

The National Defense Authorization Act for Fiscal Year 2012 Includes Numerous Government Contracts Provisions

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On December 31, 2011, President Obama signed into law Pub. L. No. 112-81, the National Defense Authorization Act for Fiscal Year 2012 (NDAA or Act). The Act contains several provisions with the potential to affect government contractors, including the extension of the current executive compensation cap to cover all employees of DoD contractors, a limitation on the aggregate amount of spending for services contracts, a prohibition on collecting political information from contractors and prospective contractors, and requirements for detecting and avoiding the use of counterfeit electronic parts in goods or services intended for military or national security uses. These provisions and other procurement-related sections of the NDAA are summarized below. As noted, most of these NDAA provisions require implementing regulations and therefore will not take full effect until the DoD and/or the FAR Council promulgate revisions to the FAR and the DoD FAR Supplement (DFARS).

Cost and Supply Chain Issues

Several NDAA provisions address cost allowability and supply chain issues. For example, § 803 expands the number of employees subject to the current "executive compensation cap," which limits the amount of compensation that can be charged to federal government contracts. Compensation costs that exceed the amount set annually by the Office of Federal Procurement Policy (currently \$693,951) are unallowable for government contracts purposes. Currently, the executive compensation cap applies only to a contractor's five most highly paid executives. Section 803 expands the cap to cover *all* employees of DoD contractors-regardless of whether those

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employees actually perform work under a DoD contract. The Act authorizes the Secretary of Defense to create "narrowly targeted exceptions for scientists and engineers" to ensure that DoD has access to critical skills and capabilities. The FAR Council must issue implementing regulations by June 28, 2012 (180 days after enactment of the Act), but the expanded cap will apply to all compensation costs incurred after January 1, 2012, including costs incurred under existing DoD contracts.

Section 818 requires DoD to develop policies to detect and avoid the use or inclusion of counterfeit electronic parts in goods or services intended for military or national security uses. While the Act requires additional training and reporting requirements for DoD personnel, it also requires DoD to issue regulations by September 26, 2012 (270 days after enactment of the Act) that make contractors responsible for detecting and avoiding the use of counterfeit electronic parts. To the extent that contractors are unsuccessful in detecting counterfeit electronic parts before they enter the supply chain, contractors must bear the costs of any counterfeit electronic parts and the work required to replace or repair them, as those costs will be unallowable under the new regulations. The Act also contains wide-ranging reporting obligations. Contractors will be required to report to DoD whenever there is "reason to suspect" that an end item or component purchased by DoD-or by any contractor or subcontractor for delivery to DoD-contains counterfeit or suspected counterfeit electronic parts.

Section 815 revises the treatment of independent research and development (IRAD) costs, which Congress most recently addressed in the Fiscal Year 2011 NDAA, Pub. L. No. 111-383. The Fiscal Year 2012 NDAA specifically reverses the instruction to DoD in the Fiscal Year 2011 NDAA to develop regulations that, in some cases, would characterize IRAD and bid and proposal costs as being developed with Federal funds. The Act also permits DoD to require contractors to deliver technical data to which the Government already retains government purpose rights, even if the contract does not expressly require delivery of the data.

DoD Acquisition Strategy and Oversight

Several sections of the NDAA address DoD acquisition policy, funding and oversight mechanisms. In particular, § 808 contains several provisions aimed at reducing the amount of money DoD spends on services contracts in fiscal years 2012 and 2013. In particular, this Section limits the total amount that DoD can obligate for services contracts in fiscal years 2012 and 2013 to the amount requested for DoD services contracts in the president's fiscal year 2010 budget. It also requires DoD to issue guidance to all DoD departments and agencies for fiscal years 2012 and 2013 that implements the following congressional direction:

- Creates a negotiation objective for newly awarded services contracts of more than \$10 million, such that the labor and overhead rates in those contracts will not exceed the labor and overhead rates paid to the same contractor for services contracts in fiscal year 2010;
- Requires the heads of military departments and agencies to approve in writing any contract or task order of more than \$10 million that is awarded to perform continuing services in fiscal years 2012 or 2013 with an annual cost above the annual cost for the same or similar services in fiscal year 2010;
- Requires all departments and agencies to eliminate all contractor positions performing inherently government functions; and

- Requires all departments and agencies to reduce funding by 10 percent per year for staff augmentation contracts and contracts for functions closely associated with inherently government functions.

Section 806 requires DoD to develop a strategy for ensuring that contractors' past performance information is timely included in the past performance databases that contracting officers consult when making make source selection decisions. The Act also requires DoD to revise the DFARS to allow contractors 14 days to comment on past performance information before it is included in the relevant database(s).

Section 823 prohibits DoD from requiring contractors, in connection with the award or modification of a contract or exercise of an option, to submit information related to political contributions by the contractor or its subcontractors, officers, directors or employees. This provision responds to a draft presidential Executive Order that became public in April 2011 and would have required federal government contractors and their executives to publicly disclose their political spending, including contributions to third-party entities, as part of the bid and proposal process. As we previously reported, the draft Executive Order also would have required contractors to certify the accuracy of those disclosures. Although § 823 prohibits DoD from collecting political spending information during the bid and proposal process, it does not address procurements by civilian agencies or requirements that agencies could seek to impose as a condition of contract performance. *See also* the companion article on campaign finance disclosure in this newsletter.

Contingency Contracting

As in previous years, the NDAA includes several provisions related to contracts in support of contingency operations in Iraq and Afghanistan. Of note, § 841 directs DoD to immediately revise the DFARS to authorize DoD officials to void or restrict award of contracts that would provide direct or indirect funding to people or entities the Commander of the United States Central Command has identified as actively supporting an insurgency or opposing U.S. forces in contingency operations. This provision also would authorize DoD to terminate for default any contract in which there is a written determination that the contractor "has failed to exercise due diligence" to ensure that contract funds do not directly or indirectly support people or entities that oppose U.S. contingency operations. Section 841 also requires DoD to include in each new contract to be performed in the Central Command area of operations a contract clause that requires the contractor to perform due diligence to ensure that U.S. government contract funds do not support entities that oppose U.S. contingency operations.

Similarly, § 842 requires DoD to include in each new contract to be performed in the Central Command area of operations a clause that authorizes DoD to examine the contractor's records to ensure that contract funds are not subject to extortion or corruption and are not providing support to entities that oppose U.S. contingency operations. Prime contractors must include this clause in all subcontracts valued at more than \$100,000, giving DoD the same authority to access the subcontractors' records that it possesses to access prime contractors' records. This flow down requirement is not limited to first tier subcontractors and therefore could result in DoD's examination of records for numerous lower tier subcontractors.

Sections 841 and 842 each required DoD to issue revisions to the DFARS by January 30, 2012 to implement the NDAA's requirements. To date, DoD has not issued the required implementing regulations.

Bid Protest Jurisdiction

Finally, as we previously reported, the NDAA also extends through September 30, 2016, the Government Accountability Office's (GAO) jurisdiction to hear protests of task or delivery orders of \$10 million or more that are issued under civilian agency contracts. This extension eliminates the discrepancy that existed for several months in 2011 between GAO's jurisdiction over protests of task and delivery orders issued under civilian contracts and those issued under defense-related contracts. With the enactment of the NDAA, the ability to protest task and delivery orders is now the same as it was between May 27, 2008 and May 27, 2011, regardless of the agency that issued the underlying contract: (1) protests that the order exceeds the scope, period or maximum value of the IDIQ contract are permitted at GAO or the Court of Federal Claims, regardless of the value of the order; (2) protests on any other grounds are permitted if the value of the order exceeds \$10 million; and (3) protests that are not based on the scope, period or maximum value must be filed at GAO.

Wiley Rein's Government Contracts Practice will continue to monitor the implementation of these and other contracting provisions in the NDAA and their effects on government contractors, as well as procurement-related legislation that is introduced in the upcoming congressional session.