

The State of the Base: DoD Diagnoses Barriers to Competition, but Has No Cure

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What happened? Just weeks before the real State of the Union Address to Congress, the Department of Defense (DoD or Department) published a report on the “State of Competition within the Defense Industrial Base” (DIB Report). Spoiler Alert: the state of DIB competition is bad. Very bad. In the last 30 years, the report notes, the number of aerospace and defense prime contractors has shrunk from 51 to 5, leaving DoD “increasingly reliant on a small number of contractors for critical defense capabilities.” At a more granular level, some of the declines in competition for several key industry sectors are just as bad:

Sector

1990 Suppliers

2020 Suppliers

Tactical Missiles

13

3

Fixed-wing Aircraft

8

3

Satellites

8

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Practice Areas

Government Contracts
Intellectual Property
Small Businesses

4

Surface Ships

8

2

Expendable Launch Vehicles

6

2

Tracked Combat Vehicles

3

1

The DIB Report highlighted “five broad recommendations to spur increased competition” in these areas, including:

- Strengthening Merger Oversight;
- Addressing Intellectual Property Limitations;
- Increasing New Entrants;
- Increasing Opportunities for Small Businesses; and
- Implementing Sector-specific Supply Chain Resiliency Plans.

The prescriptions from these recommendations run from the promise to review more aggressively—and, presumably, block—mergers to prevent consolidation among the tiny remnant of major players; to the time-honored but ever-elusive aspiration of “reducing barriers to entry” for small businesses; to implementing intellectual property acquisition “best practices.”

Why is this DIB Report worth your time? Despite the lack of much that is genuinely fresh, the DIB Report as a whole, weighing in at just 28 pages, is worth a read to better understand and adapt to the institutional forces and policy preferences to which key Government customers will be subject in the near and midterm future. We will see how that goes and how aggressively contracting activities respond, but it is good to know what we will be seeing on agency PowerPoint slide decks—and in solicitations and debriefings—in the coming months and years. Here are the highlights.

As to ***Merger Oversight***, all we can learn from the DIB Report is that DoD wants “heightened scrutiny” and the Department plans to support Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ) investigations and recommendations. DoD promises to provide “fact-based analysis of risks, issues and opportunities that help establish strategies” to improve the DIB. It is unclear how a “fact-based” analysis will differ from prior reviews. However, companies planning deals should be even more far-sighted and aggressive in planning and advocating with key stakeholders. Such transactions are sensitive and need good timing as well as high levels of confidentiality. But having a good advocacy plan to make things work with the Government, well before it’s needed, should be even more important in the wake of the DIB Report.

For ***Intellectual Property (IP)*** issues, recommended “best practices” to generate competition include early identification of “long-term IP needs,” more aggressive and searching evaluation of IP offerings in procurements, and contracting only with companies willing to “provide the government the IP deliverables and rights it needs.” One seemingly noteworthy practice that the DIB Report recommends is to “discourage the offer of proprietary technology with data rights restrictions.” Companies reliant on such technology should be on the lookout for and, where appropriate and feasible, push back against such discouragement as early in the procurement cycle as possible. Companies not so reliant should be advocating early on for their customers to follow DoD guidance in the DIB Report. And regardless of your competitive position, all concerned should recognize that many agencies have great difficulty drafting viable evaluation criteria, in rigorously applying those criteria, and in estimating proposed IP-driven costs. Accordingly, discreet, well-timed, and cogent pre-award customer interactions, or even protests, may be critical to business success.

Two recommendations focus, essentially, on the same thing: removing barriers to DIB small business participation and thereby ***Increasing the Number of Players***. The DIB Report first congratulates the Small Business Administration for meeting its Government-wide small business contracting goals for seven straight years, achieving an “all-time high” with an \$80.3 billion small business spend. On the downside, over the same period, the DIB Report notes, DIB small business dollars decreased by 40%. To fix this, aside from expanding small business outreach efforts (another time-honored nostrum and, see below), the DIB Report states that DoD will turn its small business website into a single point of entry—presumably something like FedBizOpps (FBO).

Whether DoD can pull off the technological and administrative challenges of separating small business set-asides and similar procurements from FBO, the DIB Report does not predict. Small businesses of all kinds should closely watch efforts to repurpose the DoD website and stay on top of any new registration or other associated requirements. Moreover, none of the initiatives for these two recommendations appear to address the core concern behind the DIB Report in the first place: the collapse of the major systems suppliers for

critical defense and aerospace technology. The solutions mooted in the DIB Report generate no realistic prospect of growing a small business into a major systems supplier.

However, as a first installment of follow-through, DoD published an Equity Action Plan (EAP) on April 15, 2022, with goals intended to “cultivate enduring and equitable change” about, among other things, procurement and contracting, to “[c]lose gaps in small business participation, participation by other underserved communities, and improve workforce equity through an ambitious equitable procurement and contracting agenda.” The DoD Chief Diversity and Inclusion Officer must produce an “implementation plan with clear milestones and completion times” to achieve the EAP’s goals by mid-July 2022. Stay tuned for details.

The last of the five recommendations applies an *au courant* policy aim of **Supply Chain Resiliency** to “five priority sectors”: (1) castings and forgings; (2) missiles and munitions; (3) energy storage and batteries; (4) strategic and critical materials; and (5) microelectronics. The DIB Report references “detailed recommendations” for resilience in yet another DoD Report (this one on Executive Order (EO) 14017, America’s Supply Chains). The DIB Report identifies as a global challenge a shortage of middle- and highly-skilled workers. To address this problem, “DoD and other stakeholders are working to reconnect the workforce development (training and education) ecosystem . . . to DoD needs.” Companies that face staffing challenges should investigate how to profit from any cooperation, encouragement, and funding that the Department offers.

Recommendations for specific sectors are scarce in the DIB Report, which largely defers that discussion to a reading of the EO 14017 study. Thus, it is not clear what level of senior DoD support any such initiatives might enjoy; or, that being so, whether contracting activities will stir themselves to find and implement them. In fairness, the barriers to competition for sectors (3) to (5) seem to be genuinely insoluble at the contracting activity or program levels. The problems for these sectors stem from foreign control of resources and means of production. So a solution must be found at the highest DoD, State Department, or even White House levels. Stakeholders at lower echelons and potential competitors have little choice but to wait on domestic and geopolitical developments and hope for the best.

The DIB Report’s **Conclusion** is a bit of a letdown, restating the obvious importance of competition, noting the contraction of the DIB contractor base, and foretelling an even more limited base in the rocket motor sector, with small transactions in recent years resulting in more extensive vertical consolidation. While there is no telling how much change the DIB Report will generate, smart contractors will read it to stay current with their customers’ scene and use it to anticipate and, as appropriate, influence agency actions.