

ALERT

President Obama Signs National Defense Authorization Act for Fiscal Year 2015

December 23, 2014

On December 19, 2014, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2015. The NDAA included fewer acquisition-related provisions than in previous years due to Congress's current focus on comprehensive acquisition reform efforts for the Fiscal Year 2016 NDAA. Nonetheless, several provisions in the NDAA directly affect contractors by revising agencies' internal acquisition processes, modifying existing contracting requirements, or imposing new obligations on contractors. Most of the changes will not take effect until the FAR Council and Department of Defense (DOD) issue regulations to implement the NDAA provisions. Below is a summary of the more significant provisions likely to affect contractors. Notably, the final version of the NDAA did not include a provision that had been included in the Senate version of the Act, which would have authorized the head of a defense agency to interview contractor employees. The Joint Explanatory Statement that accompanied the NDAA stated that the provision was unnecessary because the Defense Contract Audit Agency already has the authority to interview contractor employees in connection with audits.

- **Preference for Open Systems** (NDAA Sec. 801). The NDAA instructs DOD to modify its acquisition guidance to ensure information technology (IT) acquisition programs include open system approaches to the maximum extent possible. The Act requires acquisition officials to prepare a written justification for any use of non-open systems. This change is, in part, an effort to reduce "vendor lock," in which it becomes too costly for the Government to change IT vendors because such a change would also require changing the underlying IT system. The

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open systems approach is intended to increase competition among contractors.

- **Federal Information Technology Acquisition Reform Act (FITARA)** (NDAA Secs. 831–37). The NDAA includes modified versions of several provisions from the Federal IT Acquisition Reform Act (H.R. 1232). These provisions impose a series of obligations on federal agencies to make the IT acquisition process more effective and efficient, including developing specialized IT staff, inter-agency data sharing, and increasing transparency with the public. Contractors should take note of Sec. 832, however, which creates risk management requirements for major IT acquisitions and prohibits agencies from providing additional funding for poor-performing projects that are deemed “high risk” until the agency’s Chief Information Officer determines that the root causes of the risk have been addressed.
- **Additional Reporting Requirements for Comprehensive Small Business Subcontracting Plans** (NDAA Sec. 821). The NDAA extended for three years the test program that allows contractors to negotiate comprehensive small business subcontracting plans but imposed additional reporting requirements. Contractors that participate in the program will now be required to report semi-annually the amount of first-tier subcontract dollars awarded to small businesses (broken down by NAICS code, major defense acquisition programs, military department, and certain types of contracts), the number of relevant subcontracts that are active, the costs incurred to negotiate and implement the comprehensive subcontracting plan, and any costs avoided by adopting a comprehensive subcontracting plan.
- **Hacking Notification Requirements** (NDAA Sec. 1632). The NDAA seeks to streamline contractors’ obligations to report intrusions in their computer networks. To that end, the Secretary of Defense will be required to designate “operationally critical contractors” that are essential to mobilization, deployment or sustainment in contingency operations, and those designated contractors will now need to report hacking incidents involving their computer networks. The reports must follow procedures that the NDAA directs DOD to promulgate. The NDAA also authorizes DOD to access contractor networks in order to determine whether government information was accessed or downloaded.
- **Expansion of Prohibitions on Contracting with the Enemy** (NDAA Secs. 841–43). The NDAA expands to all federal agencies the authority previously provided to DOD Combatant Commands to limit contracts with entities that provide funds to a person or group that actively opposes United States or coalition forces. In particular, after an appropriate finding, agencies may restrict the award of a contract, grant, or cooperative agreement to any contractor that provides funds received under a federal contract, grant, or cooperative agreement directly or indirectly to entities actively opposing United States forces engaged in hostilities (or fails to exercise due diligence in providing such funds). Moreover, the NDAA would permit the termination for default or voiding (as against public policy) of a contract already awarded, if the requisite findings were made. These provisions will result in new clauses in the Federal Acquisition Regulation (FAR), which must be incorporated in all contracts performed outside the United States in support of contingency operations. The NDAA expressly directs that the public be provided an opportunity to comment on the standards for due diligence that will be incorporated into the applicable FAR provisions. Agencies will also be authorized to access contractor and subcontractor records if there is reason to believe that funds are being provided either directly or indirectly to enemy combatants.

- **Costs Incurred from Congressional Investigations** (NDAA Sec. 857). This provision will make unallowable the costs that contractors incur as a result of a congressional investigation or inquiry that later leads to a criminal conviction, finding of civil liability, or decision to suspend or debar the contractor or terminate a contract for default.
- **Clarification of Restrictions on Counterfeit Electronic Parts** (NDAA Sec. 817). The NDAA amends the requirements in the Fiscal Year 2012 NDAA, Pub. L. No. 112-81, for identifying and avoiding counterfeit electronic parts in the supply chain. In particular, the NDAA revises the definition of “trusted suppliers” and requires contractors and subcontractors to obtain electronic parts that are no longer in production from trusted suppliers.
- **Reverse Auctions** (NDAA Sec. 824). The NDAA places restrictions on the use of reverse auctions, including prohibiting the use of reverse auctions resulting in a single bid unless the procurement complies with existing regulations on single-bid procurements.

J. Ryan Frazee, a Wiley Rein LLP law clerk, contributed to the drafting of this alert.