note 54.

⁶⁶ *Id.* at 42.

⁶⁷ STAN LIVINGSTONE, AWARD TERM CONTRACTING: OPTIMIZING CONTRACTOR PERFORMANCE THROUGH NONMONETARY INCENTIVES (Acquisition Solutions Research Institute June 2009), https://www.asigovernment.com/files/documents/Advisory_Award%20Term%20Contracting.pdf

⁶⁸ SAIC REPORT, *supra* note 60, at 121.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* The contracting officer noted that the concept had “great support from offerors” and that “there is more pressure on [contractors] to provide exceptional performance in an award-term than in an award-fee situation because failure to earn maximum points directly affects the period of performance and return on investment.” *Id.*

⁷² Acquisition Regulation: Guidance on Use of Award Term Incentives; Administrative Amendments, 72 Fed. Reg. 56,708 (proposed Oct. 4, 2007) (to be codified at 40 C.F.R. pts. 1516, 1533, and 1552) [hereinafter EPA Award Term Proposal].

Award terms are a form of incentive, offering additional periods of performance rather than additional profit or fee as a reward for achieving prescribed performance measures. Award term incentives were introduced by the Department of the Air Force in 1997. While they have become increasingly popular, the Federal Acquisition Regulation (FAR) has yet to provide any coverage on their use. Accordingly, in order to assist EPA contracting officers seeking to use award term incentives, it is necessary to amend the EPAAR to incorporate guidance on their use.⁷³

The EPA's final EPAAR's revision resulted in EPAAR 1516.401-70.⁷⁴ The EPA shaped its rule to ensure that contractors were not under the impression that "their achievement of prescribed performance measures conferred an absolute entitlement to award term(s), notwithstanding the absence of need or funds for such term(s)." ⁷⁵ The corresponding clause at EPAAR 1516.401-70(e)(1)(iii) indicates that the government may cancel an award term if it does not have available funds.⁷⁶

While the EPAAR provides an excellent starting point for shaping the use of award term incentives, the DoD may want to revisit some of its terms in assessing how to implement its own award term incentive strategy, including whether to include such a similar provision in the DFARS. For example, the EPAAR limits the incentive to service-based contracts.⁷⁷ Also, perhaps because of its narrow focus, the EPAAR does not address some of the legal concerns with the implementation of award term incentives, which will be reviewed below.

IV. Award Term Incentives: The Legal Framework

The underlying tension then becomes reconciling award term incentives with the Anti-Deficiency Act (ADA)⁷⁸ and the Competition in Contracting Act (CICA).⁷⁹ The idea of

obligating unavailable, future-year funds seems to run afoul of the ADA's rule against obligating non-available funds.⁸⁰ Moreover, binding the government to a long-term, multiple-year contract—that may or may not trigger automatic extensions—seems to undermine the CICA's requirement for full and open competition.⁸¹ The issue for an award term incentive is navigating the ADA and CICA without diluting the incentive's effectiveness.

1. Right Year, Right Money: The Anti-Deficiency Act

Taking the ADA first, contracting officers may not obligate funds "for the payment of money before an appropriation is made unless authorized by law" ⁸² Moreover, agencies may only use funds to fill requirements that have actually accrued—for which there is a current bona fide need.⁸³ As discussed by Steven N. Tomanelli, the "legal entitlement to additional periods of performance" is the "most controversial aspect of award term contracting."⁸⁴ Tomanelli contends that exercising the award term may offend the bona fide needs rule because the obligation would occur prior to the funds' availability, where the performance (and the corresponding bona fide need) would occur in a subsequent fiscal year.⁸⁵ That is, the obligation occurs when the contracting officer determines that the contractor qualified for the award term; and such a determination may obligate unavailable funds. Tomanelli also contends that efforts to caveat the incentive in order to conform to the bona fide needs rule may erode its inherent value.⁸⁶ Namely, diluting the contractor's right to another period of performance makes the incentive illusory and thus less attractive.⁸⁷

However, there are at least two means of avoiding violations of the bona fide needs rule where funds are constrained by time. First, the contracting officer can make exercising an award term contingent on the availability of future year funds and on the bona fide need for continued performance.⁸⁸ It is important to note that, in the absence of

⁷³ *Id.*

⁷⁴ Environmental Protection Agency Acquisition Regulation (EPAAR), 48 C.F.R. § 1516.401-170 (2008).

⁷⁵ EPA Award Term Proposal, *supra* note 75, at 56,710.

⁷⁶ EPAAR 1516.401-170(e)(1)(iii).

⁷⁷ EPAAR 1516.401-170(f).

⁷⁸ Anti-Deficiency Act (ADA), 31 U.S.C. § 1341(a)(1)(B) (2012).

⁷⁹ Competition in Contracting Act (CICA) (enacted as part of the Deficit Reduction Act), P.L. 98-369, §§ 2701–2753 (1984).

⁸⁰ 31 U.S.C. § 1341(a)(1)(A).

⁸¹ 10 U.S.C. § 2304(a)(1)(A) (2012); 41 U.S.C. § 253(a)(1)(A) (2012).

⁸² 31 U.S.C. § 1341(a)(1)(B) (2012).

⁸³ 31 U.S.C. § 1552 (2012).

⁸⁴ Steven N. Tomanelli, *Feature Comment: Award-Term Contracting Incentives—Fiscal Constraints and Strategies to Overcome Them*, GOV. CONTRACTOR, 46 No. 13, ¶ 137 (2004).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* Tomanelli takes issue with an effort by the Air Force to structure award terms such that the contractor does not have a contractual entitlement when qualifying under the award term: "[S]uperior performance during the base period(s) entitles the contractor only to the possibility that the CO [contracting officer] will exercise an option to extend performance." *Id.* Tomanelli notes that while this approach may assuage fiscal law concerns, it results in a failure to provide the contractor with a meaningful guarantee of future business. *Id.*

⁸⁸ As noted, the EPA navigates this obstacle by making any exercise of an award term contingent on the availability of funds. See EPAAR 1516.401-170(e)(1)(iii). The FAR provides for obligating future year funds that are conditioned on availability, provided that the contracting officer includes an appropriate availability of funds clause. See FAR 32-703-2(a)–(c). However, the Armed Services Board of Contract Appeals (ASBCA) has opined that "exercise of an option contingent on the availability of funds is

regulatory guidance for award term incentives, a clause of this kind must be included in such contracts. The EPA included a caveat in EPAAR 1516.401-70 qualifying the obligation of funds in an award term on both the availability of funds and a continued bona fide need for contract performance.⁸⁹

Second, in an approach suggested by Tomanelli, a contracting officer may shape an award term such that it works like a requirements contract, obligating the government to purchase all its requirements from the contractor during the earned award term.⁹⁰ Under this approach, the contractor would have a monopoly for any requirement generated by the government; but the exercise of the award term would not trigger an obligation of funds when earned. Rather, the contract would only obligate funds when the contracting officer orders against the contract. Furthermore, acquisition planners may also consider exceptions to the bona fide needs rule (e.g. lead time exceptions) in avoiding ADA pitfalls.⁹¹

The bottom line is that there is a tension between vesting a contractual right to future performance under the contract and the underlying framework of the ADA. While the purpose of the award term is to incentivize long-term investment and foster superior contractor performance, acquisition planners must remain mindful of mechanisms to avoid an unlawful obligation of funds. Moreover, acquisition planners must also consider that the more award term incentives are qualified with caveats and exceptions, the more the incentive's effectiveness will erode. That is, the utility of undergirding the award term incentive is stability in a public-private partnership; and an easily broken or porous set of obligations in a partnership will diminish its value.

2. Justifying the Award Term on the Front End: Complying with the CICA

Like the ADA, contracting officers will have to tailor award term incentives to comply with the CICA. The CICA

requires that agencies only enter into contracts after full and open competition by using competitive procedures,⁹² unless otherwise authorized.⁹³ The FAR further delineates agency requirements to engage in full and open competition.⁹⁴

There is nothing about an award term incentive that, on its own, permits the extending (via earned award term) of the contract without a new full and open competition. However, extending a contract under an award term is substantially similar to extending a contract under a multiple-year option, which is not subject to the CICA.⁹⁵ The triggering of an award term intuitively resembles the government exercising an option, even though options have key differences (e.g. invoking an option is the unilateral right of the government).⁹⁶ So long as acquisition planners account for a potential award term and include them in a solicitation prior to award, award terms should be scrutinized like options vis-à-vis the CICA.

However, in practice, an award term incentive combines elements of multiple-year options and incentive or award fee contracts. To use both multiple-year options and fee-based incentives, the government must generally make a determination and finding (D&F) that the best interests of the government are served by the contract action. The government should treat award term incentives similarly.

a. Option Contracts

A contracting officer exercising an option provides perhaps the closest analogue for how an award term must comply with the CICA.⁹⁷ For an option contract to meet the requirements for full and open competition, the government must include option periods in the initial evaluation criteria.⁹⁸ So long as the government evaluates option pricing during the initial evaluation of proposals, offerors are on notice that their proposed option pricing may bind them several years before

proper" only if required by the option clause of the contract. See JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1272 (3d ed. 1998) (citing Western States Management Servs., Inc., ASBCA No. 37504, 92-1 BCA ¶ 24,663; Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA ¶ 25,912).

⁸⁹ See EPAAR 1516.401-170(e)(1)(iii)–(iv) (providing that the award term does not go into effect if "[t]he Government notifies the contractor in writing it does not have funds available for the award term" or if the "[g]overnment no longer has a need for the award term incentive period at or before the time an award term incentive period is to commence.").

⁹⁰ Tomanelli, *supra* note 87.

⁹¹ See U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATIONS, Vol. 3, ¶ 080303B (noting that "[c]ontracts entered into or orders placed for goods, supplies, or services must be executed only with bona fide intent that the contractor (or other performing activity) must commence work and perform the contract without unnecessary delay").

⁹² 10 U.S.C. § 2304(a)(1) (2012).

⁹³ See 10 U.S.C. § 2304(c). Under the CICA, there is a requirement for full and open competition unless one of the following circumstances apply: (1)

there is a single responsible source for goods or services; (2) unusual or compelling circumstances warrant limits to the number of potential contractors; (3) maintenance of the industrial base requires limited competition; (4) requirements of international agreements mandate; (5) there is statutory authorization for acquisition of brand name items; (6) disclosure of agency needs would compromise national security; (7) the agency head determines that limited competition is necessary and in the public interest. *Id.*

⁹⁴ See FAR 6.001 (2014) *et seq.* (implementing requirements of the CICA).

⁹⁵ Full and open competition does not apply to the "exercise of priced options that were evaluated as part of the initial competition." FAR 6.001(c). See also FAR 17.207 (2014).

⁹⁶ See FAR 17.207.

⁹⁷ Options are unilateral rights in a contract whereby the government may "elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract." FAR 17.201.

⁹⁸ Full and open competition does not apply to the "exercise of priced options that were evaluated as part of the initial competition." FAR 6.001(c).

performance.⁹⁹ Contracting officers must make a D&F that the use of options is in the government's best interest.¹⁰⁰

As noted, the act of exercising an award term is intuitively similar to exercising an option. For both exercising an option and earning an award term, the contractor qualifies for continued performance. The key difference is where the authority lies in the contractual arrangement. One may think of an award term as a type of option wherein the right to continued performance vests in the contractor—not unilaterally with the government. The issue then becomes whether this distinguishing feature, where leverage shifts to a contractor to continue performance, is problematic for the incentive's legal footing under the CICA.

Agencies are afforded great discretion in whether or not to exercise options.¹⁰¹ The contracting officer essentially makes a business judgment—determining that funds are available, that there is a bona fide need (and that the option is the most advantageous method of fulfilling the need), and that the option meets the requirements of FAR 5.202.¹⁰² However, in exercising an award term incentive, the terms of the incentive necessarily limit discretion, as the right to additional performance would vest with the contractor with exemplary performance.¹⁰³ If the contractor qualifies for continued performance under pre-set conditions of the award term, the government cannot simply decide not to award the award term and re-compete the contract (without perhaps a costly termination for convenience of the government). That is, a contractor may earn continued performance even if the best interests of the government would be best served by re-competing the contract.

If the government wished to postpone negotiation of pricing for award terms to avoid binding itself to a pricing or performance scheme not in its best interest, contracting officers may be tempted to craft award terms as negotiated contract extensions. Yet, with the exception of one possible workaround (discussed below), it is difficult to conceptualize how a contracting officer could avoid negotiating the pricing of award terms in the initial competition while staying in

bounds with the CICA. Specifically, the full and open competition requirement would apply to “the exercise of options that have not been evaluated in the award, since such exercise can be considered a form of sole source contracting,”¹⁰⁴ just as it would apply to award term incentives. Like options, the conditions and pricing of award terms would have to be evaluated during the initial competition for continued performance to meet the requirements of full and open competition.

The consequence is that, like an option, the details of award term incentive must be a part of the initial evaluation to comply with the CICA. Although both a contractor and the government may want to postpone the negotiation for additional award term pricing, such a delay seems to be incompatible with the CICA. Therefore, there should be no ambiguity in the solicitation concerning the evaluation of award terms in the initial competition; and acquisition planners should understand the inherent risk posed by award terms.

b. Fee-Based Incentives & Structuring the Award Term Incentive's Justification

Monetary incentives also shed some light on how the government should craft award term incentives. While the regulatory requirements behind exercising an option provide the best foundation for complying with the CICA, it would be nonsensical for the government to author a D&F when the contractor triggers the award term.¹⁰⁵ Rather, as discussed, the justification for using an award term for continued performance must precede the contract award. Therefore, in drafting a D&F for award terms, the justification used for fee-based incentives is an appropriate analogue. That is, the justification for the use of award terms should substantially comply with the D&F requirements of both exercising an option and including an incentive fee in a contract.

While monetary incentives do not require reconciling with the CICA, structuring a front-end justification for an

⁹⁹ FAR 6.001(a)–(f) provides for several circumstances when CICA's requirement for full and open competition does not apply. Full and open competition does not apply to the “exercise of priced options that were evaluated as part of the initial competition.” FAR 6.001(c). *See also*, Edwards, *Award Term: The Newest Incentive*, *supra* note 14; Edwards, *The Award Term Incentive: A Status Report*, *supra* note 49; AIR FORCE GUIDE, *supra* note 55, (directing evaluation of incentive based options with the initial competition).

¹⁰⁰ FAR 17.2 (2014).

¹⁰¹ FORMATION OF GOVERNMENT CONTRACTS, *supra* note 91, at 1264 (citing National Cash Register Co., Comp. Gen. Dec. B-179045, 74-1 CPD ¶ 116 (“[O]ptions were purely for the interest and benefit of the Government . . .”)); *id.* (“ASBCA has held that it will not review a decision not to exercise an option unless it is demonstrated that the decision is made in bad faith or is an abuse of discretion”) (citing Pennyrite Plumbing, Inc., ASBCA No. 44555, 96-1 BCA ¶ 28,044; Sample Enters., ASBCA No. 44564, 94-2 BCA ¶ 27,105).

¹⁰² FORMATION OF GOVERNMENT CONTRACTS, *supra* note 91, at 1265.

¹⁰³ The procedures involved with the exercise of an option would be an impossibility for the government if it exercised in an award term incentive. Specifically, even for options that were part of the original competition, FAR 17.207(d) charges the contractor with making a business decision prior to exercising an option. Yet, so long as the government finds that a contractor qualified for an award term incentive, the government's hands are tied vis-à-vis FAR 17.207—there is no discretion for a business judgment that comports with the regulation.

¹⁰⁴ FORMATION OF GOVERNMENT CONTRACTS, *supra* note 91, at 1267, (citing Kollsman Instrument Co., 68 Comp. Gen. 303 B-233759, 89-1 CPD ¶ 243).

¹⁰⁵ FAR 17.207 requires the government to make a business judgment at the time it exercises an option. FAR 17.207(c)(3). However, with respect to an award term the idea is that the government will extend performance if a contractor has earned an award term, regardless of its business judgment. The foundation of the award term is earning a right to continued performance.

award term incentive to mirror a monetary incentive would provide a sound insulation for an award term in light of the CICA. The D&F under FAR 16.401(d) requires a finding by the Head of Contracting Activity (HCA) that an incentive scheme is in the best interest of the government.¹⁰⁶ The discretion on the part of the government in whether the contractor met the requirements of the incentive would effectively become the proxy for the business judgment for exercising an option under FAR 17.207. It is important to note that the requirements of FAR 16.401 and FAR 17.207 substantially overlap—each requiring an analysis regarding whether the incentive structure or the exercise of an option, respectively, is in the best interest of the government.¹⁰⁷

The key point of differentiation is that incentives require a D&F prior to award, while the exercise of an option requires a D&F prior to exercising the option. However, for an HCA to execute a D&F ahead of a contract award—which finds an award term is in the best interest of the government several years before it is earned—may require HCAs to make difficult forecasts. This may be a tall order in several areas. For one, a determination that an award term is in the best interests of the government may require committing to pricing well in advance of award term periods. However, the other side of the coin is that long-term forecasting drives at the heart of the value of an award term incentive—it encourages long-term investment and innovation in order to be both competitive and profitable.

The take-away with respect to comparing award term incentives to elements of multiple-year options and fee-based incentives is that in order not to run afoul of the CICA, the government must make a finding that using an award is in the best interest of the government, which may be no easy task when assessing the incentive's utility several years down the road. However, using the incentive as such is likely

acceptable so long as incentives are in the best interest of the government and are accounted for prior to award.

This forecasting exercise presents a major counterweight in assessing whether to use an award term incentive. Pricing award terms presents risk not only for the contractor but also for the government.¹⁰⁸ While the contract could account for economic price adjustments,¹⁰⁹ it is difficult to conceptualize how an award term incentive could provide for negotiating additional award terms without pricing them at the outset of competition.¹¹⁰ However, Edwards suggests a novel workaround such that award terms may be priced in terms of a ceiling with allowances for clearly defined downward price adjustments and upward economic price adjustments.¹¹¹

Given the constraining regulatory framework, as well as the lack of formalized guidance on implementing award term incentives, incorporating award term incentives is not without both litigation and economic risk. Moreover, there is undoubtedly significant cost with administering such incentives. Nonetheless, even without a regulatory framework for incorporating award term incentives into contracts, there are analogous mechanisms for avoiding problems with the ADA and the CICA. Namely, contracting officers should include the appropriate caveats regarding availability of funds and the need for goods or services and properly document the justification for using award term incentives on the front end of contracts. Finally, contracting officers should be mindful of the tension between the need to comply with applicable laws and the inherent value of the incentive.

V. Conclusion

Insofar as defense acquisition reform remains a high-visibility, high priority item for the DoD,¹¹² exploring non-

¹⁰⁶ FAR 16.401 requires a D&F from the head of contracting activity for all incentive and award fee contracts. The D&F must be documented in the contract file and must justify why the work requires or would benefit from the incentive, why the likelihood of meeting contract objectives will be enhanced by the incentive, and why any administrative burden caused by monitoring the incentive is justified by expected benefits. FAR 16.401(d)–(e) (2014).

¹⁰⁷ FAR 16.401(d) requires that the HCA determine that the use of the incentive is in the best interest of the government. Moreover, FAR 16.401(e)(1) requires specific justification by HCA for award fees where it is not feasible to provide objective criteria for the triggering of the incentive. FAR 17.207(d) also requires a D&F that the option is in the best interest of the government. However, exercising an option only requires a contracting officer to make the determination, not the HCA.

¹⁰⁸ See, e.g., Edwards, *The Award Term Incentive: A Status Report*, *supra* note 49 (discussing the difficulty of forecasting pricing for an award term incentive).

¹⁰⁹ See FAR 17.109(b), 17.207(f) (allowing for economic price adjustments in option contracts).

¹¹⁰ FAR 17.207(f) requires that the government may only exercise options at prices that are “reasonably determinable from the terms of the basic contract.” See also Edwards, *The Award Term Incentive: A Status Report*, *supra* note 49.

¹¹¹ Edwards, *The Award Term Incentive: A Status Report*, *supra* note 49. Edwards states:

In light of the fact that most agencies that have used or that plan to use award term incentives have provided for as many as 10 to 15 years of performance, the GAO's requirement to price those years at the time of initial contract award, and its objection to renegotiating those prices, confront agencies and contractors with a daunting problem. It is hard to imagine any business person making a firm commitment to prices 10 to 15 years in advance without some provision for price adjustment or escape from the deal.

Economic price adjustment clauses, in the sense in which they are described in FAR 16.203, can help, but they usually do not cover all exigencies that could affect prices significantly. Thus, agencies that are contemplating the use of award term incentives must develop another solution, one that will meet with the approval of the GAO. One such solution may be for the parties to agree on ceiling prices that are subject to downward adjustment based on clearly stipulated terms and conditions. Upward adjustments of such ceilings could be based on economic price adjustment provisions or some other reasonable basis.

¹¹² Stewart, *Foreword*, *supra* note 3, at vii.

monetary incentives like the award term seems to naturally complement the priorities outlined in BBP 3.0.¹¹³ Non-monetary incentives like the award term encourage contracting officers to innovate, develop partnerships, and ultimately promote better value to the government. However, in order to appropriately harness the effectiveness of these incentive-based contracts, the DoD needs to review the existing regulatory framework for their use and codify incentives like the award term in the DFARS.

As BBP 3.0 recognizes, contract incentives drive down cost;¹¹⁴ but there is a questionable link between monetary incentives and cost control.¹¹⁵ Where monetary incentives are often paid as a matter of course and may not incentivize better performance,¹¹⁶ incentives that lead to long-term public-private partnerships have real potential to improve contract performance. Long-term contracts often increase efficiency and contractor investment, reduce transaction costs,¹¹⁷ and force the disciplined contract administration.¹¹⁸

While there is certainly value in developing public-private partnerships through award term incentives, there is limited guidance on how to best incorporate these incentive schemes into contracts. While the DoD already uses award terms, their use is not standardized across agencies; and there is no provision in the DFARS or service supplements for their use. Where agencies like the EPA have codified their use for service contracts, the DoD is effectively playing a pick-up game with award term incentives.

While the absence of regulatory guidance for non-monetary incentives like the award term may afford some flexibility, the government should be wary of reconciling them with the ADA and the CICA. To maintain compliance with the ADA, the government should take measures to ensure that award terms are conditioned on both the bona fide need and time constraints for the obligation of funds. Furthermore, in order to comply with the CICA, the government should follow the scheme for multiple-year options in its acquisition planning. The justification for the use of award term incentives should also substantially comply with existing D&F requirements for including monetary incentive structures in contracts.

While there is no perfect solution to control costs and exact superior performance from contractors, and while all incentives have the potential to increase the order of magnitude of difficulty for contract administration, the DoD should not overlook non-monetary incentives like the award term in its efforts to build partnerships and increase buying power.

¹¹³ U.S. DEP'T OF DEF., BETTER BUYING POWER, *supra* note 9.

¹¹⁴ BBP 3.0, *supra* note 10.

¹¹⁵ See Edwards, *Award-Fee Incentives*, *supra* note 12.

¹¹⁶ GAO ACQUISITION REPORT, *supra* note 24, at 4

¹¹⁷ AIR FORCE GUIDE, *supra* note 55.

¹¹⁸ *Id.*