

ALERT

National Defense Authorization Act for Fiscal Year 2017 Implements Numerous Acquisition Reform Measures

December 27, 2016

WHAT: President Obama signed into law S. 2943, the National Defense Authorization Act (NDAA) for Fiscal Year 2017. The NDAA sets federal funding levels and outlines the spending and policy priorities for the U.S. Department of Defense (DOD). The FY 2017 NDAA authorizes a total of \$619 billion in DOD funding for the current fiscal year and includes 88 provisions related to acquisition policy and management.

WHEN: The NDAA was signed into law December 23, 2016. 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 2017 NDAA that will directly affect contractors by modifying existing contracting requirements, adopting certain contracting preferences, revising acquisition processes, restoring acquisition authorities, and making key DOD organizational changes. Some of the higher-profile provisions likely to affect contractors are specifically related to task and delivery order protests, commercial item contracting, source selection procedures, and federal cost accounting standards.

SUMMARY: On December 23, 2016, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2017. There are several provisions in the FY 2017 NDAA that will directly affect contractors by modifying existing contracting requirements, adopting certain contracting preferences, revising

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Practice Areas

Cost Accounting and Cost Allowability

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acquisition processes, restoring acquisition authorities and making key DOD organizational changes. Summarized below are some of the higher-profile provisions likely to affect contractors.

Task and Delivery Order Protests (Sections 835, 885). The FY 2017 NDAA includes language identical to the recently-enacted GAO Civilian Task and Delivery Order Protest Authority Act of 2016, which permanently authorizes protests of civilian agency task and delivery orders valued in excess of \$10 million (click here for additional details). The NDAA also increases the minimum value of DOD task and delivery orders that can be protested, from \$10 million to \$25 million. Notably, the final version of the NDAA did not include a provision found in the Senate version of the Act, which would have required large defense contractors to pay GAO's "costs incurred for processing" unsuccessful bid protests and also would have re-distributed incumbent contractors' profits for work performed under bridge contracts to GAO or the new awardee if the incumbent's protest was not sustained. Instead, the final bill requires DOD to commission an independent study on the prevalence and impact of bid protests on DOD acquisitions.

Contract Preferences (Sections 813, 829-31). The FY 2017 NDAA includes provisions that promote DOD's use of fixed-price contracts over cost-plus contracts. Beginning in fiscal year 2018, contracting officers must obtain DOD executive-level approval to issue cost-type contracts exceeding \$50 million; this threshold will be lowered to \$25 million in fiscal year 2019. The NDAA also directs DOD to adopt a preference for performance-based contract payments. Additionally, the NDAA sets forth a policy discouraging the use of lowest price technically acceptable source selections for certain procurements, including those for information technology, cybersecurity, systems engineering, technical assistance, and knowledge-based services as well as contracts for personal protective equipment.

Commercial Items (Sections 871-80). The FY 2017 NDAA includes several provisions directed at increasing and improving DOD's use of commercial item contracting. Two provisions relate to price reasonableness determinations in commercial item acquisitions. The first will require DOD procurement officials to include in their market research for commercial items information to support the contracting officer's price reasonableness determination. Under the second provision, when contractors respond to commercial item solicitations, they will be allowed to submit information on the value of the commercial items offered, and contracting officers may consider this information when determining price reasonableness (although FAR 15.404-1(b) already authorizes contracting officers to use value analysis "in conjunction with" other price analysis techniques). Another provision expands the requirement in the FY 2015 NDAA for DOD to maintain centralized records of commercial item determinations by directing DOD to include both market research and price reasonableness analyses in those records, while eliminating the previous requirement that the records be publicly accessible. The FY 2017 NDAA also includes a preference for procuring certain services (facilities-related, knowledge-based, construction, medical and transportation services) as commercial items. These services cannot be procured as non-commercial items unless either the Undersecretary for Acquisition, Technology and Logistics (for contracts in excess of \$10 million) or the contracting officer (for contracts valued between \$10 million and the simplified acquisition threshold) makes a written determination, after conducting market research, that no commercial services are available to meet the agency's needs. Additionally, the FY 2017 NDAA provides for two pilot programs allowing DOD to acquire "innovative" commercial items,

technologies, and services through general solicitation and competitive procedures, subject to peer review and congressional notification requirements.

Organizational Changes (Section 901). The FY 2017 NDAA will result in notable changes to the organizational structure of the Office of the Secretary of Defense (OSD). In February 2018, the current OSD position of Undersecretary for Acquisition, Technology and Logistics, will be divided into two new Undersecretary positions—an Undersecretary for Acquisition and Sustainment (A&S) and an Undersecretary for Research and Engineering (R&E). Additionally, the R&E Undersecretary will serve as DOD’s chief technology officer, and DOD will establish a new chief management officer position, also in 2018.

Cost Accounting Standards (Section 820). The FY 2017 NDAA includes a requirement that the Cost Accounting Standards (CAS) be reconciled, to the extent possible, with Generally Accepted Accounting Principles (GAAP). To that end, the government-wide Cost Accounting Standards Board (CASB) will be required to hire an executive director and will meet at least quarterly for purposes of reducing inconsistencies between the CAS and GAAP. The CASB will also be responsible for addressing cost accounting problems identified in cases brought before the Armed Services Board of Contract Appeals and the Civilian Board of Contract Appeals. Additionally, the NDAA increases the number of contracts eligible for a waiver of the application of the CAS by allowing agency heads to waive the CAS requirement for contracts valued at less than \$100 million, which is an increase from the current value of \$15 million.

Independent Research and Development and Bid and Proposal Costs for Cost-Reimbursement Contracts (Section 824). The FY 2017 NDAA will create a new sub-section 2372a in Title 10 of the United States Code, directing contractors to report their bid and proposal expenses (which are considered allowable indirect costs under cost-reimbursement contracts) separately from their independent research and development costs. The NDAA also establishes a DOD-wide goal of limiting bid and proposal costs to no more than one percent of the amount of contractor sales to DOD. Additionally, the NDAA requires DOD to contract with an outside, independent entity to study the laws, regulations, and practices driving bid and proposal costs and provide recommendations on how to reduce them. If DOD fails to meet the one percent goal, the NDAA requires DOD to establish an advisory panel under the Federal Advisory Committees Act to provide recommendations on changes to statute, regulation, and practice to reduce bid and proposal costs.

Permanent Whistleblower Protection for Contractor and Grantee Employees (S.795). Another piece of legislation that directly impacts federal contractors and grant recipients was signed into law on December 14, 2016. S.795, a bill to enhance whistleblower protection for contractor and grantee employees, makes permanent a pilot program established by the FY 2013 NDAA to prevent employer retaliation against employees of civilian agency contractors, subcontractors, and grantees who report waste, fraud, or abuse involving federal funds. (The same whistleblower protections were already permanent for employees of defense agency contractors, subcontractors, and grantees.) The bill extends the same protection to employees of personal services contractors working on defense and civilian contracts, as well employees of personal services subgrantees working on civilian contracts. S.795 protects individuals who make disclosures alleging gross mismanagement of a federal contract or grant, gross waste of federal funds, abuse of authority relating to a federal contract or grant, substantial and specific danger to public health or safety, or violations of a law,

rule, or regulation related to a federal contract or grant. The law also precludes reimbursement of legal fees incurred by contractors and grantees to defend against whistleblower retaliation claims.