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Public Law 110-417—better known as The Duncan Hunter National Defense Authorization Act (NDAA) of 2009—was enacted into law on October 14, 2008. That was more than two-and-a-half years before the date of this article.

October, 2008. Only 36 months ago, but it might as well be a different era.

Back then, Wall Street and various financial institutions were in the first stages of a months-long meltdown and Congress had just passed the first “bailout” package. General Petraeus had just been appointed to lead CENTCOM. And a couple of Presidential candidates were in the midst of slugging through the last days of a bruising battle.

To be clear then, P.L. 110-417 was the final NDAA of President Bush’s eight-year term as President. It reflects the lessons learned from nearly seven years of the Global War on Terror, including the sojourn in Iraq and the difficulties in Afghanistan. And it reflects the sensibilities of a partisan battle led by Representative Henry Waxman on the alleged waste, fraud, and abuse of the Bush Administration’s spending priorities—particularly DOD spending on its efforts in Southwest Asia.

So what does this bit of ancient history have to do with us today? Well, among other things, the FAR Council is just getting around to implementing some of the requirements established by that Public Law.

One of the interesting provisions of the 2008 NDAA was Section 864, entitled, “Regulations on the Use of Cost-Reimbursement Contracts.” Section 864 said (in part)—

(a) In General- Not later than 270 days after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to address the use of cost-reimbursement contracts.

(b) Content- The regulations promulgated under subsection (a) shall include, at a minimum, guidance regarding--

(1) when and under what circumstances cost-reimbursement contracts are appropriate;

(2) the acquisition plan findings necessary to support a decision to use cost-reimbursement contracts; and

(3) the acquisition workforce resources necessary to award and manage cost-reimbursement contracts.

(c) Inspector General Review- Not later than one year after the regulations required by subsection (a) are promulgated, the Inspector General for each executive agency shall review the use of cost-reimbursement contracts by such agency for compliance with such regulations and shall include the results of the review in the Inspector General's next semiannual report.

The foregoing seems fairly straightforward. As Representative Waxman, commented, “Section 864 requires regulations to address the use of cost-reimbursement-type contracts.” How hard could that be to misinterpret?

Well, **here’s** the FAR Councils’ interim rule intended to implement Section 864—what do you think?

Let’s first note that the FAR Councils believed that the numerous revisions to the FAR connected with this rule needed to be implemented on an interim basis, without benefit of public comment on a proposed rule, because of “urgent and compelling reasons”—including the fact that they had dawdled so long over the rule that the Inspector General was in danger of not being able to conduct its required compliance review in time to get any findings into its next semi-annual report.

And when we say “numerous revisions,” we mean it. Despite the seemingly straightforward nature of the law, the FAR Councils felt the need to revise the following FAR provisions—

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1.602

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1.603

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1.604

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2.101

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7.102

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7.103

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7.104

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7.105

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16.103

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16.104

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16.301

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32.1007

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43.302

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50.205

Interestingly enough, the FAR Councils also saw fit to go beyond the requirements of the Public Law, in order to require that contracting officers justify the use of any contract type other than firm, fixed price type. For example, FAR 16.103 (Negotiating Contract Type) was revised to read as follows—

(1) Each contract file shall include documentation to show why the particular contract type was selected. This shall be documented in the acquisition plan, or if a written acquisition plan is not required, in the contract file.

(i) Explain why the contract type selected must be used to meet the agency need.

(ii) Discuss the Government's additional risks and the burden to manage the contract type selected (e.g., when a cost-reimbursement contract is selected, the Government incurs additional cost risks, and the Government has the additional burden of managing the contractor's costs). For such instances, acquisition personnel shall discuss--

(A) How the Government identified the additional risks (e.g., pre-award survey, or past performance information);

(B) The nature of the additional risks (e.g., inadequate contractor's accounting system, weaknesses in contractor's internal control, non-compliance with Cost Accounting Standards, or lack of or inadequate earned value management system); and

(C) How the Government will manage and mitigate the risks.

(iii) Discuss the Government resources necessary to properly plan for, award, and administer the contract type selected (e.g., resources needed and the additional risks to the Government if adequate resources are not provided).

(iv) For other than a firm-fixed price contract, at a minimum the documentation should include--

(A) An analysis of why the use of other than a firm-fixed-price contract (e.g., cost reimbursement, time and materials, labor hour) is appropriate;

(B) Rationale that detail the particular facts and circumstances

(e.g., complexity of the requirements, uncertain duration of the work, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection;

(C) An assessment regarding the adequacy of Government resources that are necessary to properly plan for, award, and administer other than firm-fixed-price contracts; and

(D) A discussion of the actions planned to minimize the use of other than firm-fixed-price contracts on future acquisitions for the same requirement and to transition to firm-fixed-price contracts to the maximum extent practicable.

(v) A discussion of why a level-of-effort, price redetermination, or fee provision was included.

(2) Exceptions to the requirements at (d)(1) of this section are--

(i) Fixed-price acquisitions made under simplified acquisition procedures;

(ii) Contracts on a firm-fixed-price basis other than those for major systems or research and development; and

(iii) Awards on the set-aside portion of sealed bid partial set-asides for small business.

In the foregoing quotation, note that the government has helpfully listed risks associated with other than firm, fixed price contracts. Let's bring them down here for clarity, in case you skimmed over the language of the interim rule. Risks to be considered include:

- Inadequate contractor's accounting system,
- Weaknesses in contractor's internal control,
- Non-compliance with Cost Accounting Standards, or

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Lack of or inadequate earned value management system

As you ponder the list above, ask yourself just which government oversight agency will be determining the exact level of contract-related risk for any particular contractor. If you answered, “The DCAA,” then give yourself a prize. Yes, indeed, that same audit agency criticized by the Government Accountability Office and the DOD Inspector General for widespread and systemic audit quality failures concerning assessments of contractor internal control systems will be positioned to deny contractors awards of new contracts, if said contracts are other than firm, fixed price.

We’re sure that will work out well.

The FAR Councils seem to have anticipated our concerns. They wrote—

The Councils recognize that assigning adequate and proper resources to support the solicitation, award, and administration of other than firm-fixed-price contracts (cost-reimbursement, time-and-material, and labor-hour) contract is challenging. There is also great concern that a lack of involvement in contract oversight by program offices is primarily present in other than firm-fixed-price contracts.

The FAR Councils proposed a solution to the problem of inadequate resources. The solution is—

The Councils consider that greater accountability for the management and oversight of all contracts, especially other than firm-fixed-price contracts, can be gained and improved by requiring that properly trained CORs or COTRs … be appointed before award.

So that's the solution. According to the FAR Councils, having more Contracting Officer Representatives and Contracting Officer Technical Representatives will ensure that the enumerated risks associated with other than firm, fixed-price contractors are effectively mitigated. *Yeah, sure they will.*

But we're not done yet. Before we move on, let's note another aspect of the interim rule.

Formerly, FAR 16.301-3 established the requirements for use of a cost-reimbursement contract. Prior to this rule, there were two primary requirements: (1) The contractor's accounting system had to be adequate for account for contract costs, and (2) The government had to have adequate surveillance during contractor performance in order to assure that the contractor was performing in a reasonable efficient and effective manner. Now, FAR 16.301-3 reads as follows—

(a) A cost-reimbursement contract may be used only when-

(1) The factors in 16.104 have been considered;

(2) A written acquisition plan has been approved and signed at least one level above the contracting officer;

(3) The contractor's accounting system is adequate for determining costs applicable to the contract; and

(4) Adequate Government resources are available to award and manage a contract other than firm-fixed-priced (see 7.104(e)) including—

(i) Designation of at least one contracting officer's representative (COR) qualified in accordance with 1.602-2 has been made prior to award of the contract or order; and

(ii) Appropriate Government surveillance during performance to provide reasonable assurance that efficient methods and effective cost controls are used.

(b) The use of cost-reimbursement contracts is prohibited for the acquisition of commercial items (see Parts 2 and 12).

That doesn't sound too bad until you take a look at the factors in 16.104. Among the twelve (12) factors discussed (which must be "considered" by the contracting officer), note this little gem—

(i) *Adequacy of the contractor's accounting system*. Before agreeing on a contract type other than firm-fixed-price, the contracting officer shall ensure that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type. This factor may be critical-

(1) When the contract type requires price revision while performance is in progress; or

(2) When a cost-reimbursement contract is being considered and all current or past experience with the contractor has been on a fixed-price basis. See 42.302(a)(12).

Stay with us here. Note that the last sentence directs contracting officers over to the regulations

at 42.302(a)(12). Here's what that bit says—

(12) Determine the adequacy of the contractor's accounting system. The contractor's accounting system *should be adequate during the entire period of contract performance.* The adequacy of the contractor's accounting system and its associated internal control system, as well as contractor compliance with the Cost Accounting Standards (CAS), affect the quality and validity of the contractor data upon which the Government must rely for its management oversight of the contractor and contract performance.

Note the part we italicized for emphasis: "The contractor's accounting system should be adequate during the entire period of contract performance." What might that sentence mean?

Quite frankly, we're not entirely sure what that sentence means. But consider this. Assume that DCAA issues an accounting system audit report identifying deficiencies in the contractor's system, or weaknesses in its internal controls. Assume further that the contractor will submit a corrective action plan to remediate those deficiencies. Assume further that the Administrative Contracting Officer will have to decide whether the contractor's corrective action plan will mitigate the government's risk and that the system can be deemed "adequate pending implementation of corrective actions," or if it will be deemed "inadequate" and payment withholds will be initiated. This is, of course, a very likely scenario, and one faced by many contactors today, with more to follow when the DFARS "business system" rule is finally issued.

Well, given the foregoing, we think that little sentence might just mean that *no contractor's accounting system can be considered adequate for other than firm, fixed-price contracts until all corrective actions have been implemented and until DCAA has issued a follow-up audit report telling the contracting officer that the contractor no longer has any system deficiencies and/or internal control weaknesses.*
In other words, one adverse DCAA audit report can be a death sentence for new contract awards, if those awards were to be on other than a firm, fixed-price basis.

What do you think? Do you think the FAR Councils went beyond Congress' intent and overreached? Did they establish requirements for which existing resources are inadequate? Did they give too much power to DCAA to the detriment of the contracting process?

Despite the fact that the revisions were promulgated as an interim rule, the FAR Councils are still seeking public input. (The rule, link above, explains how to submit comments.) If you share our concerns with the interim rule revisions, perhaps you will be motivated to submit comments to the FAR Councils.