

National Defense Authorization Act for Fiscal Year 2019 Includes Acquisition Reforms That Contractors Should Be Aware Of

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On August 13, 2018, President Trump signed into law the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, which sets federal funding levels and outlines the spending and policy priorities for the U.S. Department of Defense (DOD). Although the NDAA does not include sweeping acquisition reforms, it does include several provisions that will directly affect contractors. These changes include placing additional limits on sole-source and lowest price technically acceptable (LPTA) contracting, revising the definition of “commercial item” to separately address products and services, requiring additional justifications and approvals for exercising multi-year contract authority or withholding consent to subcontract, directing full and open competition for the forthcoming GSA e-Commerce Portal, and providing exceptions for price competition in the award of indefinite-delivery indefinite-quantity (IDIQ) contracts. Several of these changes were recommended in early reports by the “Section 809 Panel” on DOD acquisition reform that was established in the FY 2016 NDAA. We expect the Section 809 Panel to propose more comprehensive acquisition reforms in its final report at the end of the year, which Congress is likely to address in the FY 2020 NDAA.

The FY 2019 NDAA also requires DOD to submit reports to Congress on high-profile issues such as “second bite at the apple” bid protests filed at both the Government Accountability Office (GAO) and the U.S. Court of Federal Claims (COFC), the use of Other Transaction Authority, and a mandated pilot program to accelerate contracting and pricing processes. These and other provisions are summarized below. In addition to the acquisition reforms, the policy provisions in

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the NDAA also enact significant changes regarding cybersecurity, foreign ownership of U.S. companies, and export controls.

Commercial Item Contracting (Sections 836-838)

The FY 2019 NDAA revises the definition of “commercial item” by separating it into two new definitions: “commercial product” and “commercial service.” Despite the new nomenclature, the scope and definitions of the two concepts remain largely unchanged. The term “commercial product” is consistent with the first few prongs of the current commercial item definition. Thus, a “commercial product” will be one that is of a type customarily used by the general public or nongovernmental entities for nongovernmental purposes and either (1) has been sold, leased, licensed or offered to the general public, in its original or slightly modified state, or (2) is not yet available but will be in time to satisfy the Government’s requirements. Also included in the definition of “commercial products” are nondevelopmental items that were developed exclusively at private expense and have been sold competitively to multiple state, local, or foreign governments. “Commercial services” will include services provided to the public, sold competitively in substantial quantities in the commercial marketplace, and procured by the federal Government for support of commercial products. This is similar to the current services prong of the “commercial item” definition.

The NDAA also amends other related definitions and provisions of the acquisition statutes to substitute “commercial product” or “commercial service” for “commercial item.” The new definitions will take effect on January 1, 2020, and DOD must submit a detailed implementation plan to Congress by April 1, 2019. The Federal Acquisition Regulation (FAR) and agency-specific supplements will require significant updates to incorporate the new definitions, and DOD and the FAR Council could use that opportunity to address other unrelated changes to the relevant regulations. Industry should pay close attention to how these changes are implemented to identify potential unexpected changes.

In response to the Section 809 Panel’s recommendations for streamlining procurement of commercial products and services, the FY 2019 NDAA also limits the applicability of certain executive orders and procurement regulations to commercial products and services. The NDAA also requires FAR Council to review the procurement regulations applicable to commercial products and services and recommend exemptions from FAR requirements unless there is a statutory reason to not provide an exemption.

Increase in DOD Micro-Purchase Threshold (Section 821)

The FY 2019 NDAA increases the DOD micro-purchase limit from \$5,000 to \$10,000, making the threshold the same for all federal government agencies. Congress elected not to further increase the micro-purchase threshold to \$25,000 for purchases through the new e-commerce portal, which GSA and OMB had requested to incentivize broader participation from vendors and government agencies.

GSA e-Commerce Portal Competition (Section 838)

The FY 2019 NDAA authorizes GSA to develop procedures for procurements through the e-commerce portal. Under those procedures, a procurement will satisfy competition requirements if there are at least two suppliers that offer comparable products on the portal. The NDAA also expresses the sense of Congress that the portal must enhance competition, expedite procurement, ensure a reasonable price for commercial products, be implemented through multiple contracts with multiple portal providers, and safeguard data from suppliers and other e-commerce vendors to ensure the data is not used for pricing or marketing purposes or to obtain a competitive advantage.

Bid Protest Study, Tracking and Expedited Process (Section 822)

In response to a long-standing DOD request to revise the jurisdiction of the COFC to eliminate so-called “second bite at the apple” bid protests, i.e., successive protests at GAO and the COFC involving the same DOD contract award or proposed award, the FY 2019 NDAA instead requires DOD to conduct a study of the frequency, duration, and collateral impacts of such protests. The study must identify and analyze:

- The number of protests filed at both venues, the results of each, and the number of times GAO and the COFC reached different outcomes;
- The average and median lengths of time consumed by each stage of the litigation;
- The number of protests where performance was stayed or enjoined, and for how long, as well as whether the Government’s requirement went unfulfilled during the stay or was obtained through another contract vehicle or in-house;
- Whether any monetary damages were awarded and, if so, in what amount; and
- For each protest, whether the protester was an incumbent contractor and whether the protester was a small or large business.

DOD must also establish a data collection system to better track and analyze GAO and COFC bid protest trends. The NDAA also directs DOD to develop an expedited bid protest process for DOD contracts valued at less than \$100,000, which seems likely to increase the number of protests related to those low dollar-value procurements. DOD must submit a report to Congress on the expedited process by May 1, 2019, with implementation by December 1, 2019.

Technical Data Rights (Section 865-866)

The FY 2019 NDAA clarifies that the Government may continue to exercise rights in technical data while a dispute over the nature and scope of the Government’s data rights is pending before a Board of Contract Appeals or the COFC, so long as the Secretary of Defense provides a written determination that “compelling mission readiness requirements” will not permit awaiting the final decision of the Board or Court. The Secretary of Defense must also develop policies on the negotiation of technical data rights for noncommercial software in the event of a protest or the replacement of an incumbent contractor. DOD must also develop training and guidelines on the use of Specially Negotiated Licenses for major weapons systems to address the numerous interpretations of those licenses within Government and industry.

Other Transaction Reporting (Sections 211, 873)

Congress continued its focus on enhancing the use of Other Transaction Agreements (OTAs). As a follow-on to the preference for OTAs established in the FY 2018 NDAA, the FY 2019 NDAA requires DOD to collect and analyze data related to the Department's use of OTAs, report annually to Congress on the data collected, and update policy and guidance related to the use of OTAs. The report to Congress must also identify any successes or challenges associated with DOD's use of OTAs.

The FY 2019 NDAA also revised the statutory authority for follow-on production OTAs, to allow them even if predecessor prototype projects had not been completed. This change was a direct response to GAO's bid protest decision in *Oracle America, Inc.*, B-416061 (May 31, 2018), which sustained a protest because the agency had executed a follow-on production OTA without first completing the prototype projects.

Task Order Price Competition (Section 876)

The FY 2019 NDAA provides several exceptions that will allow DOD agencies to award multiple award IDIQ contracts, including those under the Federal Supply Schedule, to acquire services where price is not necessarily an evaluation factor. Under these exceptions, DOD agencies may award un-priced contracts and then establish fair and reasonable prices through competition at the task order level.

LPTA Source Selection Policy (Section 880)

As a follow-on to the lowest price technically acceptable (LPTA) source selection limitations for DOD in the FY 2018 NDAA, the FY 2019 NDAA expands those restrictions government-wide by requiring a new FAR provision to limit the use of LPTA procurements. LPTA procurements will be authorized only if agencies clearly describe the minimum requirements, performance objectives, and standards that will be used to evaluate proposals. Agencies must also make a determination that any proposed technical approach would require little to no subjective judgment to evaluate and that the agency expects little to no value from an offeror exceeding the minimum requirements. The FAR provision must also make clear that LPTA source selections should be avoided to the maximum extent possible for procurements of services such as information technology, health care, and cybersecurity, as well as personal protective equipment and contingency operations. Additionally, the NDAA directs GAO to develop a methodology that would provide insight into the specific LPTA source selection criteria agencies continue to employ.

Pilot Program to Accelerate Contracting and Pricing Processes (Section 890)

The FY 2019 NDAA requires DOD to establish a pilot program to "reform and accelerate" the contracting process for contracts exceeding \$50 million by (1) basing price reasonableness determinations on actual cost and pricing data for DOD purchases of the same or comparable products and (2) reducing the amount of cost and pricing data required for such purchases. No more than ten contracts may be part of the pilot program and none of the contracts may be for major defense acquisition programs. By January 30, 2021, DOD must report the results of the pilot program to Congress, including an assessment of whether it should be continued

or expanded.