

## How NDAA For 2017 Changes DOD Contracting

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*Law360, New York (January 11, 2017, 4:15 PM EST) --*

On Dec. 23, 2016, President Obama signed the National Defense Authorization Act for Fiscal Year 2017, S. 2943. The new law includes several provisions of interest to federal contractors, including jurisdictional changes for protests of task and delivery orders, new restrictions on the use of the "lowest price technically acceptable" (LPTA) source selection process, preferences for the fixed-price contract type and the use of commercial standards and services, and new rules for using undefinitized contractual actions (UCAs). The NDAA also calls for studies or assessments on several procurement issues, setting the stage for additional reforms in the years ahead.



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### Changes to Authority for Bid Protests of Task and Delivery Orders

Section 835 of the act makes two notable changes to the pre-existing statutes governing the ability of contractors to file protests of the issuance or proposed issuance of task and delivery orders.

First, the act makes permanent the authority of the Government Accountability Office to hear protests of task and delivery orders issued by civilian agencies valued at over \$10 million. This authority had expired on Sept. 30, 2016, causing the GAO to dismiss several protests that were filed after that date due to lack of jurisdiction. While the NDAA reinstates the GAO's jurisdiction to hear such protests, it is unlikely that the protests originally filed during the "gap" period after Sept. 30, 2016, can be successfully refiled, as most will not be able to satisfy the GAO's strict timeliness rules.



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Second, the act increases the dollar threshold for protests of task and delivery awards issued by the U.S. Department of Defense, NASA and the Coast Guard. Such protests are now authorized only if the task or delivery order is valued at over \$25 million, a significant increase over the previous \$10 million threshold. This new dollar threshold clearly impacts new protests, but it is unlikely that the GAO will dismiss protests of DOD task or delivery orders with a value between \$10 million and \$25 million that were filed before the NDAA became law.



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The GAO continues to retain exclusive jurisdiction for protests of task and delivery

orders satisfying the dollar thresholds discussed above. However, contractors can also file protests of task and delivery orders of any dollar value, and in any forum (the GAO, the Court of Federal Claims, or at the agency level), if alleging that the order increases the scope, period, or maximum value of the contract under which the order is issued.

### **Restrictions on Use of LPTA Source Selection Process**

Section 813 of the NDAA sets forth a new policy for the DOD regarding use of LPTA awards. Under the new law, the DOD is to avoid using LPTA selection criteria in those circumstances “that would deny [the DOD] the benefits of cost and technical tradeoffs” in source selection. In short, the NDAA expresses a clear congressional preference for the DOD to use best value procurements whenever possible.

But Congress went further than simply setting forth a general policy statement disfavoring the use of LPTA procurements. Under the new NDAA, the DOD has 120 days to revise the Defense Federal Acquisition Regulation Supplement to limit the use of LPTA procurements to only those situations in which six specific criteria are met. Moreover, Congress specifically stated that LPTA procurements are to be avoided “to the maximum extent possible” in procurements for the acquisition of:

- IT services, cybersecurity services, systems engineering and technical assistance services, advance electronic testing, audit or audit readiness services, or other knowledge-based professional activities;
- Personal protective equipment; or
- Knowledge-based training or logistics services in contingency operations or other operations outside the United States (including in Afghanistan or Iraq).

Finally, to monitor the DOD’s compliance, the NDAA requires the GAO to submit annual reports to Congress over the next four years regarding the number of instances in which LPTA is used for contracts exceeding \$10 million and how the six factors listed in the statute were considered in making the determination to utilize LPTA selection criteria.

### **Preferences for Fixed-Price Contracts and Commercial Standards/Services**

Congress also used the NDAA to increase the DOD’s use of fixed-price contracts and commercial standards and services.

Section 829 of the act directs the DOD to revise the DFARS to establish a preference for fixed-price contracts in the determination of contract type, and starting in October 2018, requires DOD contracting officers to obtain the approval of the agency head before entering into certain high-value cost-type contracts. In addition, Section 830 of the act requires the DOD to prescribe regulations to require the use of firm fixed-price contracts for foreign military sales, subject to certain exceptions.

Section 875 of the act requires the DOD to use commercial or nongovernment specifications and standards unless no practical alternative exists to meet user needs. The statute states that military specifications shall be used only “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,” and calls for the DOD to form partnerships with industry associations to develop commercial or nongovernment

standards to replace existing military specifications where practicable.

Finally, Section 876 requires the DOD to procure commercial services in acquisitions for facilities-related services, knowledge-based services (except engineering), construction, medical services, and transportation services, unless a determination is made that no commercial services are suitable to meet the agency's needs. This section expands upon a similar directive from the NDAA for Fiscal Year 2016 that focused on the procurement of commercial information technology products and services.

### **Restrictions on UCAs**

The NDAA adds new restrictions on the use of UCAs, which are procurement actions in which the contractual terms, specifications, or price are not agreed upon before performance begins. A letter contract is a type of UCA.

Section 811 adds new language to 10 U.S.C. § 2326 setting forth a 90-day time limit for UCAs entered into by the DOD. Under the new statute, a UCA can continue beyond 90 days only if the head of the contracting agency makes a written determination that it is in the best interests of the agency to continue.

In addition, the act requires that UCAs for foreign military sales provide for agreement on contractual terms, specifications, and price by the end of the 180 days after the contractor submits a qualifying proposal for definitization. 10 U.S.C. § 2326 included a similar requirement prior to the enactment of the NDAA, but it was not previously applicable to foreign military sales.

### **Studies/Reports on Topics for Potential Future Reform**

Finally, several sections of the act foreshadow potential areas of future reform by requiring the DOD or the GAO to complete detailed studies and reports. These areas include the bid protest process, indefinite delivery contracts, and contractual flow-down provisions.

The final version of the NDAA agreed upon in conference eliminated provisions from the Senate version of the bill that would have drastically changed the bid protest process at the GAO. Section 885 of the act instead requires the DOD to hire an independent research entity to study "the prevalence and impact of bid protests on Department of Defense acquisitions." The study will be far-ranging and comprehensive, as the NDAA lists 14 separate topics (and multiple subtopics) to be addressed, to include specific aspects of the bid protest process, trends, and the schedule and cost impacts of protests.

Section 886 of the act calls for the GAO to issue a report on the DOD's use of indefinite delivery contracts, to include indefinite-delivery, indefinite-quantity contracts. The report will include a review of DOD policies and competition requirements on such contracts and include recommendations for potential changes to promote competition.

Finally, Section 887 of the act requires the DOD to engage an outside entity to review the effect of contractual flow-down provisions on contractors and suppliers, to include small businesses, commercial item contractors, nontraditional defense contractors, universities, and not-for-profit research institutions. The study will assess whether such flow-down provisions impose unnecessary costs or burdens on the supply chain, or restrict the DOD's access to advanced research and technology capabilities available in the private sector.

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