



FY 2018 NDAA – Title VIII – Acquisition Policy, Acquisition Management, and Related Matters

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President Trump signed December 12, 2017 the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. This signed legislation contains several notable provisions to introduce new or modify existing U.S. federal government contracting compliance requirements.

Summarized below are some of the pertinent compliance requirements anticipated for change in the near term:

Performance of Incurred Cost Audits (SEC. 803) – Directs the Department of Defense (DoD) to use qualified private auditors to perform a sufficient number of incurred cost audits to eliminate by October 1, 2020 any backlog of such audits of the Defense Contract Audit Agency (DCAA), and complete audits no later than one year from receipt of a qualified incurred cost proposal. Further provisions and DoD directions include:

- o Submission by October 1, 2018 to congressional defense committees a plan to implement the audit requirements noted above, including an update to the plan by October 1, 2019;
- o Award not later than October 1, 2019 contracts or task orders under existing contracts to two or more qualified, private auditors to perform the incurred cost audits;
- o Submission by October 1, 2019 to congressional defense committees a report on proposed numeric materiality standards to be used in conjunction with performance of the incurred cost audits, including prior coordination with the private auditor and Section 809 advisory panel to establish the standards;
- o Implementation by October 1, 2020 of numeric materiality standards consistent with “commercially accepted standards of risk and materiality”; and
- o Submission by October 1, 2019 to the committees on Armed Services of the Senate and House of Representatives an update on the process of selecting a commercial auditor to perform peer reviews of the DCAA in conjunction with the DCAA’s issuance of unqualified (clean) audit opinions, effective October 1, 2022.

Repeal of Certain Auditing Requirements (SEC. 804) – Strikes the FY 2017 NDAA language allowing contractors to select their private auditors. Private auditors under the FY 2018 NDAA SEC. 803 requirements are to be selected by the DoD.

Increased Simplified Acquisition Threshold (SEC. 805) – Increases the simplified acquisition threshold to \$250,000. No effective date was noted.

Modifications to Cost or Pricing Data and Reporting Requirements (SEC. 811) – Increases the truthful cost or pricing data threshold to \$2,000,000 applicable to contracts awarded on or after July 1, 2018.

Also of note, the Cost Accounting Standards (CAS) threshold will as well increase to \$2,000,000 as the CAS threshold self-executes to mirror the Truth in Negotiations Act (TINA) threshold as implemented by a 2011 Office of Federal Procurement Policy interim rule.

Enhanced Post-Award Debriefing Rights (SEC. 818) – Provides enhanced rights to offerors (successful and unsuccessful) regarding a post-award debriefing process, including:

- o Disclosure of the agency’s written Source Selection Award determination for contract awards greater than \$100,000,000 (redacted to protect confidential information);
- o Disclosure of the agency’s written Source Selection Award determination for contract awards greater than \$10,000,000 and not greater than \$100,000,000 (redacted to protect confidential information) and made to a small business or nontraditional contractor; and
- o A written or oral debriefing for all contract awards and task or delivery orders valued at \$10,000,000 or higher.

Change to Definition of Subcontract in Certain Circumstances (SEC. 820) – Changes the definition of a subcontract to exclude “commodities that are intended for use in the performance of multiple contracts with the Federal Government and other parties and are not identifiable to any particular contract”.

Prohibition on use of Lowest Price Technically Acceptable Source Selection Process for Major Defense Acquisition Programs (SEC. 832) – Prohibits the use of lowest price technically acceptable source selection processes for the engineering and manufacturing development of a major defense acquisition program applicable to programs for which budgetary authority is requested for FY 2019 or subsequent FYs.

Other Transaction Authority for Certain Prototype Projects (SEC. 864) – Increases the threshold to \$500,000,000 for certain other Transaction Authority Prototypes. No effective date was noted.

Of the selected FY 2018 NDAA provisions noted above, SECs. 803 and 804 have been and remain the most controversial and present the greatest amount of questions. The use of third-party auditors for performance of audits for the DoD that traditionally are performed by the DCAA has been discussed for a few years and in various means, including prior NDAs and DoD Proposed Rules and the April 2017 industry and DCAA testimony in front of the House Armed Services Committee. Contractors should follow the development of forthcoming implementing rules (proposed, interim, or final) to stay informed on the proposed mechanics to address the SEC. 803 requirements. Initial questions that need to be addressed in the implementing rules include:

- What is a qualified incurred cost proposal and will it differ from established adequacy criteria currently used by the DCAA (proposal adequacy checklist)?
- Who makes the determination that a proposal is qualified?
- Will a risk-based audit approach be utilized to recognize low-risk or low dollar value incurred cost proposals?
- What numeric materiality standards will be developed?
- Will the selected private auditors be sufficiently knowledgeable in pertinent government contract and cost allowability compliance requirements?
- How will the one-year audit completion requirement align with the current six-year statute of limitations and related time barred outcomes? Will audits not completed within one year be time barred?

Other provisions noted above that appear favorable to industry include SEC. 811, which significantly raises both the TINA and CAS thresholds – thereby reducing overall audit and compliance risk. SEC. 818 adds requirements to allow offerors greater visibility into the government’s source selection procedures and decisions – potentially improving and adding efficiency to the bid protest process. And SEC. 820 also narrows the definition of a subcontract – potentially reducing the number of contractors, vendors, or supply chain partners from traditional flow down requirements and inclusion in the corresponding contractor purchasing system review universe.

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