

President Obama Signs Fiscal Year 2014 National Defense Authorization Act

January 8, 2014

On December 26, 2013, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2014 and the Bipartisan Budget Act of 2013 (BBA). Both the NDAA, which provides Congress with the necessary authority to appropriate funds for the Department of Defense (DOD) activities, and the BBA, which (among other things) makes continuing appropriations for fiscal year 2014, include provisions that will undoubtedly affect how contractors do business with DOD and other Government agencies. Below is a summary of the significant contracting-related provisions in the two laws:

- **Allowable Costs for Contractor Compensation** (NDAA Sec. 811; BBA Sec. 702). As discussed in our December 16, 2013 client alert, both laws include provisions to repeal the current formula for determining the allowable costs for contractor compensation. Because the President signed the BBA after the NDAA, the BBA's lower compensation cap was enacted as the controlling law. In particular, the BBA resets the allowable cost ceiling for contractor compensation to \$487,000, which will be adjusted annually based on the Employment Cost Index, and expands the compensation cap to all contractor and subcontractor employees. The BBA allows for exceptions to this cap for "scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities."
- **Limitation of Amounts Available for Contract Services** (NDAA Sec. 802). This provision amends Section 808 of the FY 2012 NDAA (Pub. L. No. 112-81) to extend, into fiscal year 2014, the

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limitation on the amount of funds DOD may spend for contracts for services. Section 802 revises the previous limitation so that DOD is no longer required to implement a "negotiation objective" to freeze contractors' labor and overhead rates at fiscal year 2010 levels when awarding new contracts.

- **Identification and Replacement of Obsolete Electronic Parts** (NDAA Sec. 803). Section 803 requires the Secretary of Defense to establish a process for the expedited identification and replacement of obsolete electronic parts in DOD procurements. This continues Congress's efforts to thwart counterfeit electronic parts within DOD contracts.
- **Prohibition on Contracting with the Enemy** (NDAA Sec. 831). Section 831 expands to any Combatant Command the authority previously provided to the U.S. Central Command to limit contracts with entities that provide funds to a person or group actively opposing U.S. or coalition forces. In particular, after an appropriate finding, the Combatant Commander may "prohibit, limit, or otherwise place restrictions on the award" of a DOD contract, grant, or cooperative agreement to any entity that provides funds received under a DOD contract, grant, or cooperative agreement (or fails to exercise due diligence in providing such funds). Moreover, this section would permit the termination for default or voiding (as against public policy) of a contract already awarded, if the requisite findings were made.
- **Advancing Small Business Growth** (NDAA Sec. 1611). This section requires DOD to develop a contract clause for inclusion in small business contracts, which "requires the contractor to acknowledge that acceptance of the contract may cause the business to exceed the applicable small business size standards" and that the "contractor may no longer qualify as a small business concern for that industry."
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- **Credit for Small Business Subcontractors** (NDAA Sec. 1614). This provision requires prime contractors to review and monitor their subcontractors' subcontracting plans to ensure compliance with stated goals. It also allows for the inclusion of lower-tier subcontractors for purposes of satisfying a prime contractor's small business goals.
- **Notice Change when Compelling Reasons to Contract with Suspended or Debarred Entities** (NDAA Sec. 813). When DOD determines that there is a compelling reason to solicit an offer from, or award a contract to, a suspended or debarred contractor or individual, DOD must provide a written justification to the General Services Administration. Although this information was previously available upon written request, Sec. 813 now requires that the justification be published on a public website.