Somebody I follow asserted that 2021 didn't actually start until January 21, 2021. I want that to be true, because January 6th belongs with 2020, doesn't it? Regardless of your position on the matter, for defense contractors 2021 could be said to have started on January 1, 2021, which is a nice alignment with the calendar. That's the date when the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021 became public law.

The 2021 NDAA became public law on that date because that's the date Congress voted to override the President's veto of the bill. It was President Trump's tenth veto of a bill during his four-year term, but the first veto to be overridden by Congress. The date of the override becomes the date of the public law, or so we're told.

For the twentieth year in a row, Bob Antonio at WIFCON.com published his **invaluable analysis** of the NDAA, section by section. As has become tradition here, we'll take a look at his analysis and bring certain highlights to your attention. But if you want to know more, there is no better source than his analysis, and we encourage you to go read it.

The most relevant section for compliance folks would be **Section 806** . In that Section, Congress directed significant changes to the contractor business system administration regime. Well, we think they're significant. You be the judge. Anyway, Congress make revisions to the 2011 NDAA language that first established the contractor business system administration rules, replacing the term "significant deficiency" with "material weakness" to better align audit/review findings with other audits/reviews of internal controls, thus reducing confusion among practitioners and (hopefully) reducing confusion among those who have to deal with audit/review reports and findings.

We've spent a decade dealing with "significant deficiencies" and most of us have learned that a significant deficiency inexorably leads to a contractor business system being determined to be inadequate. During that decade, contractors have argued (largely unsuccessfully) with auditors and contracting officers about whether or not a deficient is actually "significant" or not. So what's changing?

Here's the official definition of "material weakness" from the NDAA:

The term `material weakness' means a deficiency or combination of deficiencies in the internal control over information in contractor business systems, such that there is a reasonable

possibility that a material misstatement of such information will not be prevented, or detected and corrected, on a timely basis. For purposes of this paragraph, a reasonable possibility exists when the likelihood of an event occurring--

(A) is probable; or

(B) is more than remote but less than likely.

The linkage to the more traditional audits/reviews of contractor internal controls should be obvious. But let's break that definition down a bit more:

- A single deficiency or a combination of deficiencies
- In internal control over information in contractor business systems
- Leading to a reasonable possibility
- That a material misstatement
- Will not be prevented
- Or detected and corrected

-

On a timely basis

-

Where “reasonable possibility” cannot mean a remote possibility

Points likely to lead to a disagreement include: (1) What is a “material misstatement” and (2) what is a “timely basis”. With respect to “material misstatement” we have fairly recent **DCAA guidance** on how to quantify materiality. While that guidance only applies (formally) to contractor’s incurred costs, informally most people (including DCAA leadership) agree it can—and should be—applied more broadly. We see no reason that the materiality guidance could not be extended to DCAA audits of contractor business systems. As for DCMA, there is materiality guidance found in FAR Part 30, which is applicable to CAS cost impact proposal analysis and related determinations. Again, there is no reason that materiality guidance couldn’t be extended to DCMA reviews of contractor business systems. We very much hope it will be.

Which leaves “timely basis.” What does that mean in the context of government contracting? We don’t have much in the way of authoritative answers, and the correct answer will probably depend on the context. For example, with respect to calculating indirect cost rates, we would hazard the position that “timely” means “before the end of the contractor’s fiscal year.” But with respect to complying with Limitation of Cost/Limitation of Funds requirements, “timely” could well mean something else. There are other contexts to consider as well, including Truthful Cost or Pricing Data requirements (aka “TINA”). So we’ll just have to wait and see what the contracting parties make of it.

Getting back to the NDAA, Congress continues to play with the increase in the TINA threshold. **Section 814** formally increased the threshold at which certified cost or pricing data must be submitted to “a standard $2.0 million threshold for application of the requirements of the Truthful Cost or Pricing Data statute (commonly known as the Truth in Negotiations Act) with respect to subcontracts and price adjustments.” (Of course, this is the value assuming no exception applies.)

There are dozens of other Sections to be reviewed, but most of those are pointed at the Department of Defense in general, and we expect any impacts to contractors will be primarily indirect in nature. The two above are the ones that struck us as being most worthy of discussion. That being said, you shouldn't rely on our judgment; you should follow the link we provided and do your own research.