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On January 2, 2013, President Obama signed the $633 billion Fiscal Year 2013 National Defense Authorization Act (NDAA). As has become common in recent years, this year’s NDAA was not without controversy and political posturing on both sides of the aisle. Given that much of Washington’s attention over the past few weeks has been focused on negotiations over the looming “fiscal cliff,” there was genuine uncertainty this year about whether an NDAA would be passed at all. In addition to the usual last-minute bill amendments and conference negotiations, President Obama threatened to veto the final bill over several provisions that ultimately were (or were not) included. In the end, Congress and the President successfully passed defense authorization legislation for the 51st consecutive year.

The final version of the FY 2013 NDAA contains several dozen acquisition policy provisions that will affect contractors doing business with the Department of Defense. Following passage of the House (H.R. 4310) and Senate (S. 3254) versions of the bill earlier this year, industry groups raised significant concerns over several of these proposed provisions, including, most notably, an amendment that would require DOD to cut contractor and civilian jobs by the same percentage as any cut to military personnel, a provision lowering the cap on contractor compensation, and a provision allowing the Defense Contract Audit Agency (DCAA) access to a contractor’s internal audit reports. The good news for contractors is that these and several other of the more controversial contracting provisions were removed, or significantly watered down, in the final bill.

Nevertheless, the FY 2013 NDAA contains many important new requirements and restrictions with which contractors will need to grapple. Below is a summary of the significant contracting-related provisions included in (or excluded from) the final NDAA:

- **Trafficking in persons (Sections 1701-08).** The NDAA substantially amends the Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7104, by directing the President to ensure that federal government contracts include a condition that authorizes the Government to take punitive action against a contractor, subcontractor, their employees, or agents if they engage in certain activities related to sex or labor trafficking. For all contracts that exceed $500,000 and are performed outside the U.S., contractors will be required to maintain a compliance plan and make annual certifications related to anti-human trafficking efforts. Of particular significance, the NDAA imposes mandatory disclosure obligations on contractors that receive information from “any source” of “credible information” that an employee engaged in trafficking-related activities.

- **Counterfeit electronic parts (Section 833).** Section 833 amends Section 818 of the 2012 NDAA to pro-
vide certain protections for contractors performing re-
work or corrective action to remedy the use of counter-
feit electronic parts. Specifically, Section 833 makes the 
costs of such work allowable if (i) the contractor has an 
operational detection and avoidance system as required 
under Section 818, (ii) the counterfeit electronic parts 
were provided to the contractor as government prop-
erty, and (iii) the contractor provides timely notice to 
the Government.

- **Cybersecurity (Section 941).** Section 941 re-
quires DOD to establish procedures that would require 
certain defense contractors to report successful pen-
etrations of their networks and information systems. 
The procedures will include mechanisms for DOD per-
sonnel to obtain access to equipment or information of 
the contractor necessary to conduct a forensic analysis 
to determine whether sensitive DOD information was 
successfully extracted from the contractor's network or 
information system. In response to industry objections 
to earlier versions of this provision because of concerns 
over the potential compromise of contractor proprietary 
information, the final NDAA includes a new require-
ment that DOD "provide for the reasonable protection 
of trade secrets, commercial or financial information, 
and information that can be used to identify a specific 
person."

- **DCAA access to contractor internal audit reports 
(Section 832).** Although previous versions of the legis-
lation included provisions that would have vastly ex-
panded DCAA's ability to access contractors' internal 
audit reports and materials, these provisions were sub-
stantially revised in the final language. The Senate bill 
included provisions that would have given DCAA essen-
tially unlimited access to contractor internal audit re-
ports and working papers. It also provided that if a con-
tractor refused to provide its internal audit reports and 
supporting materials, its internal system could be de-
clared inadequate on that basis alone. The final NDAA 
ensures that DCAA cannot use contractor internal audit 
reports and supporting materials for purposes other 
than assessing risk and evaluating the efficacy of con-
tactor internal controls and the reliability of associated 
contractor business systems. It also provides that while 
internal audit reports "may be considered" in assessing 
a contractor's system of internal controls, they "shall 
not be the sole basis" for finding a system inadequate.

- **Limitation on use of cost-type contracts (Section 
811).** Section 811 prohibits DOD from using cost-type 
contracts for the production of major defense acqui-
sition programs (MDAPs) unless the Under Secretary of 
Defense for Acquisition, Technology and Logistics cer-
tifies to Congress that a cost-type contract is needed to 
provide a required capability in a timely and cost-
effective manner.

- **Contractor profits (Section 804).** Section 804 re-
quires DOD to review its profit guidelines in order to 
identify any necessary changes to ensure an appropri-
ate link between contractor profit and contractor per-
formance. The review must consider the appropriate 
levels of profit needed to sustain competition, contrac-
tors’ assumption of risk and incentives for superior per-
formance in delivering quality products and services in 
a timely and cost-effective manner.

- **Contractor employee compensation (Section 
864).** In a major win for contractors, rather than tying 
allowability limits on contractor compensation to the 
salary of the Vice President, as the Senate bill would 
have done, the final NDAA requires the Government 
Accountability Office (GAO) to conduct a study on the 
effects reducing the allowable costs of contractor compen-
station.

- **Contingency contracting (Sections 841-53).** The 
NDAA contains a litany of provisions relating to gov-
ernment contracts in support of contingency opera-
tions, including several major acquisition reforms from 
the Comprehensive Contingency Contracting Reform 
Act (S. 3286) introduced by Sen. Claire McCaskill (D-
Mo). These provisions would, among other things, (i) 
require DOD to develop and issue guidance establish-
ing the chain of authority and responsibility within DOD 
for the planning and execution of overseas conti-

overnment operations (Section 843), (ii) require DOD to de-
velop risk mitigation plans for the use of contractors 
performing critical functions in support of contingency 
operations, including private security functions, train-
ing of foreign government personnel, intelligence and 
information operations, and other functions closely as-
associated with inherently governmental functions (Sec-
tion 846), (iii) extend governmentwide the DOD re-
quirement that contractor past performance evaluations 
be posted within 14 days regardless of whether the con-
tactor has provided any comments (Section 853), and 
(iv) require that the information in the Federal Awardee 
Performance and Integrity Information System (FA-
PIIS) on a contractor also include information about 
any parent, subsidiary, or successor entities of the con-
tactor (Section 852).

- **Small business (Sections 1631-1699).** The NDAA 
contains a host of provisions aimed at increasing con-
tacting opportunities for small business, including pro-
visions that would (i) authorize the Small Business Ad-
ministration (SBA) to establish a mentor-protégé pro-
gram for all small business concerns similar to the 
program currently in place for participants in the 8(a) 
Business Development program (Section 1641), (ii) re-
quire that small business prime contractors not expend 
on subcontractors more than 50 percent of the amount 
paid to the concern under the contract, with exceptions 
for subcontractors that qualify as a "similarly situated 
entity" (Section 1651), (iii) require an offeror to notify 
any potential subcontractors that it intends to include in 
its subcontracting plan and require the SBA to establish 
a reporting mechanism that allows a subcontractor or 
potential subcontractor to report "fraudulent activity or 
bad faith by a contractor with respect to a subcontrac-
ting plan" (Section 1653), and (iv) require the SBA to 
conduct a study every five years to identify industries, 
as defined under the North American Industry Classifi-
cation System (NAICS), underrepresented by small 
business concerns owned and controlled by women.

- **Suspension and debarment (Section 861).** The fi-
nal NDAA requires that each DOD military department 
and the Defense Logistics Agency (DLA), the Depart-
ment of State, and USAID have at least one suspension 
and debarment official that does not report to, and is 
not supervised by, the acquisition office or the inspec-
tor general of the respective departments or agencies. 
The NDAA also directs that such suspension and debar-
ment officials develop written policies for the (i) consid-
eration of formal referrals (and non-formal referrals) of 
suspension and debarment matters and (ii) documenta-
tion of any final decision taken pursuant to a formal referral.

- **Extension of contractor conflicts of interest limitations (Section 829).** Section 829 requires DOD to review the guidance on personal conflicts of interest for contractor employees performing acquisition functions closely associated with inherently governmental functions in order to determine whether it should be extended to contractor personnel performing functions other than acquisition functions that are closely associated with inherently governmental functions, personal services contracts or contracts for staff augmentation services.

Although it could have been much worse for defense contractors, the final NDAA still includes many significant new requirements and restrictions that will affect virtually every company that does business with DOD. Contractors should closely review these provisions to assess the potential impact on their business. For now, defense contractors were spared new requirements in several areas—including profits, allowable costs of employee compensation, and personal conflicts of interest—but the provisions calling for studies and reports on these issues will also merit close attention, as those issues may very well end up the subject of contracting provisions in future NDAA.