From the public law that is the annual National Defense Authorization Act, signed by President Obama on 23 December 2016, springs future FAR and DFARS rule-making. Thus, a review of the NDAA gives some forewarning about future rules and rule revisions to come. As always, we rely heavily on Bob Antonio's WIFCON **analysis** of Title VIII.

And as always, it's a challenge to reconcile the House and Senate versions. Bob's analysis provides them both. Any mistakes in interpretation are ours.

What is our opinion of the new public law? Well, let's be diplomatic about it.

This year's NDAA is a mixed bag. It contains much really bad law drafting, which is sure to lead to really bad future rule-making. It also has some nuggets of goodness mixed in with the bad. Overall, though, it's not a good thing at all.

Remember that we are not reporting on the whole thing; the entire piece of legislation is massive. These are just the provisions that leap out at us, mostly from Title VIII and one bit at the end from Title IX. There are many more issues in the final document that is the formal public law, but it would take us a long time to wade through it all.

With that out of the way, let's hold our collective noses and get started, shall we?

Section 820 establishes a new Defense Cost Accounting Standards Board. We agree that the current CASB, housed in the OFPP (which is housed in the OMB, which is under the White House), has been pathetic over the past four or more years. We've posted our opinion on the CASB's inaction more than once. Still, WTF? Do we really need two of these things?

The duties of the Defense CASB include:

(1) ensure that the cost accounting standards used by Federal contractors rely, to the maximum extent practicable, on commercial standards and accounting practices and systems;

(2) within one year after the date of enactment of this subsection, and on an ongoing basis thereafter, review any cost accounting standards established under section 1502 of this title and conform such standards, where practicable, to Generally Accepted Accounting Principles; and

(3) annually review disputes involving such standards brought to the boards established in section 7105 of this title or Federal courts, and consider whether greater clarity in such standards could avoid such disputes.

Yeah, there's *no* conflict of interest there. We are sure that the new DCASB and the old CASB will align and collaborate well together. (Note: That was sarcasm.)

The House version included the following amendment, which we believe would be carried forward into the final public law:

The House … would … improve the government-wide Cost Accounting Standards Board (CASB) and require that Federal Cost Accounting Standards (CAS) be reconciled, to the extent possible, with U.S. Generally Accepted Accounting Principles. The amendment also would require the CASB to hire an executive director and meet at least quarterly to reduce inconsistencies between CAS and GAAP, as well as address problems identified by cases presented to the Armed Services Board of Contract Appeals and Civilian Board of Contract Appeals. … the head of a Federal agency [may] waive the application of the CAS for contracts valued at less than $100.0 million. The amendment also would retain the Senate proposal to create a Defense Cost Accounting Standards Board, but would authorize the new board to advise the CASB, *oversee implementation of CAS within the Department of Defense, and ensure that managerial cost accounting is appropriately implemented for commercial functions performed by employees of the Department.* The conferees also encourage the Director, Defense Contract Audit Agency (DCAA) to examine the potential for electronic quality management systems to improve the ability of DCAA to conduct thorough and timely audits.

[Emphasis added.]

See that part in italics, the part we emphasized? What does that even mean? What does "oversee the implementation of CAS within the Department of Defense" mean and how is that any different from the now long-defunct DoD CAS Working Group?

None of the above is any good for contractors, except perhaps for the creation of a new CAS exemption for any/all contracts valued at less than $100 million. We'll have to see whether it will be the new Defense CASB or the old OFPP CASB that takes the lead in revising the FAR Part 99 CAS regulations as Congress directed. As the old OFPP CASB (henceforth: "OCASB") has done nothing in the past several years, we expect the new DCASB to take the lead, because somebody has to.

Section 822 does something to competition requirements. Based on the Section title, one assumes the intent was to enhance competition. Let us know if you see how the following language will enhance competition.

FAR 15.403-1(b)(1) currently establishes that a contracting officer is *prohibited* from obtaining certified cost or pricing data when certain listed circumstances are present. Among those listed circumstances is the following: "The contracting officer shall not require certified cost or pricing data to support any action (contracts, subcontracts, or modifications) … to support a determination of a fair and reasonable price or cost realism) … When the contracting officer determines that prices agreed upon are based on adequate price competition …."

The phrase "adequate price competition" is a term of art that is defined at FAR 15.401-1(c)(1). That FAR subparagraph identifies various circumstances that would create "adequate price competition". Thus, to know if you have adequate price competition you have to read that subparagraph to see if your circumstances qualify. If they do qualify, then not only are you exempt from the requirement to provide certified cost or pricing data, but the contracting officer is actually prohibited from requiring it.

The 2017 NDAA directs the FAR Councils to revise the current language of FAR 15.402-1(b)(1) as follows:

"Submission of certified cost or pricing data shall not be required … in the case of a contract, a subcontract, or modification of a contract or subcontract for which the price agreed upon is

based on … *competition that results in at least two or more responsive and viable competing bids* …. "

In other words, the term of art "adequate price competition," which previously had been defined by the FAR, has been replaced with a single set of circumstances. The other circumstances previously defined by FAR 15.401-1(c)(1) no longer seem to lead to a determination that there is adequate price competition. If we've interpreted the change correctly, this is really bad news for contractors. On the other hand, the other listed circumstances may continue to apply, and the changes may only apply to the first set if circumstances. That would be better. We'll have to see which way it goes.

In addition, Section 822 also clarifies that the prime contractor is responsible for applying the FAR criteria to its subcontract awards, and thus determining whether or not it needs to obtain certified cost or pricing data for its own cost/price analyses. The language also clarifies that the government has the right to review those determinations. Frankly, we don't see this as much of a change. From our point of view, the prime was always responsible for those determinations and the government always had the right of review (through CPSR, if nothing else).

Section 823 appears to clarify when the executive compensation ceiling amounts are to be applied. If we are interpreting it correctly, it eliminates the retroactive implementation. That's some good news.

Section 824 requires both contractors and DCAA to separately report IR&D and B&P expenses—i.e., separately from other claimed allowable costs. In addition, it requires the DoD to establish a goal that limits reimbursement of contractor B&P expenses on cost-type contracts to not more than 1 percent of that contractor's revenue; however, the DoD cannot accomplish this by making excess B&P reimbursements unallowable. Instead, if the DoD finds itself reimbursing excessive contractor B&P costs, it must figure out why. This language is going to require contractors to do separate reporting on their expenditures—in addition to the current burdens placed on them in 2016 (which we have written about fairly extensively).

Section 831 reinforces the FASA concept that the DoD should be using performance-based payments instead of cost-based progress payments as the preferred form of contract financing. That's a bit of a joke, isn't it? The DoD has worked very hard to move away from PBPs over the past few years and we don't see any reason that's going to change in 2017, no matter what Congress may direct.

Section 851 establishes that the DoD may count first and second tier subcontract awards in reporting progress in meeting its socioeconomic reporting goals. To us, this means that contractors will have some additional reporting burdens.

Section 861 directs the DoD to establish "program management" as a separate discipline from "acquisition management" – which is a very very good thing indeed.

Section 893 makes significant changes to the contractor business system rules. As we interpret the language, it establishes the following:

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Publicly traded contractors that must comply with Sarbanes-Oxley, for which they hire external CPAs to test compliance with SOX Section 404, may also use their external CPAs to test their compliance with contractor business system requirements. If the external CPAs express an opinion that the contractor meets the requirements, then those business systems need not be further audited by the DoD.

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Contractors not subject to full CAS coverage have long been exempted from compliance with the contractor business system requirements. In addition, contractors that generate less than one percent of sales from the U.S. Government are now also exempted.

If we interpret the foregoing correctly, it means that certain contractors may benefit but other contractors will still be in the same business system boat.

Finally, as we reported would be the case, it seems that the 2017 NDAA has directed the disbandment of the Office of the Under Secretary of Defense (Acquisition, Technology & Logistics). Section 901 replaces the existing OSD organization with two new Under Secretariats: the Under Secretary of Defense for Research and Engineering (USD R&E) and the Under Secretary of Defense for Acquisition and Sustainment (USD A&S). There is also a

new Chief Management Officer (CMO).

We have no fondness for the current USD (AT&L). We have tracked Mr. Kendall's initiatives for some time, for at least six years. In particular, we noted his attempts to take credit for the "S2T2" initiative, which turned out to be nothing at all. See our opinions of that effort **here** . More recently, his role in killing efforts to save as much as $125 billion in Pentagon overhead costs was well documented by the Washington Post, and we commented on it as well. Still, we wish him well in his new endeavors.

Similarly, whatever respect we may have once had for the Directorates reporting to the USD (AT&L) has withered away over the past 15 years or so. Pretty much since the time when DPAP refocused its mission on "procurement and acquisition policy" instead of acquisition reform. We look to DPAP and other Directorates for leadership; but what we find instead is bureaucrats defending the existing status quo. See **our article** on the many recent acquisition reform disappointments for more on this topic.

The USD (AT&L) organization has made token efforts over the years to improve acquisition outcomes. "Should-cost" and "Better Buying Power" are two initiatives that come to mind. Yet, in our view those efforts have been much about trying and not very much about doing. In other words, the taxpayers haven't received much in the way of promised benefits. So we say: let's try this again with a new organization. Perhaps we'll get a different, and better, outcome.

There is much more to say about the 2017 NDAA but this is enough words for now. As always, we encourage readers to go see the legislation for themselves.