

# Public Policy in the Trump Era-Year Two: A Spotlight on Defense Acquisition Reform

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# Overview

- Legislative Updates
- Regulatory Updates
  - Fair Pay Removed from FAR
  - DFARS Cybersecurity Rule in Effect
  - DOD Final Rule on Procurement of Commercial Items

# Legislative Update

# FY 2018 NDAA: Acquisition Reform Provisions

## Commercial Item Acquisition

- Section 846: procurement of certain COTS items via online marketplaces to streamline and simplify DOD acquisition of many COTS items, and to create cost savings and promote increased transparency and accountability
- Section 848: DOD acquisition of an item through commercial item procedures constitutes "prior determination" that the item is commercial to improve consistency within DOD acquisition system and streamline determination process for future acquisitions

# FY 2018 NDAA: Acquisition Reform Provisions

## Commercial Item Acquisition (cont.)

- Section 849: SECDEF must engage in comprehensive review of procurement regulations not required by statute to be applied to commercial item acquisitions that nevertheless have been applied through DFARS

# FY 2018 NDAA: Acquisition Reform Provisions

## Cost and Pricing

- Section 803
  - DOD must comply with "commercially accepted standards of risk and materiality" in performance of incurred cost audits and begin using private auditors "to perform a sufficient number" of such audits
  - Stated goals are to eliminate DCAA's incurred cost audit backlog by October 1, 2020, and complete all incurred cost audits within one year or less from date of receipt of incurred cost audit submission

# FY 2018 NDAA: Acquisition Reform Provisions

## Cost and Pricing (Cont.)

- Section 805/806: increase the simplified acquisition threshold to \$250K from \$100K and micro-purchase threshold to \$10K from \$3K
- Section 811: increases to \$2M from \$750K threshold for submission of cost or pricing data for prime contracts awarded after June 30, 2018, to reduce number of contracts/subcontracts (and modifications) that are subject to Truthful Cost or Pricing Data statute (formerly TINA) and reduce associated liability for alleged defective pricing

# FY 2018 NDAA: Acquisition Reform Provisions

## Competition/Bid Protests

- Section 818: provides for enhanced debriefing of disappointed offerors after a contract award
  - Redacted source selection decision document provided as part of debriefing in an acquisition >\$100M
  - Small businesses/nontraditional contractors may request redacted source selection document as part of debriefing in acquisitions >\$10M
  - Debriefing required for all contract and task order awards under contracts  $\geq$ \$10M
  - Within two business days of debriefing, offeror will have opportunity to pose additional questions to agency in writing; agency will have five days to respond

# FY 2018 NDAA: Acquisition Reform Provisions

## Competition/Bid Protests (Cont.)

- Section 822: limits use of LPTA acquisition methodologies to acquisitions where DOD will not realize more than minimal additional innovation or future technological advantage and the goods acquired are predominantly expendable in nature, nontechnical, or have a short life expectancy/shelf life

# Accelerating Pace of Acquisition Reform Act of 2018

- Statutory streamlining
  - Would repeal statutory requirements for approximately 100 "outdated" defense acquisition provisions
  - Would repeal statutory requirements for certain DOD positions or offices
  - Would repeal seven DOD reporting requirements related to defense acquisition

## Accelerating Pace (cont.)

- Acquisition agility
  - Would separate definition of "commercial item" into definitions of "commercial product" and "commercial service" to "simplify and streamline procurement"
  - Would create a "precise, unified" definition of "subcontract"
  - Would direct SECDEF to submit annual report through 2021 on DOD's use of other transaction authority (OTA) to allow for "proper [Congressional] assessment of effectiveness and success" of DOD's use of OTA

## Accelerating Pace (cont.)

- Private sector participation
  - Would require DOD to develop and implement a strategy "to better leverage small business as a means to enhance or support mission execution" to increase entry points to defense sector "for nontraditional and innovative companies"
  - Would increase micro-purchase threshold for procurement through online marketplaces from \$10K to \$25K

# FY 2019 NDAA

## Markup Dates

- HASC subcommittee markups: April 26
- HASC full committee markup: TOMORROW
- SASC subcommittee markups: May 22
- SASC full committee markups: May 23-24

# Regulatory Update

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## Fair Pay Removed from FAR

- In November 2017, DOD, GSA, and NASA issued final rule amending FAR and disapproving Fair Pay and Safe Workplaces
  - Implemented by President Obama in 2014
  - Required companies bidding on federal contracts/subcontracts greater than \$500K to disclose violations of labor laws
- "All clauses identified in the final FAR rule are unenforceable by law and considered to have never taken effect"
- Pro: decreased risk that contractors can be disqualified from federal awards
- Con: rules requiring compliance with labor laws would have potentially leveled the playing field among contractors; heightened incentive to comply with labor laws

# Regulatory Update

## DFARS Cybersecurity Rule in Effect

- On December 31, 2017, DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, took effect
- Applies to contractors and subcontractors that handle controlled unclassified information
- Changes
  - Rapidly report cyber incidents
  - Preserve images and grant DOD access
  - Flow does to subcontractors "for which subcontract performance will involve covered defense information"
  - For contracts awarded prior to October 1, 2017, notify DOD of any security requirements specified by NIST SP 800-171 not implemented at time of award

# Regulatory Update

## DOD Final Rule on Procurement of Commercial Items

- January 31, 2018, DOD issued final rule and published updated two-part guidebook
- Pros
  - Expressly acknowledges commercial item determination is separate from price reasonableness determination
  - Clarifies items not previously commercial may qualify as commercial if they are "of a type"
  - Relates to nontraditional defense contractors

# Regulatory Update

## DOD Final Rule on Procurement of Commercial Items (cont.)

- Cons
  - Creates new barriers for commercial item procurement
  - Requires documentation in support of commercial item determination or price reasonableness
  - CO has broad discretion to require additional information in determining price reasonableness

# Regulatory Update

## Federal Government Modernizing

- GAO updated its bid protest system (March 2018)
  - Electronic Protest Docketing System
- NASA updated its payment process (March 2018)
  - Voucher and invoice submittal program through eInvoicing Secure File Transfer
- President's Management Agenda lays out plan for modernizing government
  - Released March 20, 2018
  - Priorities
    - IT modernization
    - Data accountability and transparency
    - Creating a 21st century workforce

# Questions?