Continuing the series of articles exploring the 2018 NDAA, courtesy of Bob Antonio's **annual analysis** of the final language. As noted in the prior article, we are not going to talk about every single little thing. We're going to talk about stuff that interests us. You may want to do your own research, using the link above. Today's article is going to focus on acquisition stuff—i.e., stuff that impacts contractor prime contracts.

Changes to Thresholds

Section 806 raised the micro purchase threshold from $3,000 to $10,000.

Section 805 raised the Simplified Acquisition Threshold to $250,000. From the House Conference Report, it appears that Congress wants the new SAT to be implemented governmentwide. Consequently this may lead to changes to the FAR, rather than to the DFARS.

Section 811 raised the TINA threshold for non-competitive prime contracts, modifications of such contracts, subcontracts, and modifications of subcontracts would increase from $500,000 to $2.0 million, while the threshold for modifications to legacy contracts would increase from $100,000 to $750,000. This section also modifies statute to require offerors to submit other than certified cost or pricing data sufficient to determine price reasonableness when certified cost or pricing data is not required. Interestingly, the Senate language would have required DCAA "to provide more clarity on the cost effectiveness of different types of audits … require DCAA to report separately for incurred cost, forward pricing, and other audits with regard to the number and dollar value of audits completed and pending, sustained questioned costs, the costs of performing audits, and the return on investment of conducting audits." The Senate language would also have established "a standard definition for [DCAA's] reporting on its backlog … DCAA should include any individual incurred cost audit that has not been completed within 18 months after receipt of a qualified proposal as part of the incurred cost audit backlog." The Senate language related to DCAA was eliminated during conference negotiations.

Section 812 permitted the Secretary of Defense to waive a certification of cost or pricing data "for a foreign military sale where there is already an existing U.S. Government contract for the same or similar item or service" if "the Secretary determines that the Federal Government has

sufficient data and information regarding the reasonableness of the price."

Section 821 modified U.S.C. Title 41 to ensure that, as prime contractors' thresholds change, as they do every five years based on an analysis of inflation over that period, then subcontractor's thresholds must change as well. The new thresholds must be applied "to a contract, and any subcontract at any tier under the contract, in effect on that date without regard to the date of award of the contract or subcontract." That seems … challenging.

Commercial Items

Section 848 required that "a contract for an item acquired using commercial item acquisition procedures under part 12 of the Federal Acquisition Regulation *shall serve as a prior commercial item determination*
with respect to such item for purposes of this chapter unless the senior procurement executive of the military department or the Department of Defense as designated for purposes of section 1702(c) of title 41 determines in writing that it is no longer appropriate to acquire the item using commercial item acquisition procedures." (Emphasis added.) Further, this Section limits the use of FAR Part 15 procedures to acquire commercial items previously acquired under FAR Part 12 procedures, unless certain circumstances are found to apply.

Despite the title, Section 847 did not impact "commercial items" as defined at FAR 2.101. Instead, it clarifies that "nondevelopmental items are commercial items when the procuring agency determines, in accordance with conditions in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities on a competitive basis to multiple foreign governments."

Section 846 has been termed "the Amazon provision" in that it mandated establishment of a program "to procure commercial products through commercial e-commerce portals … through multiple contracts with multiple commercial e-commerce portal providers, and shall design the program to be implemented in phases with the objective of enabling Government-wide use of such portals."

Other Stuff

Section 815 prohibited unilateral definitization of Undefinitized Contract Actions (UCAs) valued at $50 million or more, unless "the service acquisition executive for the military department that awarded the contract, or the Under Secretary of Defense for Acquisition and Sustainment if the contract was awarded by a Defense Agency or other component of the Department of Defense, approves the definitization in writing." Even so, the contractor has 30 days after receipt of the written approval to respond.

Section 818 established minimum contractor debriefing topics and clarified that "the 5-day period described in subparagraph (A)(ii) does not commence until the day the Government delivers to a disappointed offeror the written responses to any questions submitted pursuant to section 2305(b)(5)(B)(vii) of title 10."

Section 820 is interesting. It modified the definition of "subcontract" "in certain circumstances." As readers know, we have often pointed out the problems with FAR/DFARS definition of "subcontract" and "subcontractor." Here is the full text of Section 820: "Section 1906(c)(1) of title 41, United States Code, is amended by adding at the end the following: '*The term does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Federal Government and other parties and are not identifiable to any particular contract.*
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Section 822 limited the circumstances in which DoD may use a Lowest-Price-Technically-Acceptable (LPTA) acquisition strategy. (Also see Section 832.)

Section 824 modified Section 836 of the 2017 NDAA, to give the DoD authority to close-out contracts awarded at least 17 government fiscal years before the current government fiscal year, via negotiated settlement, without performing additional reconciliations—but only under certain circumstances.

Section 837 addressed "should-cost" reviews. It requires such reviews to be codified in the DFARS, and that the regulations address, as a minimum, the following elements: "(1) a description of the feature distinguishing a should-cost review and the analysis of program direct and indirect costs; (2) establishment of a process for communicating with the contractor the elements of a proposed should-cost review; (3) a method for ensuring that identified should-cost

savings opportunities are based on accurate, complete, and current information and are associated with specific engineering or business changes that can be quantified and tracked; (4) a description of the training, skills, and experience, including cross functional experience, that Department of Defense and contractor officials carrying out a should-cost review should process; (5) a method for ensuring appropriate collaboration with the contractor throughout the review process; and (6) establishment of review process requirements that provide for sufficient analysis and minimize any impact on program schedule."

The final article in this series will address intellectual property matters in the 2018 NDAA.