

ALERT

NDAA for FY 2018 Includes Acquisition Reforms that Present Potential Risks and Benefits for Federal Contractors

December 12, 2017

WHAT: President Trump signed into law H.R. 2810, the National Defense Authorization Act (NDAA) for Fiscal Year 2018. The NDAA sets federal funding levels and outlines the spending and policy priorities for the U.S. Department of Defense (DOD). The FY 2018 NDAA authorizes a total of \$634.2 billion in DOD funding for the current fiscal year and includes more than 75 provisions related to acquisition policy and management.

WHEN: The NDAA was signed into law on December 12, 2017. Most provisions require DOD to issue implementing regulations, although some provisions are effective immediately or on another date established by Congress.

WHAT DOES IT MEAN FOR INDUSTRY: There are several provisions in the FY 2018 NDAA that will directly affect contractors by reforming defense contract auditing, changing various aspects of the negotiated procurement process, expanding opportunities for commercial item and service contracting, increasing non-traditional procurements under other transaction authority, and modernizing federal information technology. Some of the higher-profile provisions presenting both potential risks and benefits to federal contractors are related to: DCAA audits; post-award debriefings; bid protest costs; commercial item contracting; source selection procedures; and planned government-wide funding increases for information technology procurements.

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Practice Areas

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Government Contracts

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OUR FULL ANALYSIS:

On December 12, 2017, President Trump signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2018. There are several provisions in the FY 2018 NDAA that will directly affect contractors by reforming defense contract auditing, changing various aspects of the negotiated procurement process, expanding opportunities for commercial item and service contracting, increasing non-traditional procurements under other transaction authority, and modernizing federal information technology. Summarized below are some of the higher-profile provisions, which present potential risks and benefits to federal contractors.

Private Auditors for Incurred Costs (Section 803)

The FY 2018 NDAA directs DOD to begin using private auditors to perform incurred cost audits to reduce the current backlog and focus Defense Contract Audit Agency (DCAA) resources on forward pricing audits, which yield a higher rate of return. This provision is intended to support DOD's need for timely and effective incurred cost audits, and to ensure that DCAA is able to allocate resources to higher-risk and more complex audits. DOD must submit a plan to Congress for implementing this direction by October 1, 2018 and must issue contracts to at least two qualified private audit firms by April 1, 2019. This provision has the potential to benefit contractors by reducing the amount of time required to close out incurred cost audits due to increased staffing by private auditors. It is possible, however, that contractors may face heightened scrutiny during the audit process from auditors who are not as overburdened as DCAA auditors and may employ different audit methodologies. Additionally, while the NDAA includes provisions to avoid potential organizational conflicts of interest and disclosure of proprietary or nonpublic data, both of these risks still exist.

Enhanced Post-Award Debriefing Rights (Section 818)

The FY 2018 NDAA requires revisions to the DFARS that will provide for enhanced post-award debriefings for disappointed offerors in DOD procurements for awards exceeding \$100 million. These enhanced debriefings will include the right to receive a redacted copy of the agency's written source selection award determination and the right to ask follow-up questions within two business days of receiving a post-award debriefing. The agency must provide written responses to any follow-up questions within five business days, and the debriefing will not be concluded until the agency delivers its written responses. The day the Government delivers the written responses will, in turn, begin the five-day period to file a protest at the Government Accountability Office (GAO) that triggers an automatic stay. The NDAA also provides that small businesses or nontraditional contractors may request redacted source selection determinations for awards in excess of \$10 million. Once the pilot program begins, disappointed offerors will benefit from having access to information that can provide increased insight into the agency's evaluation and award decision, which could lead to fewer protests as offerors will no longer have to file a protest merely to understand why they did not receive an award.

LPTA Source Selection Limitations (Section 822)

The FY 2018 NDAAs require the Secretary of Defense to amend the DFARS to add two additional circumstances when DoD may use lowest price technically acceptable (LPTA) source selection criteria. Specifically, in addition to the seven circumstances that were established in the FY 2017 NDAA, LPTA procurements may be used in instances when DOD would realize no or minimal additional innovation or future technological advantage or, with respect to a contract for procurement of goods, the goods procured are predominantly expendable in nature, non-technical, or have a short life expectancy. The provision would also require DOD to avoid the use of LPTA source selection criteria when procuring certain types of electronic test and measurement equipment. Contractors may benefit to the extent relevant procurements highlight technical solutions and innovation over low prices for minimal performance that sometimes leaves agency customers dissatisfied.

Pilot Program on Payment of Costs for Denied GAO Bid Protests (Section 827)

In an effort to reduce the number of bid protests related to DOD procurements, the FY 2018 NDAA establishes a three-year pilot program that will require contractors with revenue in excess of \$250 million during the previous year to reimburse DOD for “costs incurred in processing covered protests” if GAO denies the protest in a written opinion. The pilot is scheduled to begin two years from the date of enactment of the FY 2018 NDAA and will apply to protests filed between October 1, 2019 and September 30, 2022. The NDAA does not explain how DOD’s “processing” costs will be calculated, creating additional areas for disagreement and possibly litigation regarding the amount of the processing costs that DOD seeks to have reimbursed. Contractors that seek to avoid reimbursing DOD’s costs by filing protests at the U.S. Court of Federal Claims instead of GAO also could face a more-costly and potentially more time-consuming protest process.

Commercial Item Online Marketplaces (Section 846)

The FY 2018 NDAA requires DOD to contract with multiple commercial online marketplaces for the procurement of certain commercial-off-the-shelf (COTS) products. These marketplaces must provide procurement oversight controls, including the ability to screen suppliers and products to ensure compliance with existing laws. The measure also requires GAO to report to Congress on small business participation in the marketplaces. While COTS contractors could benefit from increased sales via the online marketplaces, it is unclear how marketplace acquisitions will comply with mandatory sourcing obligations such as the Javits-Wagner-O’Day Act, the Berry Amendment, or the Buy American Act, or how these transactions will affect DOD’s small business goals.

Service Contracting (Sections 851, 854)

The FY 2018 NDAA establishes a pilot program for DOD to enter into longer term multi-year contracts for certain services. As part of the pilot, DOD may enter up to five service contracts for up to 10 years, which may be extended for up to 5 additional 1-year terms. The FY 2018 NDAA also requires more specificity in DOD service contracts, which now must be submitted through the DOD budget process. Contractors that provide operations and maintenance, facilities support, equipment maintenance, specialized training, base services, and environmental remediation services for DOD stand to benefit significantly from the ability to secure such

long-term contracts. Nevertheless, tying the contracting process to the often lengthy and complicated annual DOD budgeting process could result in increased scrutiny of contracting opportunities and associated funding, as well as potential funding delays.

Other Transaction Authority (Sections 861-868)

The FY 2018 NDAA establishes a preference for Other Transaction Authority agreements (OTAs) in the execution of both science and technology and prototyping programs, and it doubles the funding authorized for OTA prototype projects. The FY 2018 NDAA also expressly authorizes the use of OTAs as methods for entering into research agreements with industry, academia, and other researchers and technology developers, and specifies that DOD may provide for the award of follow-on production contracts without further competition. Additionally, the NDAA requires the Secretary of Defense to ensure that DOD management, technical, and contracting personnel responsible for awarding and administering OTAs maintain minimum levels of continuous experiential learning and reach certain training levels to meet acquisition certification requirements.

The increased use of OTAs offers potential benefits to both contractors and DOD, including faster awards and funding, flexible terms, decreased competition and awards that are not subject to protest or governed by the FAR. While freedom from procurement regulations can be beneficial, it can also present risks if contractors encounter disputes with the agency, as it may not always be clear which rules apply. Also, the expanded use of OTAs will inevitably result in some contractors missing out on lucrative business opportunities due to limited competition, without any recourse.

Modernizing Government IT (Sections 1076-1078)

The FY 2018 NDAA incorporates the Modernizing Government Technology Act (H.R. 2227, S. 990), which was introduced earlier this year by Rep. Hurd (R-TX) and Sen. Moran (R-KS). These provisions authorize funding for modernizing the federal government's legacy information technology (IT) and incentivize IT savings in federal civilian agencies. Specifically, agencies covered by the Chief Financial Officer (CFO) Act are authorized to establish agency-specific IT modernization funds, and the U.S. Office of Management and Budget (OMB) will oversee a government-wide IT modernization fund to be administered by the General Services Administration. By authorizing funding for government IT modernization, the Act could present significant business opportunities for IT contractors. While this funding has been authorized, however, it has not yet been appropriated. Thus, additional congressional action is necessary to fund these efforts.