

ALERT

Congress Continues Efforts to Decrease Allowability of Contractor Compensation

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In both the bipartisan budget agreement and the final version of the National Defense Authorization Act for Fiscal Year 2014 (NDAA), Congress again is seeking to limit the amount of contractor compensation that can be charged to federal government contracts. Under the current "executive compensation cap," compensation costs for certain contractor employees that exceed the compensation cap are unallowable for government contracts purposes. Both bills would lower the amount of the compensation cap and expand the number of contractor employees to which it applies. The House of Representatives passed both bills on December 12, 2013, and the Senate is expected to address them this week.

As we previously discussed, the current compensation cap is \$763,029, and it applies to all contractor employees performing Department of Defense, National Aeronautics and Space Administration, and Coast Guard contracts, as well as the five most highly paid executives performing contracts issued by all other agencies. Pursuant to the current statutory formula, the Office of Federal Procurement Policy recently announced that the cap would increase to \$952,308 for costs incurred after January 1, 2012. See 78 Fed. Reg. 72930 (Dec. 4, 2013). Several proposals during the current session of Congress sought to reduce significantly that amount, including by making the cap equal to the President's or Vice President's salaries of \$400,000 and \$230,700, respectively.

The NDAA eliminates the previous formula and establishes a compensation cap of \$625,000 for all contractor employees, which will be adjusted annually based on the Employment Cost Index. The NDAA also authorizes the Secretary of Defense and other agency heads to establish exceptions for positions in "science, technology, engineering, mathematics, medical and cybersecurity fields and other fields requiring unique areas of expertise." The NDAA's revised compensation cap would apply to costs incurred under government contracts that are executed on or after the date that is 180 days after the NDAA becomes law.

The budget agreement includes a similar provision, but it would set the compensation cap at \$487,000, with annual Employment Cost Index adjustments, for all contractor *and subcontractor* employees. It would allow fewer, "narrowly targeted exceptions for scientists, engineers, or other specialists." The budget agreement's

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changes also would apply to costs incurred under contracts executed on or after the date that is 180 days after the budget agreement becomes law.

It is unclear how Congress will reconcile these competing provisions, but contractors should continue to monitor developments in this area to ensure they are compliant with the latest requirements.