



What Defense Contractors Should Expect: Important Changes in the 2018 NDAA

IN SHORT

2017, The Situation: On December 12, President Trump signed the 2018 National Defense Authorization Act for Fiscal Year 2018, H.R. 2810. Title VIII of the Act contains a number of provisions that could affect defense contractors.

The Result: Congress has created enhanced post-award rights for offerors, directed the Secretary of Defense to take proactive measures concerning intellectual property and data rights, mandated a program to procure commercial products through commercial e-commerce portals, and modified requirements for disclosing cost or pricing data.

Looking Ahead: In 2018, we can expect to see disappointed offerors exercising their post-award rights, the Department of Defense making efforts to increase its understanding of intellectual property and data rights, and implementation of an e-commerce procurement plan.

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Title VIII of the 2018 National Defense Authorization Act ("NDAA") includes several provisions that are likely to affect companies currently holding defense contracts and companies seeking to do business with the Department of Defense ("DOD"). Perhaps most significantly, the 2018 NDAA creates new post-award debriefing rights for offerors, authorizes a pilot program that would require certain unsuccessful offerors to reimburse DOD for the cost of processing certain protests, mandates a program for purchasing from commercial e-commerce vendors, and directs DOD to shore up its efforts in understanding the government's intellectual property rights.



Not only does Section 818 provide an opportunity for offerors to seek additional information regarding an agency's evaluation and award, the new follow-up question process will also extend the time for filing a bid protest that triggers a CICA stay.



Enhanced Debriefings

Section 818 of the NDAA directs the Secretary of Defense to revise the Defense Supplement to the Federal Acquisition Regulation ("DFARS") to provide additional post-award debriefing rights to offerors. Specifically, Section 818 provides disappointed offerors with the opportunity to submit additional, follow-up questions within two business days of a post-award debriefing. The agency is required to answer these questions, in writing, within five business days of receipt. Significantly, a debriefing is not considered to be concluded, and the five-day period for obtaining a stay of contract performance in connection with a protest bid protest at the U.S. Government Accountability Office ("GAO") under the Competition in Contracting Act ("CICA") does not commence, until the day the agency delivers its written response to the follow-up questions. Thus, not only does Section 818 provide an opportunity for offerors to seek additional information regarding an agency's evaluation and award, the new follow-up question process will also extend the time for filing a bid protest that triggers a CICA stay. This change will allow offerors additional time to review their protest options more fully and to devise the best legal strategies for challenging a contract award decision.

Additionally, with regard to contracts that exceed \$100 million in value, all required post-award debriefings must include the agency's written source selection award decision, which will be redacted to protect confidential and proprietary information. For contracts valued between \$10 million and \$100 million, small businesses or nontraditional contractors may request the agency's written source selection. As a result, for certain contract awards, offerors will not have to file a bid protest in order to gain access to the agency's source selection decision. This provision has the potential to decrease the number of protests filed, and those protests that are filed will likely be more targeted to actual flaws in the procurement process.

Payment of Costs in Certain Bid Protests

Also related to bid protests, Section 827 orders the Secretary of Defense to conduct a pilot program to determine the effectiveness of requiring contractors to reimburse DOD for costs incurred in processing certain protests. Notably, this pilot program would not begin until December 2020 and would apply only to protests denied by GAO and filed by a party with revenues in excess of \$250 million. In addition to the limited application of this pilot program, Section 827 does not define what "costs" would be reimbursable, how those costs would be calculated, or who would resolve disputes regarding these costs. Companies pursuing protests subject to this provision may want to consider requesting "outcome prediction"

alternative dispute resolution at GAO. If GAO advises that the protest will likely be denied, the protester will have the opportunity to withdraw its protest to avoid the issuance of a written decision denying the protest—a loophole that may allow unsuccessful protesters to avoid this fee provision.

Use of e-Commerce Portals

Section 846 of the 2018 NDAA requires the establishment of a program to procure commercial products through commercial e-commerce portals for the purposes of enhancing competition, expediting procurement, enabling market research, and ensuring reasonable pricing of commercial products. This section directs DOD to carry out this program by entering into contracts with multiple commercial e-commerce portal providers and encourages the use of commercial e-commerce portals that are widely used in the private sector. Section 846 specifically provides that the term "commercial e-commerce portal" does not include a government-managed online portal or a portal predominantly used by government agencies. Instead, the Section appears to contemplate the use of e-commerce portals that are already household names.

As a result of this program, agencies could elect to purchase items from well-known e-commerce vendors instead of a GSA Schedule contract or other government-wide acquisition vehicle. While the potential impact of this program is significant, Section 846 contemplates the rollout of this program to occur over several years and limits eligible purchases to those not exceeding the simplified acquisition threshold. Additionally, at this point, the willingness of private e-commerce portals to participate in this program remains to be seen.

THREE KEY TAKEAWAYS

1. The 2018 National Defense Authorization Act carries several provisions that directly affect defense contractors.
2. Notably, unsuccessful offerors are given the opportunity to submit additional, follow-up questions within two business days of a post-award debriefing.
3. Other provisions include authorization of a pilot program that would require certain unsuccessful offerors to reimburse DOD for the cost of processing certain protests, a mandate for purchasing from commercial e-commerce vendors, and a directive for DOD to shore up its understanding of the government's intellectual property rights.

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