

Acquisition Policy: FY17 Defense Authorization Act and Legislative Prospects for 2017

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National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328)

- **Signed into law on December 23, 2016.**
- **At 100+, largest number of acquisition policy provisions ever in one bill.**
 - Innovation
 - Major systems acquisition
 - Commercial item acquisition
 - Undefined contract actions
 - Small business subcontracting
 - Intellectual property/ IR&D
 - Cost or pricing data requirements
 - Contract type/payments
 - Business system requirements

Acquisition Policy Provisions in the FY17 NDAA



Sec. 805. Modular open system approach in development of major weapon systems.

- Requires all major defense acquisition programs (MDAPs) receiving Milestone A or B approval after January 1, 2019, to be designed and developed with a modular open system approach (MOSA), to the maximum extent practicable.
- MOSA is defined, with respect to MDAPs, as an integrated business and technical strategy that employs a modular design with major system interfaces between a major system platform (such as a ground vehicle, ship, or aircraft) and its major system components (such as sensors or communication equipment), between major system components, or major system platforms.

Sec. 806. Development, prototyping, and deployment of weapon system components or technology.

- Requires the Secretary of Defense to provide detailed budget information on advanced component development and prototyping associated with programs of record and the development, prototyping, and experimentation of weapon system components or other technologies separate from acquisition programs of record.
- Requires the establishment of oversight boards within each military department to establish strategic plans every three years to identify gaps, priorities, opportunities in technology development and to oversee such efforts.
- Establishes a two-year time limit and a ceiling of \$10 million for the development of weapon systems components or prototype technologies to support MOSA approaches for weapons platforms.
- Establishes provisions for low rate production and rapid fielding of component technologies.

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 809. Amendments relating to technical data rights.

- Largely repeals changes made to 10 USC 2320 and 2321 in section 815 of the FY12 NDAA that required data utilized in the performance of a contract necessary for the segregation and reintegration of components and capabilities in systems to be delivered to the government at any time for the costs of reproduction.
- Allows a contractor or subcontractor to limit the right of the government to release or disclose detailed manufacturing or process data otherwise deemed necessary for operation, maintenance, installation, or training.
- Provides for the government rights to use or release for government purposes interface data developed with mixed funding or major systems interface data developed with mixed funding or developed exclusively at private expense.

Sec. 811. Modified restrictions on undefinitized contractual actions.

- Amends 10 USC 2326 to:
 - require profit on a contract to reflect the cost risk to the contractor as it existed on the date the contractor submitted the qualifying proposal if the contract definitization occurs beyond 180 days of proposal submission.
 - limit the performance period for any undefinitized contract to 90 days without a written determination for a longer period by a secretary of a military department or the head of defense agency; and
 - prohibits DoD from entering into an undefinitized contract action for a foreign military sale unless the UCA provides for definitization by the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price.

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 813. Use of Lowest Price Technically Acceptable source selection process

- Requires that DoD issue new regulations restricting the use of lowest-price technically acceptable source selection criteria to situations that meet certain detailed requirements and in which the contracting officer includes a justification based on meeting such detailed requirements in the contract file.
- Requires that LPTA source selection criteria be avoided to the maximum extent practicable in the cases of certain procurements (IT, Cyber services, SETA, or other knowledge-based professional services, personal protective equipment, knowledge-based training or logistics services supporting contingency or other operations outside the US).

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 820. Defense cost accounting standards.

- Amends 41 USC 1501 and 1502 to require the Cost Accounting Standards Board (CASB) to reconcile Federal Cost Accounting Standards (CAS) with Generally Accepted Accounting Principles (GAAP) and to hire an executive director and meet at least quarterly to reduce inconsistencies between CAS and GAAP.
- Authorizes Federal agencies to waive the application of the CAS for contracts valued at less than \$100.0 million.
- Establishes a Defense Cost Accounting Standards 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 DoD employees.
- Requires DCAA to accept summaries of audit findings by a commercial auditor that meet certain conditions.
- Requires DCAA to rely on a contractor's commercial audits of indirect costs except in case of a company or business unit with a predominance of government cost-type contracts as a percentage of sales.

Acquisition Policy Provisions in the FY17 NDAA Continued

Sec. 824. Treatment of independent research and development costs on certain contracts.

- Amends the current IRD/B&P statute (10 USC 2372) to:
 - limit coverage to IR&D costs;
 - provide for regular exchange of comprehensive information related to such costs between DoD and industry.
- Adds a new 10 USC 2372a to:
 - provide for allowability of bid and proposal costs in a cost pool separate from IR&D;
 - establish a goal that DoD-wide bid and proposal costs should not exceed one percent of the total amount of annual contractor sales to the Department, but prohibit DoD from limiting reimbursement such costs as a means of achieving the goal in a given year;
 - require DoD to contract with an independent entity to study the laws, regulations, and practices driving bid and proposal costs and provide recommendations to reduce such costs; and
 - require In any year DoD fails to meet the one percent goal that an advisory panel be established to provide recommendations to reduce such costs bid and proposal costs.

Acquisition Policy Provisions in the FY17 NDAA Continued

Sec. 825. Exception to requirement to include cost or price to the Government as a factor in the evaluation of proposals for certain multiple-award task or delivery order contracts.

- Amends 10 USC 2305 to allow an agency to forgo considering cost or price in awarding multiple task or delivery contracts for the same or similar services under a solicitation with respect to any offeror that is determined to be from a responsible source and the contracting officer has no reason to believe would likely offer other than fair and reasonable pricing.
- In such cases, cost or price would be required to be considered in the issuance of any task or delivery order under a contract awarded under the solicitation.
- Prohibits the use of this authority in cases of awards of single-source multiple award contracts to 8(a) firms.

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 826. Extension of program for comprehensive small business contracting plans.

- Extends the authority for the comprehensive small business subcontracting plan test program to December 31, 2027.

Sec. 829. Preference for fixed-price contracts.

- Requires DoD to issue regulations establishing a preference for the use of fixed-price contracts and requiring approval by the agency or service acquisition executive for the use of any cost-type contract above a specified contract value threshold (\$50 million in FY18, \$25M in FY19 and beyond).

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 830. Requirement to use firm fixed-price contracts for foreign military sales.

- Requires DoD to issue regulations with requirement for the use of firm-fixed price contracts for all FMS contracts, unless the foreign country concerned specifies a different contract type or the Secretary of Defense determines on a case-by-case basis that a different contract type is in the best interest of the United States.
- Establishes a pilot program to January 1, 2020 for up to ten foreign military sales contracts for items in full-rate production using reduced requirements for new cost or pricing data.

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 831. Preference for performance-based contractual payments.

- **Amends the contract financing statute (10 USC 2307) to establish a stronger preference for performance-based payments and to ensure that:**
 - performance-based payments are not conditioned on costs incurred but on achievement of performance milestones;
 - commercial and non-traditional contractors have access to performance-based contract financing; and
 - contractors are able to rely on accounting systems compliant with general accepted accounting principles (GAAP) in order to be eligible for such payments and are not subject to DCAA audit of such systems.

Sec. 835. Protection of Task Order Competition.

- Amends 10 USC 2304c to raise the task order value threshold at which protests are authorized under DoD multiple award contracts from \$10 million and above to \$25 million and above effective on the date of enactment.
- Amends 41 USC 4106 to restore and make permanent authority to protest task orders \$10 million and above under civilian agency multiple award contracts effective on date of enactment.

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 836. Contract closeout authority.

- Authorizes use of special authorities to close out certain DoD contracts entered into before FY 2000.

Sec. 846. Repeal of major automated information systems provisions.

- Repeals, effective on September 30, 2017, all of chapter 144A of title 10 concerning the acquisition of major information technology programs, including the special rules for information technology program cost reporting put in place in lieu of the Nunn-McCurdy reporting process for major defense acquisition programs.

Sec. 855. Mission integration management.

- Provides funding from the Rapid Prototyping Fund to support a requirement for systems of systems interoperability.
- Requires the appointment of a mission integration manager for each covered multi-service mission areas (close air support, air defense and counter-air offense and defense, interdiction, ISR, and other overlapping mission areas).

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 865. Limitations on funds used for staff augmentation contracts at management headquarters of the Department of Defense and the military departments.

- Establishes limits on the total amount of funding that may be obligated for staff augmentation contracts at management headquarters in the DoD and the services.
- FY17 and in FY18 - 100 percent of the amount obligated for such contracts in DoD in FY16.
- FY19 through FY22 - 75 percent of the amount obligated for such contracts in DoD in FY16.

Sec. 875. Use of performance and commercial specifications in lieu of military specifications and standards.

- Establishes a requirement that DoD use commercial or non-governmental specifications and standards generally in procurement in lieu of military specifications and standards unless waived by the defense acquisition executive or the appropriate service acquisition executive or in cases when there is no acceptable commercial or non-government standard or when the use of a commercial or non-government standard is not cost effective.
- Requires a revision to the DFARS to encourage contractors to propose non-government standards and industry-wide practices that meet the intent of military specification and standards.

Acquisition Policy Provisions in the FY17 NDAA Continued

Sec. 876. Preference for commercial services.

- Requires that the DoD guidance issued to implement section 855 of the FY16 NDAA (Market research and preference for commercial items) be amended to provide that:
 - prior to DoD entering into any contract valued above \$10M for facilities-related services, knowledge-based services, equipment-related services, construction services, medical services, logistics management services or transportation services that are not commercial services, the USD (AT&L), the service acquisition executive, agency head or commanding officer must determine in writing that no commercial services are suitable to meet the agency's needs; and
 - prior to DoD entering into any contract valued between \$150K and \$10M for facilities-related services, knowledge-based services, equipment-related services, construction services, medical services, logistics management services or transportation services that are not commercial services, the contracting officer must determine in writing that no commercial services are suitable to meet the agency's needs.

Sec. 878. Treatment of services provided by nontraditional contractors as commercial items.

- Amends 10 USC 2380A to provide that services provided by a business unit that is a non-traditional defense contractor be treated as commercial items to the extent that the services are provided by the same pool of employees as are used for commercial customers and are priced using similar methodology as commercial pricing.

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 881. Greater Integration of the National Technology and Industrial Base.

- Requires a DoD plan for the identification and reduction of barriers to the more seamless integration of Nation Technology and Industrial Base among various private and public entities including steps for enhancing interoperability of allied forces.
- Amends 10 USC 2500(I) to add Australia and the United Kingdom to the countries in the definition of the National Technology and Industrial Base, which currently includes just the US and Canada.

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 893. Amendments to contractor business system requirements.

- Amends section 893 of the FY 11 NDAA to:
 - require the Department of Defense to identify and make public clear business system requirements;
 - allow a contractor to submit a certification from their third-party independent auditors attesting to the internal control assessment of the contractor, pursuant to Sarbanes-Oxley, that its business systems conforms to the Department's business system requirements to eliminate the need for further review by DoD; and
 - specify that business system requirements apply only to contractors that have covered contracts accounting for greater than 1 percent of their total gross revenue, but that such requirements do not apply in any case to a contractor that is exempt from using the full cost accounting standards.

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 901. Under Secretary of Defense for Research and Engineering and related acquisition position in the Office of the Secretary of Defense.

- Abolishes, effective February 1, 2018, the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics in favor of:
 - An Office of the Under Secretary for Research and Engineering, who also serves as the Chief Technology Officer, to:
 - establish policies on, and supervise, all defense research and engineering, technology development, technology transition, prototyping, experimentation, and developmental testing activities and programs, including the allocation of resources for defense research and engineering, and unifying defense research and engineering efforts across the Department.
 - An Office of the Under Secretary of Defense for Acquisition and Sustainment to establish policies on, and supervise, all elements of the Department relating to:
 - acquisition (including system design, development, and production, and procurement of goods and services) and sustainment (including logistics, maintenance, and materiel readiness);
 - the defense industrial base and materials critical to national security
 - policies on contract administration;
 - responsibilities as the senior procurement executive for the Department; and the Defense Acquisition Executive for purposes of regulations and procedures of the Department
 - the modernization of nuclear forces and the development of capabilities to counter weapons of mass destruction.
- Gives precedence to the Under Secretary of Defense for Research and Engineering over the Under Secretary of Defense for Acquisition and Sustainment.
- Eliminates, effective on date of enactment, the offices of the Assistant Secretaries of Defense for Acquisition; Logistics and Material Readiness; Research and Engineering; and Energy, Installations and, Environment.

Acquisition Policy Provisions in the FY17 NDAA Continued



Sec. 902. Establishment of Assistant Secretary of Defense for Information (Chief Information Officer) in Office of Secretary of Defense.

- Establishes an Assistant Secretary of Defense for Information (Chief Information Officer) in Office of Secretary of Defense reporting directly to the Secretary and the Deputy Secretary of Defense. Responsibilities include:
 - electromagnetic spectrum, including coordination with other Federal and industry agencies, coordination for classified programs, and in coordination with the Under Secretary for Personnel and Readiness, policies related to spectrum management workforce;
 - nuclear command and control systems;
 - matters related to precision navigation and timing; and
 - the architecture and programs related to the networking and cyber defense architecture of the Department.

Sec. 903. Reduction in maximum number of personnel in Office of the Secretary of Defense and other Department of Defense headquarters offices.

- Places specific limits on the number of civilian and detailed personnel in the Office of the Secretary of Defense, the Joint Staff, the Offices of the Service Secretaries, all effective on December 31, 2019.

Acquisition Policy Provisions in the FY17 NDAA Continued

Sec. 1811. Scope of review by procurement center representatives.

- Clarifies that SBA procurement center representatives may not review contracts awarded pursuant to status of forces agreements or contracts of the Department of Defense awarded and performed overseas.
- Stipulates that contracts excluded from procurement center representative review shall not be included in any calculation of the DoD's attainment of its small business goals.

Sec. 1821. Good faith in subcontracting.

- Requires SBA within 270 days of enactment of the bill to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontract plan requirement for purposes of assessing liquidated damages.

Sec. 1822. Pilot program to provide opportunities for qualified subcontractors to obtain past performance ratings.

- Requires SBA to establish a three-year pilot program to allow a small business concern without a past performance rating as a prime contractor performing as a first tier sub to request and receive a past performance rating for purposes of competing as a prime contractor.

- **FY17 Appropriations under Continuing Resolution until April 28, 2017.**
 - FY17 base amendment and supplemental proposals to OMB by March 1.
- **FY18 budget process not likely to begin in earnest until early summer.**
 - Detailed PB request proposal to OMB by May 1.
- **House Armed Services Committee – Third and last big year.**
 - Requirements process
 - Operations & sustainment planning and costs
 - Contracting (type)
 - Contracting for services
 - Operational and developmental testing
 - Defense auditing - materiality
 - Implementation of modular open systems architecture approach in major programs
- **Senate Armed Services Committee.**
 - IT acquisition process and oversight.
 - Overhead for traditional contractors and subcontractors.
 - Impact of budget and resource allocation process on stakeholder incentives