


THE 2019 NDAA: A LOOK AT ITS MAJOR GOVERNMENT CONTRACTING REQUIREMENTS, AND HOW THEY'VE BEEN IMPLEMENTED THROUGHOUT THE YEAR

BY THE GOVERNMENT CONTRACTS PRACTICE GROUP
AT DRINKER BIDDLE & REATH LLP



The 2019 National Defense Authorization Act (NDAA),¹ which authorized the budget for the Department of Defense (DOD), was signed into law on August 13, 2018, marking the 58th straight year that Congress was able to pass the budget prior to the end of the prior fiscal year's funding.

Title VIII of the 2019 NDAA, "Acquisition Policy, Acquisition Management, and Related Matters," as the name suggests, created or changed federal procurement policies and practices for DOD, and sometimes for all agencies. Let's take a look at the major government contracting requirements of the 2019 NDAA, and check where they are now.²

MICRO-PURCHASE THRESHOLD INCREASE

Section 821 raised the micropurchase threshold for DOD procurements from \$5,000 to \$10,000, making the threshold the same as civilian agencies. Moving quickly, on August 3, 2018, DOD issued a class deviation to implement Section 821 by increasing the micropurchase threshold to \$10,000.

BID PROTEST STUDY AND PLAN

Section 822 required DOD to study the frequency and effects of filing a bid protest against the same contract action at both the Government Accountability Office (GAO) and the Court of Federal Claims, and to continue to collect information on these dual protests. DOD must report the results of its study "along with related recommendations for improving the expediency of the bid protest process" to Congress within 180 days after enactment of the NDAA (i.e., by February 9, 2019).

DOD was also required to develop a proposal for expedited bid protest procedures for procurements under \$100,000 by December 1, 2019, and to report to Congress on the plan and schedule for implementation of the expedited bid protest process not later than May 1, 2019. As of November 1, 2019, DOD does not appear to have publicly released these reports to Congress if it met the statutory deadline.³

ACCESSING PAST PERFORMANCE INFORMATION FOR SUBCONTRACTORS AND JOINT VENTURE PARTNERS

Section 823 required DOD to develop policies to ensure that the best information on past performance of construction and architect-engineer subcontractors and joint venture partners is available when awarding DOD contracts within 180 days after enactment of the NDAA (i.e., by February 9, 2019). The policies must include proposed *Defense Federal Acquisition Regulation Supplement (DFARS)* revisions requiring performance evaluations for first-tier subcontractors on construction and architect-engineer subcontracts above the threshold at *Federal Acquisition Regulation (FAR)* 42.1502(e) (currently \$700,000) or 20% of the prime contract value, whichever is higher, and partners of joint ventures

performing construction and architect-engineer contracts above the threshold at FAR 42.1502(e) under certain conditions—as well as a process for requesting exceptions.

DOD does not appear to have publicly released these policies and proposed revisions if it met the statutory deadline.

APPROVED PURCHASING SYSTEMS

Section 824 adopted the FAR Part 44 procedures and definition of “approved purchasing system” as the statutory definition and required that a contracting officer consent to a subcontract request from a contractor with an approved purchasing system unless the contracting officer has “the written approval of the program manager.” DOD must revise the *DFARS* to incorporate these statutory changes.

On April 1, 2019, DOD issued a final rule revising *DFARS* 244.201-1 to implement Section 824.

CHANGE TO “COMMERCIAL ITEM” DEFINITION

Section 836 replaced the term “commercial item” with two separate terms—“commercial product” and “commercial service”—throughout Title 41 of the U.S. Code effective January 1, 2020, and required DOD to submit a plan to implement the changed definition through regulatory and policy changes to Congress by April 1, 2019. The divided definition is nearly identical to the product and service parts of the FAR 2.101 definition for “commercial item.”

DOD does not appear to have publicly released this plan if it met the statutory deadline.

IMPROVING SMALL BUSINESS STRATEGY

Section 851 directed DOD to implement a small business strategy that creates a unified management structure within DOD for small business programs, small business industrial base policy, and small business technical assistance programs. DOD had to implement the plan within 180 days following the NDAA's enactment (i.e.,

by February 9, 2019). DOD must manage DOD programs to—

- “[F]urther national defense programs and priorities and the statements of purpose for acquisition set forth in Section 801” of the 2018 NDAA,⁴ which includes:
 - “[T]he forward-looking purpose of managing investments in technologies, programs, and product support necessary to achieve the national security strategy”;
 - “[S]upport [of] future Armed Forces”; and
 - “[To] acquire quality products that satisfy user needs with measurable improvements to mission capability and operational support, in a timely manner, and at a fair and reasonable price”;
- Clearly identify small business opportunities; and
- Permit small businesses access to “program managers, contracting officers, and other persons using the products or services of such concern to the extent necessary to inform such persons of emerging and existing capabilities of such concerns.”

The Secretary of Defense must transmit the small business strategy to Congress and publish it on a public DOD website.

As of November 1, 2019, DOD does not appear to have publicly released this strategy.

PROMPT PAYMENTS TO SMALL BUSINESSES

Section 852 required DOD, “to the fullest extent permitted by law,” to establish an accelerated payment date with a goal to pay small business prime and subcontractors within 15 days of invoicing.

On May 31, 2019, DOD issued a proposed rule to revise the *DFARS* to implement this requirement of the NDAA.

USE OF TECHNICAL DATA IN CONTRACTOR DISPUTES

Section 866 allowed DOD to authorize the use of a contractor’s technical data while litigation over the government’s rights in that data is pending at a court or board of contract appeals after DOD notifies the contractor and determines “in writing that compelling mission readiness requirements will not permit awaiting the final decision” by the court or board. DOD was required to revise the *DFARS* to implement the rule within 180 days after enactment of the NDAA (i.e., by February 9, 2019).

DOD has opened a *DFARS* Case to implement this section, but as of November 1, 2019, the case is on hold “pending resolution of technical issues.”

UNDERSTANDING THE USE OF OTHER TRANSACTION AUTHORITY

On November 20, 2018, DOD issued a memorandum to implement the data collection requirements of this section. On March 19, 2019, DOD issued a memorandum to provide a standard reporting format within DOD to implement the data collection and reporting requirements of this section.

As of November 1, 2019, DOD does not appear to have publicly released its initial report to Congress if it met the statutory deadline.

EASIER USE OF GWACS

Section 875 removed the requirement for agencies to make a determination that the use of an interagency acquisition represents the best procurement approach prior to using an Office of Management and Budget-approved Government-Wide Acquisition Contract (GWAC).

On May 6, 2019, DOD, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) issued a final rule implementing this section.

EXTENSION OF THE LIMITATION ON USE OF LPTA PROCUREMENTS TO CIVILIAN AGENCIES

Section 880 required an amendment of the FAR within 180 days after enactment of the NDAA (i.e., by February 9, 2019) to limit the use of lowest price technically acceptable (LPTA) procurements to the following six situations:

- 1 | When an executive agency is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers;
- 2 | When the executive agency would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposals;
- 3 | When the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;
- 4 | When the executive agency has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the executive agency;
- 5 | When the contracting officer has included a justification for the use of an LPTA evaluation methodology in the contract file; and
- 6 | When the executive agency has determined that the lowest price reflects full life-cycle costs, including for operations and support.

Congress also directed agencies to avoid the use of LPTA source-selection criteria to the maximum extent practicable in procurements predominately for the acquisition of the following:

- “[I]nformation technology services, cybersecurity services, systems engineer-

SECTION 873 REQUIRED DOD TO COLLECT DATA, UPDATE ITS POLICIES AND GUIDANCE ON THE USE OF OTHER TRANSACTION AUTHORITY (OTA), AND SUBMIT A REPORT TO CONGRESS ON ITS USE OF OTA NOT LATER THAN DECEMBER 31, 2018, AND EACH YEAR THEREAFTER THROUGH 2021, COVERING THE PRECEDING YEAR.

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ing and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services”;

- “[P]ersonal protective equipment”; and
- “[K]nowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.”

On October 2, 2019, DOD, GSA, and NASA issued a proposed rule to implement this section.

DOD'S AUTHORITY OVER SUPPLY CHAIN RISK MANAGEMENT IS HERE TO STAY

Section 881 permanently extended DOD's authority to manage supply chain risk in procurements for covered national security systems (originally provided in the 2011 NDAA⁵) by limiting sources eligible for covered procurements and limiting “the disclosure of information relating to the basis for carrying out a covered procurement action.” The section also provided the procedures for exercising the authority, and provided that neither GAO nor any federal court would have jurisdiction for a bid protest of the decision to limit disclosure of information.

On February 9, 2019, DOD issued a final rule to implement this section.

DEVELOPING PROCEDURES TO LIMIT FOREIGN ACCESS TO TECHNOLOGY

Section 885 directed DOD to develop “a process and procedures for limiting foreign access to technology through contracts, grants, cooperative agreements, or other transactions, when such limitation is in the interest of national security,” and to report the procedures and processes to Congress no later than September 1, 2019.

As of November 1, 2019, DOD does not appear to have publicly released this report if it met the statutory deadline.

BAN ON COVERED TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT

Section 889 prohibited the government from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses “covered telecommunications equipment or services” as a substantial or essential component of any system, or as a critical technology as part of any system. In this context, “covered telecommunications equipment or services” is defined in the statute to mean:

- Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);
- For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);
- Telecommunications or video surveillance services provided by such entities or using such equipment; or
- Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

The effective date for the ban was August 13, 2019.

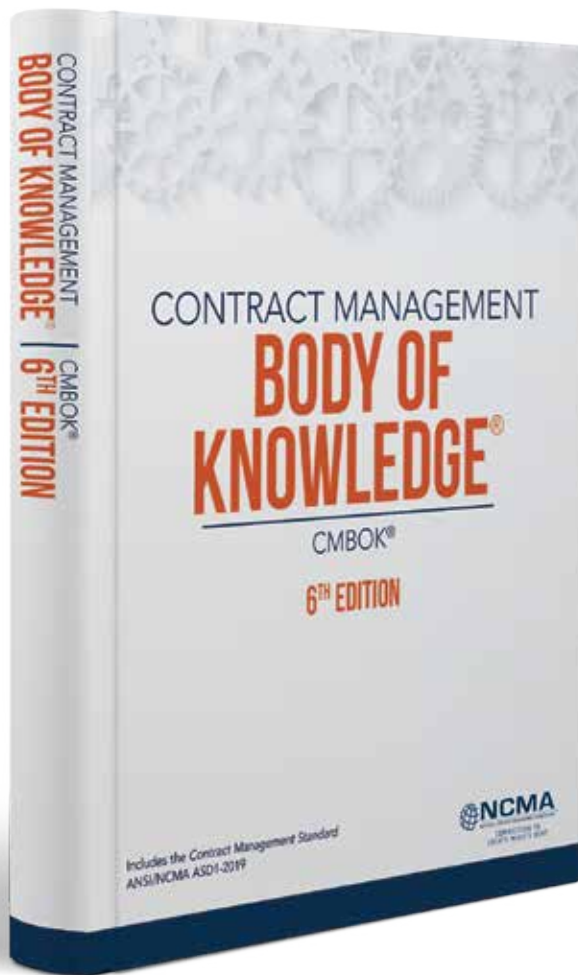
On August 13, 2019, DOD, GSA, and NASA issued an interim rule amending the FAR to implement this requirement.



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PILOT PROGRAM ON RELIEVING THE BURDEN OF COST OR PRICING DATA

Section 890 required DOD to establish a pilot program “to reform and accelerate the contracting and pricing processes associated with contracts in excess of \$50 million” by—

- “[B]asing price reasonableness determinations on actual cost or pricing data for purchases of the same or similar products for [DOD]”; and
- “[R]educing the cost or pricing data required to be submitted....”

The program must not include more than 10 contracts, or any contracts that are part of a major defense acquisition program. DOD must report to Congress no later than January 30, 2021, on the results of the pilot program an assessment of whether the program should be continued or expanded.

On April 1, 2019, DOD issued a class deviation to implement this section.

CONCLUSION

Given the scope of the 2019 NDAA, DOD did quite well in implementing its requirements. By our count, DOD either implemented (or at least began the process of implementing) all nine of the required changes to the *DFARS* or *FAR* (along with GSA and NASA, of course). The picture on DOD’s satisfaction of the NDAA requirements for reports or plans to Congress is less clear, and potentially less favorable. For the most part, the required reports do not appear to be publicly available.

Unlike the previous 58 fiscal years, Congress was not able to pass the 2020 NDAA prior to the end of the funding for 2019 and had to resort to a continuing resolution—a short-term spending bill authorizing defense spending until the 2020 NDAA can be enacted.

After it is eventually enacted, be on the lookout for a summary of the 2020 NDAA in a future issue of *Contract Management*. **CM**

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CONTRIBUTED BY THE GOVERNMENT CONTRACTS PRACTICE GROUP AT DRINKER BIDDLE & REATH LLP.

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ENDNOTES

1. *Pub. L.* 115-232.
2. Although the discussion within this article is limited to changes made through Title VIII, other sections of the 2019 NDAA have also affected government contracts. For example, Title XVI, “Strategic Programs, Cyber, and Intelligence Matters,” established policies, authority, and structure for DOD’s cybersecurity; established a U.S. Space Command within the U.S. Strategic Command, and requires a plan for separate acquisitions for the Space Command; and established policies and procedures to mitigate “risks to national security posed by providers of information technology products and services who have obligations to foreign governments.”
3. Tracking down DOD’s reports to congressional committees is more difficult and less reliable than finding *Federal Acquisition Regulation (FAR)* and *Defense FAR Supplement (DFARS)* revisions, which are reported in the *Federal Register*. We have attempted to find DOD reports required by the 2019 NDAA by reviewing DOD websites where DOD reports are publicly disclosed. There remains a possibility, however, that DOD submitted the required reports or plans but did not make them publicly available at its websites.
4. *Pub. L.* 115-91.
5. *Pub. L.* 111-383.