

We were amused during the last election cycle by those who refused to vote for Obama because of some provision in the 2012 NDAA they didn't like. As if the President had much effect on the provisions Congress—and lobbyists—added to what is an annual piece of legislation. People really need to get a clue.

And speaking of clues, you need to get one about the many provisions of the 2013 NDAA. Thankfully (for all of us), Bob Antonio over at WIFCON takes the time each year to analyze the legislation and show what the House and Senate had to say about each provision. Here's [a link](#) to his analysis, which should be taken as the definitive analysis of the 2013 NDAA, otherwise known as H.R. 4310 and soon to be known as Public Law 112-xx.

You had better read it, because the various sections of the law are going to become future FAR and DFARS rules. There are some 83 individual sections, ranging from 801 through 3121. Obviously, we are not going to repeat all 83 provisions. But we do want to draw several of them to your attention, as we think they may have significant effects on compliance and contract management. (Remember, this bill affects only the Defense Department unless other Agencies are specifically identified.)

802 – Requires the Secretary of Defense, the Secretary of State, and the Administrator of the United States Agency for International Development to issue such guidance and regulations to ensure that in any case in which an offeror for a contract or a task or delivery order informs the agency (pursuant to FAR provision 52.215-22) that it intends to award subcontracts for more than 70 percent of the total cost of work to be performed under the contract, task order, or delivery order, the contracting officer for the contract is required to (1) consider the availability of alternative contract vehicles and the feasibility of contracting directly with a subcontractor or subcontractors that will perform the bulk of the work; (2) make a written determination that the contracting approach selected is in the best interest of the Government; and (3) document the basis for such determination.

804 – Requires the Secretary of Defense to review the profit guidelines in the Department of Defense Supplement to the Federal Acquisition Regulation in order to identify any modifications to such guidelines that are necessary to ensure an appropriate link between contractor profit and contractor performance.

827 – Extends whistleblower protections to “an employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Department of Defense or National Aeronautics and Space Administration contract or grant.” Extends the disallowance of legal fees defending against a

suit initiated by a contractor employee, where the disposition is imposition of a monetary penalty or an order to take corrective action.

828 – Establishes a pilot program to enhance contractor employee whistleblower protections, such that “An employee of a contractor, subcontractor, or grantee may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body ... information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.”

831 – Requires the USD (AT&L) to issue guidance and standards (and training) for evaluations of price reasonableness, including “standards for determining whether information on the prices at which the same or similar items have previously been sold is adequate for evaluating the reasonableness of price; ... standards for determining the extent of uncertified cost information that should be required in cases in which price information is not adequate for evaluating the reasonableness of price; [to] ensure that in cases in which such uncertified cost information is required, the information shall be provided in the form in which it is regularly maintained by the offeror in its business operations; and ... [to] provide that no additional cost information may be required by the Department of Defense in any case in which there are sufficient non-Government sales to establish reasonableness of price.”

832 – Requires the Director of DCAA to revise audit guidance regarding access to contractor internal audit reports to ensure that requests for access are “properly documented.” The document must include a “written determination that access to such reports is necessary to complete required evaluations of contractor business systems; a copy of any request from the Defense Contract Audit Agency to a contractor for access to such reports; [and] a record of response received from the contractor, including the contractor’s rationale or justification if access to requested reports was not granted.” In addition, “the revised guidance shall include appropriate safeguards and protections to ensure that contractor internal audit reports cannot be used by the Defense Contract Audit Agency for any purpose other than evaluating and testing the efficacy of contractor internal controls and the reliability of associated contractor business systems.” Moreover, the law directs that “A determination by the Defense Contract Audit Agency that a contractor has a sound system of internal controls shall provide the basis for increased reliance on contractor business systems or a reduced level of testing with regard to specific audits, as appropriate. Internal audit reports provided by a contractor pursuant to this section may be considered in determining whether or not a contractor has a sound system of internal controls, but shall not be the sole basis for such a determination.”

833 – Establishes that “the cost of counterfeit electronic parts and suspect counterfeit electronic parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts are not allowable costs under Department contracts” unless “the covered contractor has an operational system to detect and avoid counterfeit parts and suspect counterfeit electronic parts that has been reviewed and approved by the Department of Defense ... the counterfeit electronic parts or suspect counterfeit electronic parts were

## Hey, It's the 2013 National Defense Authorization Act, and You Had Better Read It

Written by Nick Sanders

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provided to the contractor as Government property in accordance with part 45 of the Federal Acquisition Regulation; and ... the covered contractor provides timely notice to the Government...." [Note: The use of the conjunction "and" may be of some concern in this context.]

864 – Instead of the drastic drop in the ceiling to establish allowable contractor compensation (which we have previously discussed), requires the GAO to issue a report to Congress on the effect of "reducing the allowable costs of contractor compensation to employees to the amount payable to the President ... or to the Vice President."

1701 – 1708 – Enhances requires relate to prevention of trafficking in persons. Among other things, requires contractors to annually certify that they have a compliance plan and have "implemented procedures to prevent [human trafficking] and to monitor, detect, and terminate any subcontractor, subgrantee, or employee of the recipient engaging in [such activities]." Covered contractors will "provide a copy of the plan to the contracting or grant officer upon request, and as appropriate, shall post the useful and relevant contents of the plan or related materials on its website and at the workplace."

As we stated, there are many provisions in the 2013 NDAA that may be of interest to government contractors. The foregoing are but a few of them—but we think you'll agree that they are especially interesting and worth knowing about in advance of rulemaking action by the FAR and DAR Councils.

Remember, when the proposed and/or interim rules are issued in response to the requirements imposed by Congress, there's not much to argue about. The Councils need to comply with the statutory requirements imposed on them.

But watch and see if the Councils' rulemaking is consistent with the statutory language in the NDAA, and with the various Conference Reports that discuss Congressional intent. It's not unheard of for the Councils to take—shall we say?—liberties with the language.