Executive Summary

Amid continuing efforts to speed up the federal contracting process, COVID-19 renewed the sense of urgency. Lofty goals of 60-day lead times to contract award no longer seemed fast enough when confronted with a pandemic. The President’s declaration of a national emergency on March 13 sparked dozens of contract flexibilities and new policies.

Federal non-defense COVID-19 contract dollars saw a rapid increase during the month of March to an average of over $300 million obligated each day (Figure 1). While there is an apparent drop-off in April, the figures are subject to revision as more transactions get reported. Cumulatively, over $7 billion in non-defense contracts were reported for COVID-19 as of April 21. For comparison, non-defense agencies normally obligate about $500 million each day with defense adding more than $1 billion.

This special report from the Center for Government Contracting at George Mason University will discuss rapid contracting approaches in federal contracting and how they have been used to respond to COVID-19 using data from the Federal Procurement Data System. While federal agencies have exercised flexibilities—for example invoking nearly $1 billion in emergency FAR 12.102(f) authorities—more can be done. Moving forward, rapid contracting approaches will remain an
imperative not just for response to pandemics, but for possible natural disasters and wartime mobilization.

**Acquisition Reform—A Hardy Perennial**

The Federal Acquisition Regulation (FAR) is known for its complexity. In the past sixty years, for example, the Defense Department has experienced the work of over sixty major commissions, reviews, and initiatives aimed at improving or reforming the processes of procurement, to find the correct balance of price, speed, quality, and even relevance. Engineering complexities, technological challenges, legal and regulatory requirements, as well as administrative processes and cultural norms create challenges across the acquisition system.

There have been a large number of legislative and executive branch initiatives over the past several years to improve how the overall system functions. These have focused on, for instance, simplifying how the government purchases commercial items; giving agencies greater flexibility to employ new contracting tools; and undertaking efforts to streamline the acquisition process for major programs. Given the urgency of the COVID-19 response, it is useful to examine how some of these efforts, and the system overall, are performing and being utilized in the current situation.

**FAR Contract Flexibilities**

Despite its reputation, a great deal of flexibility exists within the FAR. Emergency FAR clauses and procedures, for example, have been implemented for the COVID-19 response, often increasing thresholds or delegating approvals to streamline how business gets done.

**Federal Supply Schedules.** Government-wide schedules that simplify order procedures are described in FAR 8.4 and 38. Using an existing multiple award task order contract, a contracting officer may add a task order to take advantage of existing pricing, bulk-buy discounts, and reduced regulations. [Link] In an emergency situation, however, the best-in-class contractors may not be able to surge production to meet demand. Thus, the schedules likely do not provide access to much of the industrial potential.

Of COVID-19 contract obligations, $527 million used government-wide contracts. Indefinite delivery, indefinite quantity (IDIQ) contracts made up another $787 million. Together, they represent 18 percent of all COVID-19 contract obligations.

**Commercial Items.** Federal agencies are expected to maximize the use of commercial items for procurement (41 U.S.C. 3307). Contracting officers may use commercial procedures in conjunction with simplified acquisition, sealed bidding, or negotiation. Commercial item procurements bypass over 100 statues and regulations, but still face hurdles. [Link] A contracting officer must make a “commercial item determination” according to FAR 2.101. This process can be lengthy, as it involves special groups within agencies. [Link]

FAR 12.102(f), however, allows “any acquisition of supplies and services” to use commercial item processes for contracts up to $19 million if purchased for recovery from an “attack.” The first transactions to invoke FAR 12.102(f) for COVID-19 were signed on March 3 and total $1 billion through April 19.

As illustrated in Figure 2, 60 percent of COVID-19 non-defense contract obligations to date have used commercial items or emergency commercial item authorities. This stands in stark contrast to the pre-COVID period, where only about one-third of all non-defense contracts between January and March used commercial items procedures.

![Figure 2. Non-defense COVID-19 obligations breakout. R&D is identified separately because it is far less likely to use commercial procedures. Data as of April 21. Source: FPDS.](image-url)
**Simplified Acquisition.** Provided that the buy cannot be accomplished through a federal schedule, simplified acquisition procedures can also reduce process burdens. Informal quoting and price comparison may occur, performed orally rather than written. There is no formal acquisition plan. Overall, simplified acquisition may reduce processing time by 90 percent. [Link]

In normal times, the threshold for simplified acquisition is $250,000, and micro-purchases under $3,500 can be paid using a credit card. However, in an emergency like COVID-19, the ceiling on domestic micro-purchases increases to $20,000, on purchase orders increases to $750,000. The threshold for certain commercial items to use the procedures increases from $7 to $13 million (41 U.S.C. 1903, “Special Emergency Procurement Authority”). The government invoked these flexibilities on March 20. [Link] While over one-quarter of all non-defense transactions in response to COVID-19 used simplified acquisition procedures, they amounted to only $186 million (3 percent) of total obligations.

**Letter contracts.** Also known as an Undefinitized Contract Action (UCA), a letter contract authorizes a contractor to begin work immediately, with more specific terms to be negotiated when time permits. Letter contracts may only be used after a written determination “that no other contract is suitable” (FAR 16.603-3). Letter contracts require a statement of urgency and a determination from the head of the contracting activity. Overall, use of a letter contract increases reporting requirements and oversight.

For the Department of Defense, the CARES Act gave flexibilities to letter contracts in two major ways. First, it allows heads of agencies to waive 10 U.S.C. 2326(b) which created a deadline for an agreement on terms and price to be reached before 6 months or 50 percent of the ceiling is obligated. Second, it waives section 2326(b)(3) which requires a qualified contractor price proposal before 50 percent of the contract ceiling is obligated. [Link]

More than 39 non-defense actions for COVID-19 reported using letter contracts or other undefinitized actions as of April 21. The obligations totaled $158 million, but this figure does not capture eventual pricing. One contract from the Department of Veterans Affairs to Abbot Molecular has zero money obligated, but a potential award of $100 million for COVID-19 test kits.

**Non-FAR Authorities**

**Other Transaction Authority (OTA).** To accelerate the research and prototyping of vaccines and medical equipment, the federal government expanded the use of “Other Transaction” Authority first provided to NASA in 1958 (P.L. 85-568 §203(c)). The CARES Act provided $3.5 billion to Health and Human Services’ Biomedical Advanced Research and Development Authority (BARDA) which uses OTs. The Act also expanded the authority and raised the funding caps for HHS (Section 3301) and DoD (Section 13006) to use OT agreements on larger-scale projects to foster innovation on COVID response efforts.

Since renewed emphasis on the OT authority began in 2016, the use of OT contracts has expanded ten-fold across the Defense Department. [Link] The Department of Health and Human Services has only used OT authority at most a few times a year since 2006. [Link] In response to COVID-19, HHS quickly obligated over $700 million in OTs in four actions to develop antivirals. However, in April, only $31 million in OTs were identified. Most of the recent dollars reported under BARDA, for example, have gone for consulting services. [Link]

Overall, non-defense obligations for COVID-19 R&D have remained robust, from $775 million in March to nearly $757 million during the first half of April.

**The Defense Commercial Solutions Openings (CSOs) Pilot Program.** authorized by the 2017 National Defense Authorization Act, provides another rapid process for buying innovative commercial items and services. While a procurement of respirators may use commercial item contracting means (see above), buying 3D-printed medical equipment through a challenge competition might be a good candidate for a CSO.
The CSO is a non-FAR solicitation procedure that is similar to Broad Agency Announcements (FAR 35.016). CSOs include a long open period for addressing a broad topic rather than a defined requirement. Contractors may submit white papers and make oral presentations. A series of negotiated task orders proceed in a competitive environment. [Link] CSOs allow agreements officers to make merit-based decisions without reference to cost-realism. Yet the CSO process may use either OT or fixed-price contracts that are subject to the FAR. [Link]

The Defense Innovation Unit piloted and trained contracting officers within the military services on CSOs. The DIU had hoped to use CSOs to make awards in 60 days or less; as of 2019, its actual timelines were closer to 90 days. [Link] Homeland Security recently announced a new CSO for COVID-19 as part of the Procurement & Acquisition Innovation Response team. [Link]

Impact of COVID-19 on Obligations

Overall, federal obligations haven’t appeared to slow down since the start of COVID-19. That is partly due to government efforts to assure contract cash flow. [Link] The other part is the lack of a strong correlation between COVID hotspots and the destination of federal obligations, illustrated in Figures 3 and 4. Moreover, some facilities impacted by COVID, such as Boeing facilities in Washington state, are now reopening as cases recede in that former hot spot. [Link] This disruption as well as prioritization of COVID response efforts is having an impact, however, as Under Secretary of Defense for Acquisition and Sustainment Ellen Lord recently reported delays to major acquisition programs such as the Columbia Class Ballistic Missile Submarine. [Link]

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