SEC. 810. ENHANCEMENT OF REVIEW OF ACQUISITION PROCESS FOR RAPID FIELDING OF CAPABILITIES IN RESPONSE TO URGENT OPERATIONAL NEEDS.

Section 804(b)(3) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111–383; 124 Stat. 4256; 10 U.S.C. 2302 note) is amended—

(1) by inserting "and" at the end of subparagraph (B);

(2) by striking "; and" at the end of subparagraph (C) and inserting a period; and

(3) by striking subparagraph (D).

Section-by-Section Analysis

This proposal would amend subsection (b)(3) of section 804 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111–383) to strike subparagraph (D), which limits the Department of Defense (DoD) to only consider rapid fielding capabilities that can appropriately be acquired under fixed price contracts.

Section 804(b)(1) of that Act requires the DoD to develop a process to determine whether capabilities proposed as urgent operational needs are appropriate for fielding through the process for the rapid fielding of capabilities or should be fielded through the traditional acquisition process. The review process developed and implemented by section 804(b) is limited to only the covered capabilities described in section 804(b)(3). The conditions in section 804(b)(3) constrain the Department's ability to make meaningful determinations required by section 804(b)(1) in a timely manner.

The rationale for repealing subparagraph (D) is that it is unnecessarily restrictive and would likely adversely impact the Department's ability to rapidly fulfill the warfighters' urgent requirements. At the time a capability is proposed as an urgent operational need it may not be known if the capability can be fulfilled through fixed price contracting at a reasonable cost and in an acceptable amount of time. This is generally accomplished not when an urgent need is being proposed but in consultation with contracting professionals, after the requirement is being worked by an acquisition organization.

The Department's experience in fulfilling warfighter requirements is that few, if any, urgent needs can be resolved from contractor or government off-the shelf solutions that do not involve research and development and that lend themselves to fixed price contracts. Most rapid solutions require varying degrees of research and development effort to field an effective solution. Additionally, contractors are understandably reluctant to accept a fixed price contract

when they are expected to deliver a solution that must achieve specifications that have never been met and could lead to a termination for default of contract.

The enemy has proven highly adaptive in developing new weapons and tactics and there is seldom an existing capability or capacity to adequately counter these new threats. The underlying purpose of the Department's urgent needs processes is to rapidly provide our warfighters with the capabilities they need to address new and evolving threats and opportunities. It is impossible to anticipate every emerging threat on the battlefield, however; the accelerating pace of technology development and commercial innovation provides DoD with an opportunity to rapidly develop and field new capabilities to counter each threat and ensure that the decision cycle advantage remains with our forces. This fluid environment often requires research and development work and the need to use flexible cost plus contracts that adapt to new work, changed work or no work. These cost type contracts provide the degree of flexibility necessary to meet the demands of a highly fluid and dynamic battlefield environment.

Fixed price contracts are appropriate when the Government and Industry fully understand and articulate the requirement and can effectively negotiate a reasonable price and schedule. Contractor performance is to a clear set of specifications. Fixed price contracts are generally used when there is adequate market data and the requirement is not expected to change. Any change in quantity, performance, or delivery terms requires the contactor to develop a new proposal for the modification(s) which results in renegotiations and which can often result in significant cost growth and performance and schedule delays. During war, "schedule" delays often become the risk that is least acceptable because the speed at which something can be fielded, even if it is only a mitigating capability, is often the most relevant factor in reducing the Commander's operational risk.

Part 16 of the Federal Acquisition Regulation (FAR) and Part 216 of the Defense Federal Acquisition Regulation Supplement provide extensive guidance to contracting officers on selecting the appropriate contract types. The FAR directs that when a reasonable basis for firm, fixed pricing does not exist, negotiations should be directed toward contract(s) that tie profit to contractor performance Contracting officers are given the flexibility to select a contract type that is in the best interest of the Government and most suitable for the procurement action at hand."

The current provisions of subsection (b)(3)(D) of section 804 restrict the Department's ability to rapidly make the determination required by section 804(b)(1) and either enter the normal acquisition process or to execute rapid acquisition authorities and deliver urgently needed solutions to the Warfighter. Therefore, section 804(b)(3)(D) should be repealed.

It should be noted that the determinations required by section 804(b)(1), subject to the limitations imposed by section 804(b)(3)(A)-(C), are made during the urgent need proposal phase. These decisions must be accomplished expeditiously and will generally be constrained by the availability of information.

Budget Implications: This proposal is administrative and has no budgetary impact. It deletes the restriction to use only fixed price contracts for the rapid acquisition of urgent needs, and does not necessitate any new appropriation of funding.

Changes to Existing Law: This proposal would amend section 804 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111–383) as follows:

SEC. 804. REVIEW OF ACQUISITION PROCESS FOR RAPID FIELDING OF CAPABILITIES IN RESPONSE TO URGENT OPERATIONAL NEEDS.

(a) ***

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(b) DISCRIMINATING URGENT OPERATIONAL NEEDS FROM TRADITIONAL REQUIREMENTS.—

(1) ***

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(3) COVERED CAPABILITIES.—The review process developed and implemented pursuant to paragraph (1) shall provide that, subject to such exceptions as the Secretary considers appropriate for purposes of this section, the acquisition process for rapid fielding of capabilities in response to urgent operational needs is appropriate only for capabilities that –

(A) can be fielded within a period of two to 24 months;

(B) do not require substantial development effort; and

(C) are based on technologies that are proven and available~~; and~~.

~~(D) can appropriately be acquired under fixed price contracts.~~

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